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THE

# Weekly Reporter,

## APPELLATE HIGH COURT,

CONTAINING

IONS OF THE APPELLATE HIGH COURT IN ALL ITS BRANCHES, viz., IN CIVIL, EVENUE, AND CRIMINAL CASES, AS WELL AS IN CASES REFERRED BY THE MOFUSSIL SMALL CAUSE COURTS; TOGETHER WITH LETTERS IN CRIMINAL CASES, AND THE CIVIL AND CRIMINAL CIRCULAR ORDERS ISSUED BY THE HIGH COURT; ALSO DECISIONS OF H. M.'S PRIVY COUNCIL IN CASES HEARD IN APPEAL FROM COURTS OF BRITISH INDIA.

BY D. SUTHERLAND.

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(3) Where a ghatwalee tenure was granted under a valid sunnud from a person representing the then Government in that behalf more than 100 years ago, and had been allowed to change hands by descent or purchase without question, the zemindar was held incompetent of his mere motion without the assent and against the will of the Government, to put an end to the ghatwalee, to deprive the ghatwals, and to treat them as common trespassers ... 199

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(5) Buildings and other such improvements made on land in the mofussil do not, by the mere accident of their attachment to the soil, become the property of the owner of the soil. If he, who makes the improvement, is not a mere trespasser, but is in possession under any *bonâ fide* title or claim of title, he is entitled either to remove the materials or to obtain compensation for the value of the building at the option of the owner ... 228

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HELD that the plaintiffs, as representing the original mortgagor, were

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entitled to redeem, but that, as the mortgage was of an entire estate, neither of them could redeem upon payment of less than the full amount of the mortgage-money.
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# The Weekly Reporter,

## APPELLATE HIGH COURT.

The 12th June 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley and E. Jackson, *Judges*.

**Declaratory decrees.**

Case No. 58 of 1865.

*Regular Appeal from a decision passed by the Judge of Behar, dated the 5th December 1864.*

Ranee Rajessuree Koonwar and others (Plaintiffs), *Appellants*.

*versus*

Maharanee Indurjeet Koonwar and others (Defendants), *Respondents*.

*Baboos Kishen Kishore Ghose, Banee Madhub Banerjee*, and *Mohendro Lall Shome* for Appellants.

*Messrs. R. V. Doyne, G. C. Paul, R. T. Allan, R. E. Twidale*, and *C. Gregory*, *Moonshee Ameer Ali, and Baboos Dwarkanath Mitter, Kalee Prosunno Dutt, Unnoda Pershad Banerjee, Nill Madhub Sein*, and *Kedarnath Mozoomdar* for Respondents.

Suit laid at Rupees 67,27,842-8-17-14.

In a suit brought, on the ground of an existing right of inheritance, for immediate possession and mesne-profits, by setting aside an adoption, the Court will not allow the form of action to be changed, and proceed to decide whether (the claim for possession on the ground of an existing right being abandoned) a declaratory order may not issue for setting aside the adoption, but will, on failure of right to immediate possession, dismiss the suit.

According to Section 15, Act VIII. of 1859, declaratory orders can be issued only in suits brought to obtain such orders.

THIS is a suit brought to recover possession with mesne-profits of certain zemindaries and other property, by setting aside a deed of adoption alleged to be forged, and which would stand in the way of plaintiff's claim as to part of the property.

The Judge of the Lower Court has held that the title upon which the plaintiff claims cannot be sustained. It is admitted here upon appeal that, as against the defendants, the plaintiff cannot succeed in the suit in her claim to possession of the zemindaries and other property, or to the mesne-profits. But it is asked that the Court should try that portion of the claim which impugns the validity of the adoption. But this is not a suit for a declaration of right as against the adopting widow and the adopted son, or to have that adoption set aside for the purpose of binding the adopted son after the death of the widow, with reference to the claim of the plaintiffs as the heirs who would be entitled after the death of the widows if the deed of adoption were invalid and set aside. The object of the suit is to recover immediate possession and mesne-profits upon an existing right of inheritance, and right to immediate possession set up on the part of the plaintiffs. It is contended that, notwithstanding the suit is for possession and mesne-profits, that portion of the claim which seeks to obtain possession and mesne-profits may be abandoned, and that portion of the suit which asks for a declaration that the deed of adoption is an invalid one, may proceed. We do not think that it was the intention of the Legislature to authorize declaratory decrees in suits of this nature.

The law, Section 15, Act VIII. of 1859, says: "No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief." We think that that must be in suits framed for the purpose of getting a declaratory decree, and not in a suit framed for the purpose of recovering land and mesne-profits. The object of the present suit was simply to recover the possession of land and for mesne-profits, and, in order to do that, to set aside the deed of adoption. We think that the suit was wholly misconceived, if it was intended to bring before the Court the question simply of the validity of the adoption, and to ask to set aside that adoption for the benefit of the plaintiffs as reversioners after the death of the widows.

The plaintiffs did not ask for any declaration of right. The widows of Het Narain and Mode Narain, it is now admitted, are entitled to possession for their lives, and the plaintiffs are not entitled to possession whether the adoption was valid or invalid. The widows come in to defend their respective rights. If the plaintiffs sought merely to set aside the deed of adoption and to obtain a declaration of right, the widows of Mode Narain and many of the other defendants were unnecessary parties, and ought not to have been sued.

Under these circumstances, we are clearly of opinion that the appeal must be dismissed with costs.

We would here state that, notwithstanding our decision upon this issue, we should have proceeded to try the remaining issues in the suit if we had entertained any doubt upon the point on which we have decided it. Should an appeal be preferred to Her Majesty in Council, no inconvenience will be caused by our not going into the whole case. Her Majesty in Council will have the necessary materials for determining the other questions disposed of by the Judge, whether we express our opinion upon them or not. The evidence on the question of adoption is upon the record, and the question of the plaintiff's right to succeed in the present suit during the lives of the widows of Het Narian and Mode Narain is one merely of law upon which we cannot render much assistance by expressing our opinion upon it. We do not, therefore, consider it necessary to go into these issues.

The 12th June 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley and E. Jackson, *Judges*.

**Mooktearnamah (Proof of genuineness of)—Exhibits (Endorsement of)—Right of suit (by distant heir).**

Case No. 60 of 1865.

*Regular Appeal from a decision passed by the Judge of Behar, dated the 5th December 1864.*

Baboo Bisram Singh *alias* Bishen Singh and others (Plaintiffs), *Appellants*,

*versus*

Maharanee Indurjeet Koonwar and others (Defendants), *Respondents*.

*Messrs. G. C. Paul* and *R. E. Twidale*, and *Baboos Ashootosh Dhur* and *Unnoda Pershad Banerjee* for Appellants.

*Messrs. R. V. Doyne*, *R. T. Allan*, and *C. Gregory*, *Moonshee Ameer Ali*, and *Baboos Dwarkanath Mitter*, *Kalee Prosunno Dutt*, *Nil Madhub Sein*, *Banee Madhub Banerjee*, *Kishen Kishore Ghose*, and *Mohendro Lall Shome* for Respondents.

Suit laid at Rupees 67,98,843-4-8-17-14.

The mooktearnamah, upon the authority of which this suit was brought, being impugned by the defendant as a forgery and as not executed by the party alleged to have granted it, the Court held that, notwithstanding its attestation in due form by the Moonsiff of Muttra, the parties charged were bound to prove its genuineness; and, as they failed to do so, the suit was dismissed, and the parties in whose favor it was drawn, and who declined to appear in Court to prove it, were directed to be sent to the Magistrate to be placed on their trial for forgery.

Exhibits produced in Court ought to be endorsed with the name of the person who produced them, as required by Section 132, Act VIII. of 1859.

During the existence of a near heir, a more distant heir cannot sue.

THIS was a suit instituted in the Court of the Judge of Behar, under a vakalutnamah signed by one Moorolee Dhur, and this appeal was instituted under a vakalutnamah signed by Rung Bahadoor, his brother, both being sons of Bishen Singh. The one authorized the institution of the suit, the other authorized the institution of the appeal; and they both claim to have so acted under an alleged mooktearnamah, dated the 20th February 1863, which gave them general power to act on behalf of Bishen Singh. Another person who is a party to the suit is Moonshee Ameer Ali. He claims title to a portion of the property under a conveyance executed by one or both of these two sons, they alleging their

power to convey away that portion of the father's property which they assigned to Moonshee Ameer Ali under the same mooktearnamah. The defendant Ram Kishen Singh, in his answer, states that Bisram Singh *alias* Bishen Singh, the plaintiff, is untraceable from before the date of the mooktearnamah under which the suit has been brought (that is, the mooktearnamah of 20th February 1863 to which the Judge refers) giving a general power to the two sons; that consequently the suit on the part of that individual is false; that the mooktearnamah in question has been brought into existence by the frauds of the sons of Bishen Singh and of Moonshee Ali Kureem, the Government rebel, and Moonshee Ameer Ali, the maintainer of the suit, and is wholly a fabricated document. There was then a charge in this defendant's answer that the mooktearnamah was a forgery brought about by the sons of Bishen Singh, who was stated to have been untraceable from before the date of this mooktearnamah. That being the charge, the Judge laid down the issue—" Is Bisram Singh *alias* Bishen Singh, one of the plaintiffs, untraceable or not; if so, is the suit on his part valid or not?" The question whether the suit was validly instituted or not, depended upon the question whether the mooktearnamah was genuine or not, was expressly alleged in the answer which had been already quoted that it was a forged document, and had been brought about by the fraud of the two sons. The judgment delivered by the Lower Court says: " From the record, it appears that, on the 20th of February 1863, a mooktearnamah was presented in the Court of the Moonsiff of Muttra on the part of Bishen Singh, in favor of his two sons, through one Gunnesh Singh, a mooktear, and attested by two witnesses, apparently residents of Muttra; and, under the authority of this mooktearnamah, the present suit has been instituted. As to the legality of this procedure, and that it is in accordance with the custom and usage of our Courts, there can be no question; hence it must be held that the mooktearnamah, although not attested by Bishen Singh in person, by virtue of which his sons have verified the plaint, is *primâ facie* good and valid. Moreover, apart from suspicion and presumption arising from the facts and circumstances of the case, there is nothing to support any legal presumption that Bishen Singh, the principal plaintiff, is missing or dead; and hence this issue in bar is overruled." We do not quite understand what the Judge means by the words " from suspicion and presumption arising from the facts and circumstances of the case." The Judge himself appears to have thought that there was some suspicion in the case arising from the absence of Bishen Singh. But if a presumption arose from the facts and circumstances of the case, that Bishen Singh was absent at the time when that power of attorney appears to have been executed, surely, when there was a charge, and a distinct issue founded upon that charge, it was necessary to enquire whether the document was genuine or a forgery. It was the more necessary to enquire into the validity of the document, as the title of Moonshee Ameer Ali depended upon it; for, if it was not a valid document executed by Bishen Singh but a forgery, the sons had no power to transfer any portion of their father's property. Therefore, it appears to us that there has been a very insufficient investigation on the part of the Judge in upholding the document without evidence in support of it, especially when it was declared to be a forgery, and when the title of one of the parties depended upon the authority of the persons who were alleged to have derived their authority from that document. The Judge says that there is no question as to the legality of the procedure in admitting the mooktearnamah, because it was attested by two witnesses in the presence of the Moonsiff, in accordance with the custom and usage of the Courts. But when a charge is made, and one of the parties distinctly, in his answer, states that the document is a forgery—that it has been brought about by fraud—surely it is not sufficient to refer to an attestation in another Court without bringing forward the attesting witnesses and subjecting them to a cross-examination. That proceeding in the Moonsiff's Court was a wholly *ex-parte* proceeding. The parties to this suit had nothing to do with it. Although the document was brought into the Moonsiff's Court, and was there attested by the witnesses in the presence of the Moonsiff, that did not dispense with the necessity of calling for these attesting witnesses for the purpose of proving the document, when the document was stated to be a forgery, and an issue was raised which involved the question whether it was a genuine document or not.

This appeal came on before this Court on the 11th July last. At that time, Mr. Doyne objected that it was not proved sufficiently that Bishen Singh had authorized

the suit, and also that it was not sufficiently proved that he had authorized the institution of the appeal; and the case was postponed to enable the parties to produce satisfactory evidence to this Court that the mooktearnamah had been executed by Bishen Singh. The appellants were required to prove that Bishen Singh executed it, and it was suggested that the best evidence in the case would be to produce Bishen Singh himself It was then said that Bishen Singh was afraid to come forward, because he might be arrested for judgment-debts; and in order that he might come forward and give evidence, Bishen Singh was guaranteed against any arrest by either Ranee for whom Mr. Doyne appeared. This Court also recommended that Bishen Singh, and also Gunnesh, the mookhtear, should attend when the appeal should come on again. Gunnesh was the mookhtear who produced the mookhtearnamah for attestation in the Court at Muttra, and therefore he would have been a very important witness to prove that the document was really executed by Bishen Singh, as it purported to be. When the appeal again came on, neither Bishen Singh nor Gunnesh appeared in this Court to say whether the document was valid or not. When the case was before the Court in July last, in order to avoid any difficulty, in the event of the parties not being able to procure the attendance of Bishen Singh or Gunnesh, the Court authorized a commission to be issued to examine the attesting witnesses to the mooktearnamah in the Court at Muttra. If the Lower Court could not examine these witnesses personally, the Court ought certainly to have required their evidence taken under a commission which he might have issued. This Court, however, issued a commission which has been executed. The three attesting witnesses to the mookhtearnamah have been examined under it. The first witness, Mohunt Surgoo Doss, deposes as follows. Answer to first question: "My name is "Surgoo Doss; my age 32 years; by caste "Byragee. I live at Bindabun." (To *2nd* question:) "After examining this mookhtear-"namah, I declare this to be my attestation "on the margin of the mooktearnamah, "and I attested it on the acknowledgment "of Bishen Singh now in Court." (To *3rd* question:) "Yes; Bishen Singh signed it in "my presence at Bindabun." (To *4th* question:) "I signed my name with my own "hand. I do not know what other witnesses "attested. Kawal desired me to sign for "him as he could not write, and I did so." Then the witness having identified a person in Court as Bishen Singh, the following question was put on cross-examination: "This person in Court, whom you recognize as Bishen Singh, states that his name is not Bishen Singh: what do you say to this?" The witness answered, "He said his name was Bishen Singh." Now, if it should turn out that Bishen Singh was not present when that document was executed, and that the person who actually signed it was one of the two sons in whose favor it was executed, there can be no doubt that it was a forged document. Then comes the deposition of Kewal Ram. This witness, when called, said (answer to *1st* question): "My name is Kewal Ram; age 40 years; by caste Rahoo. I live at Mouzah Uzeemabad." (To *2nd* question:) "Mohunt Sargoo Doss signed the mookhtearnamah for me, and I attested by desire of Baboo Bishen Singh." (To *3rd* question:) "Yes; Bishen Singh signed it in my presence at Bindabun." But upon cross-examination he said, in answer to the question "Is this Bishen Singh?" "No; this is Baboo Rung Bahadoor Singh, his son;" and again, to the question, "Are you in Bishen Singh's employ?" "Yes; I live in his village, and am in his employ." If this witness's evidence is correct, it seems that Rung Bahadoor Singh, the son, was in Court; but it is not quite certain that he is the same person who was identified by the first witness as the person who executed the document and said his name was Bishen Singh. As the last witness says that he came from Patna, and was in the employ of Bishen Singh, he might surely have been brought forward, and given evidence on the issue raised as to whether Bishen Singh was missing. The third attesting witness says: "My name is Kurun Lall, by caste Chowbey, and resident of Muttra, aged 22 years." (To *2nd* question:) "No; I did not sign this attestation or sign this mookhtearnamah." He says that he never signed or attested the document.

On the last occasion, when the case was before the Court, the Court allowed it to stand over in order that the genuineness of the mookhtearnamah might be proved. From the evidence given, it would seem doubtful whether the document was not really executed by Rung Bahadoor. Now, there is a person besides Bishen Singh who could say whether it was Bishen Singh or Rung Bahadoor who executed the document, and that person is Rung Bahadoor. A sum of

money was deposited for the costs of the day, as a condition upon which this Court allowed the case to stand over. It accordingly stood over till the present day in order that Rung Bahadoor, who authorized the appeal, might prove that it was Bishen Singh, his father, who executed the document. But Rung Bahadoor has not thought fit to appear; he has authorized the appeal to this Court, and executed the vakalutnamah, and yet he does not come forward to prove that he was authorized by his father by that power of attorney. Therefore we have it that he has instituted an appeal in this Court by virtue of a vakalutnamah, signed by him, in which he says that he was authorized by Bishen Singh to sign that vakalutnamah; and when he is charged with having signed that vakalutnamah under a forged mookhtearnamah, he does not venture to come forward and prove that it was a genuine mookhtearnamah signed by his father, or that it was not actually signed by himself, as appears to have been alleged by one of the witnesses examined under the commission. Then what is the inference the Court must draw from these facts? Can they, in the absence of Bishen Singh, of Rung Bahadoor, and of the attesting witness, Kewal Ram, who stated that he was in the employ of Bishen Singh, believe that it was Bishen Singh who signed the document? Or must they not rather infer that this document was not signed by Bishen Singh, but that it was signed by Rung Bahadoor, representing himself at the time to be Bishen Singh? If Rung Bahadoor, representing that he was Bishen Singh, executed this document conferring a power on himself as the son of Bishen Singh, there was a clear forgery. Under these circumstances, the Court have no difficulty in finding that the Judge came to a wrong conclusion on a point of fact in holding that it was satisfactorily proved that the mookhtearnamah was a genuine and valid document. We asked to hear Mr. Paul, who was retained under the authority of Rung Bahadoor, but Mr. Paul very properly declined to occupy the time of the Court unnecessarily by attempting, in the face of the difficulties with which he had to contend, to convince the Court that this document was actually signed by Bishen Singh.

We, therefore, think that the decision of the Lower Court upon that issue must be reversed. But although the decision on that issue, as to whether the suit was brought by Bishen Singh or not, is decided against Bishen Singh, it does not decide the suit, inasmuch as there are other parties—Lall Narain Singh and Deoputtee Narain Singh—who are co-plaintiffs in the suit. It is sufficient for us to say that these two gentlemen cannot maintain this suit so long as Bishen Singh is *alive;* because, if he is alive, he is admittedly a nearer heir than either of those parties can be, and there is no sufficient proof of his death.

The other plaintiff is Moonshee Ameer Ali, and he claims a portion of the property under a conveyance executed by virtue of that mooktearnamah. If the mooktearnamah is not a genuine document, then the title of Moonshee Ameer Ali, under the conveyance which was executed under an authority alleged to have been derived through that document, must fall to the ground.

Having reversed the decision of the Judge as to the issue whether the mooktearnamah was a genuine document or not, and holding that Bishen Singh did not execute it, we think that, in such case, we must relieve Bishen Singh from all costs. We therefore reverse so much of the judgment of the Lower Court as awards costs against him, and we order that the plaintiffs, with the exception of Bishen Singh, pay the costs of this appeal and the costs in the Lower Court—that is, the costs of the Ranees who are the principal defendants and of Ram Kishen Sing, but not the costs of those defendants who were plaintiffs in the other suit.*

* No. 1 of 1864; appeal to this Court, No. 53 of 1865.

And we further order that Rung Bahadoor, who filed this appeal, do pay all costs of this appeal in case they are not paid by plaintiffs.

The mooktearnamah was produced in the Judge's Court, but it does not appear to have been filed originally. But, as it was produced in the Lower Court and the Judge received it, there ought to have been an endorsement on the document as to the name of the person who produced it. Section 132 of the Procedure Act says: "When an exhibit is received by the Court and admitted in evidence, it shall be endorsed with the number and title of the suit, the name of the party producing it, and the date on which it was produced, and shall be filed as part of the record." We think that, whether the exhibit was filed originally or was produced at the trial, the rule is one which ought to be acted upon, and that all documents produced as evidence on the trial, though they may not have been filed as

exhibits in the first instance, ought to be endorsed as directed by Section 132. The Procedure Code requires all documents which are intended to be given in evidence to be filed in the first instance, and it appears that, without the leave of the Judge, no document which has not been filed is admissible as evidence. Then when a Judge on a trial thinks it proper to admit a document which has not been filed as an exhibit, surely he ought to take care that it is produced by a proper person, and that the endorsement pursuant to Section 132 is made upon it, in order that hereafter it may be known who the person is who produced it. If that had been done, we should have seen upon the face of this document whether it was produced by a vakeel in the Lower Court, or whether it was produced by Rung Bahadoor. But in consequence of that not having been done, we are unable to say at the present moment whether Rung Bahadoor did produce it or not. We think that an investigation ought to be made by the Magistrate of Behar into this case, as to whether Rung Bahadoor or any other persons did use, or attempt to use as true, evidence which he or they knew to be fabricated; and further, as regards this particular mooktearnamah, under Section 471 of the Penal Code, to see whether Rung Bahadoor or any other person did fraudulently or dishonestly use as genuine a document which he knew, or had reason to believe, to be a forged document. Under Section 171 of the Code of Criminal Procedure, we think that the case should be sent to the Magistrate of Behar for investigation, and direct him to proceed according to law against Rung Bahadoor or any other person or persons for any offence or offences which he or they may appear to have committed against the above-mentioned Section or any other Section or Sections of the Indian Penal Code.

The 12th June 1866.

*Present:*

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

**Mortgage (Zur-i-peshgee lease)—Recovery of land before expiry of lease—Account.**

Case No. 399 of 1866.

*Special Appeal from a decision passed by the Judge of Patna, dated the 12th December 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 18th April 1865.*

Punjum Singh (Defendant), *Appellant,*

*versus*

Musst. Ameena Khatoon (Plaintiff), *Respondent.*

*Baboo Kishen Succa Mookerjee* for Appellant.

*Moonshee Ameer Ali* for Respondent.

**A mortgagor—one who has granted a *Zur-i-peshgee* lease—can sue to recover possession of his lands before the expiry of the term fixed by the lease, on the ground that the mortgage-debt has been satisfied by the mortgagee's receipts while in possession.**

**In the case of a mortgage by a *Zur-i-peshgee* lease, the mortgagor is entitled to an account from the mortgagee, notwithstanding an express stipulation in the lease that the latter shall not be liable to account.**

THE special appellant contends that the Lower Court is wrong—*firstly*, in holding that the mortgagor (this being a case of a *Zur-i-peshgee* lease) can sue to recover possession of his lands before the expiry of the term fixed by the lease, on the ground that the mortgage-debt has been more than paid off by the mortgagee's receipts while in possession; and, *secondly*, in holding that the mortgagor is entitled to an account from the mortgagee, when it is expressly stipulated in the lease that the latter shall not be liable to account.

As regards the first point, we are of opinion—and our opinion accords with that expressed by the late Sudder Court on various occasions—that the Lower Court was right,

(*See* Sudder Dewanny Adawlut, 1852, pp. 280, 304; 1860, Volume II., page 174; and Regular Appeal 269 of 1859, Anund Gopal Suhae *versus* Gopal Doss, February 28th, 1862).

As regards the second point also, we concur with the Lower Court. The contract having been entered into prior to the passing of Act XXVIII. of 1855, a condition that a mortgagor shall not claim an account from the mortgagee who has been in possession, does not in any degree bar the operation of the law which declares that the lender is to account to the borrower for his receipts while in possession. (*See* the cases above quoted, and Sudder Dewanny Adawlut, 1851, page 632; 1859, page 1076; North-Western Provinces, Volume X., pp. 51, 198.)

It was argued further for the appellant that the Lower Court's judgment is defective as containing no distinct finding as to the genuineness of one of three bonds which are in dispute in this cause. But we think it clear that the Lower Court does substantially find against all the three bonds.

All the objections which have been taken to the decision of the Lower Court fail, and we therefore dismiss the appeal with costs.

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The 12th June 1866.

*Present:*

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

**Damages (Destruction of crops by not cutting through bund)—Special Appeal.**

Case No. 3515 of 1865.

*Special Appeal from a decision passed by the Principal Sudder Ameen of the 24-Pergunnahs, dated the 26th July 1865, reversing a decision passed by the Moonsiff of Manicktollah, dated the 1st October 1864.*

Gopeenath Paul (Plaintiff), *Appellant,*

*versus*

Lieutenant S. George, Executive Engineer of the 24-Pergunnahs, and others (Defendants), *Respondents.*

*Baboo Annund Gopal Paleet* for Appellant.

*Baboo Kishen Kishore Ghose* for Respondents.

Under Section 3, Act XLII. of 1860, a suit for damages of any kind below 500 rupees (*e. g.*, a suit for damages for not cutting through a bund whereby plaintiff's crops were destroyed in consequence of accumulation of water) is cognizable by a Small Cause Court, and consequently, under Section 27, Act XXIII. of 1861, no special appeal will lie in such a case.

THIS was a suit to recover 61 rupees as damages from the Executive Engineer of the Division for not cutting through a certain bund, whereby plaintiff's crops were destroyed in consequence of the accumulation of water.

There is no occasion for us to notice the pleadings further, as it appears to us that this Court has no jurisdiction to entertain the special appeal now preferred.

By Section 27, Act XXIII. of 1861, it is enacted that no special appeal shall lie from any decision passed in regular appeal by any Court subordinate to the Sudder Court in any suit of the nature cognizable in Courts of Small Causes, when the debt, damage, or demand shall not exceed Rupees 500; and the nature of suits cognizable by Small Cause Courts is explained in Section 3, Act XLII. of 1860. Amongst the suits so cognizable are suits for "damages." There is no restriction in the Section as to any particular kind of damages; nor has it been shewn to us, from any decisions of this Court, that the word is referable to personal damages only. We think, therefore, that it must include damages of any kind when the amount claimed is under 500 rupees; and, that being so, it follows that the present claim was one cognizable by the Small Cause Court, and that no special appeal will lie.

We othecfore reject this application with costs.

The 12th June 1866.

*Present:*

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

**Putnee (sale of).**

Case No. 2540 of 1865.

*Special Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 13th June 1865, reversing a decision passed by the Moonsiff of Kalnah, dated the 15th September 1863.*

Woomesh Chunder Mookerjee (Plaintiff), *Appellant,*

*versus*

Bissessuree Dabee and others (Defendants), *Respondents.*

*Mr. R. E. Twidale* and *Baboo Gopal Lall Mitter* for Appellant.

*Baboo Hem Chunder Banerjee* for Respondents.

Suit to set aside sale of a moiety of a putnee tenure by a widow, and a subsequent and alleged collusive sale for arrears of rent under Regulation VIII., 1819. HELD that, if the defendant was in possession under a title from the widow, his subsequent purchase at the auction-sale 6 years before the death of the widow did not give him a new title against those claiming through the widow, especially when the plaintiff alleged that the defendant had allowed the putnee to fall into arrears, and then purchased it himself.

THE plaintiff in this case alleges that a putnee consisting of three mouzahs belonged in equal shares to his maternal grandfather and his maternal grand-uncle; that, on the former's death, his widow succeeded to his moiety, and afterwards sold it to the defendants. He adds that, in 1258 B. S. (six years before the widow's death, which took place in 1264 B. S.), the defendant fraudulently allowed the tenure to fall into arrear, and then purchased it himself at a sale under Regulation VIII. of 1819. Plaintiff, therefore, sues to set aside both the sale by the widow and the subsequent and collusive sale under the Putnee Sale Law.

The defendant denies having purchased the land from the widow, and alleges himself to be a *bona fide* purchaser at auction for value under Regulation VIII. of 1819.

The first Court did not go into any of these questions, but reversed the sale on the ground of informality.

The Principal Sudder Ameen took up this case in connection with one brought by Radha Kant, the holder of the other 8 annas of the putnee, and, finding no proof that Radha Kant had ever paid his *quota* of the putnee-rent, gave a decree against him, and passed a similar order in the present case.

It is urged in special appeal, and we think with good reason, that the two cases are altogether dissimilar; that Radha Kant's case was that he had paid his *quota*, but that other parties had collusively prevented the money from reaching the zemindar, and had so procured the tenure to be sold; whereas in this case the question to be decided was whether the defendant held possession under a title from the maternal grandmother, or not, previous to the putnee-sale, or did acquire his original title from that sale.

There can be no doubt that this was the issue to be tried; for, if the defendant was in possession under a title from the widow, it is evident that his subsequent purchase at the auction-sale of 1258, 6 years before the death of the widow, on account of non-payment of rent, would not give the purchaser a new title against those claiming through the widow, specially when the special appellant's allegation is that the defendant first allowed the putnee to fall into arrear, and then fraudulently purchased it himself.

The case is remanded accordingly with reference to the above remarks. Costs will follow the result.

The 12th June 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Decision on facts—Evidence—Reasons for judgment.**

No. 389 of 1865.

*Application for review of judgment passed on the 22nd June 1865, in Special Appeal No. 1060 of 1865.*

Tiluckdharee Singh (Plaintiff), *Appellant,*

*versus*

Somoodha Singh (Defendant), *Respondent.*

*Baboos Onookool Chunder Mookerjee, Dwarkanath Mitter,* and *Chunder Madhub Ghose* for Appellant.

*Messrs. C. Gregory* and *R. E. Twidale* for Respondent.

**In deciding on the facts of a case, Judges should not base their decision upon some isolated piece of evidence, but take into consideration and record their opinion on the whole evidence offered on both sides.**

It is with great regret we find ourselves obliged to remand this suit to the Judge of Patna in order that he may record a clear decision on the question of limitation—not taking into consideration one single portion of the evidence in the case as he has done, but alluding to the whole of the material evidence, and, according to law, giving his reasons for the judgment he arrives at in rejecting and accepting the evidence offered on both sides.

The case has already been once remanded to the Judge of Patna, because the decision on limitation did not in any way allude to the evidence, but apparently took it for granted that, as there had been a decision under Act IV. of 1840 adverse to the plaintiff, he was entitled to date his cause of action from the date of that decision. As far as that decision went, it was evidence that the plaintiff was not in possession, not only on the date on which the decision was passed, but also had not been in possession on the date on which the dispute originated; for the Magistrate, finding he had not been in possession, dismissed his claim. It was necessary, therefore, that the Judge should look to the evidence as to the state of facts which existed before that decision was passed, and decide whether plaintiff had been able to prove dispossession within 12 years of the institution of the suit, or not.

The Judge, on the remand, has relied upon one single document as proving that plaintiff was in possession, *viz.*, a judgment of the Civil Court in a suit for rents of the year 1846 on a claim preferred by the plaintiff founded on his title as mokurrureedar—the same title which he now sets up. The defendant put in this decision as proving that the plaintiff was, in 1846 and 1847, out of possession. The Judge says that, on the contrary, it is a proof that the plaintiff was in possession. The Judge does not state how it is evidence of possession. We, on a former hearing of this appeal, thought that it might be held as some evidence that the plaintiff was then setting up his title and exercising rights of ownership. But, on reconsideration, we are of opinion that this view cannot be sustained. The mere setting up a title is no proof that the plaintiff then held possession of the land to which he set up the title—the more so as his claim on that title was dismissed, because he could not satisfy the Court that he had been, as owner, realising the rents which he claimed. As far as the judgment of the Court went, it did not declare that plaintiff was in possession.

The Judge says, however, that the defence which was set up in that action is identical with the defence set up now. This cannot in any way assist the plaintiff. The defence was that, though the plaintiff may have been as a servant or agent of the Maliks collecting rents for his masters, he had not been collecting rents as mokurrureedar. This is no admission that the plaintiff was in possession of his mokurruree right, or that he was in possession of the land at all on his own account. The defendants in the present case are in no way bound by the answer of the defendants in that action. If their answer in the present case is an admission of the plaintiff's possession within 12 years, it was quite unnecessary to go to the decision of 1849 at all. But it is manifestly no more an admission of plaintiff's possession than the answer of the defendants in that case was. A naib or gomashtah is not in possession of his master's estate because he is deputed to collect its rents.

The decision in the rent-suit of 1849 is evidence to a certain extent against the defendants, if it in any way told against them. But as by it the plaintiff's claim to receive rents as mokurrureedar was dismissed, we fail to see what evidence it is of plaintiff's possession.

It is very much to be regretted that Judges will, in deciding on the facts of a case, base

their decision upon some isolated piece of evidence, instead of taking into consideration, and recording their opinion on the whole of the evidence offered by the parties. Constant remands in special appeal are caused by this habit. In this case, more especially considering the long time it has been pending, and that it was remanded by this Court for re-decision, it was incumbent on the Judge to look to the whole evidence and record his judgment, so that there could be no further doubt that it had been arrived at on a full consideration of all the facts.

The plaintiff here institutes a suit in 1860 to set up a title which, in 1848, he failed to establish in the Civil Courts, and under which, in 1850, he failed to prove possession before the Magistrate. He must very clearly prove that he held possession of his mokurruree rights within 12 years of the institution of the suit, before his claim on the merits can be tried.

The decision of the Judge is reversed, and the case remanded to him for re-trial with reference to the above remarks. Costs of this special appeal to follow the final decision.

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The 13th June 1866.

*Present:*

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

**Ghatwalee lands (Assessment or enhancement of)—Evidence (Adjudication of competent Court 60 years ago).**

Cases Nos. 305, 306, 342, and 381 of 1865.

*Regular Appeals from a decision passed by Baboo Ram Taruck Roy, Principal Sudder Ameen of West Burdwan, dated the 15th June 1865.*

Mr. James Erskine (Plaintiff), *Appellant,*

*versus*

Manick Singh Ghatwal and others (Defendants), *Respondents.*

*Mr. R. T. Allan* and *Baboos Dwarkanath Mitter* and *Bungshee Dhur Sein* for Appellant.

*Baboos Kishen Kishore Ghose, Juggodanund Mookerjee, Poorun Chunder Mookerjee, Obhoy Churn Bose,* and *Mohesh Chunder Bose* for Respondents.

Suit laid at Rupees 9,007-7-6.

Long possession (presumably from the Decennial Settlement) and gradual cultivation by a ghatwal on payment of a quit-rent (and not merely possession without cultivation) are evidence of an implied grant which protects the ghatwal from enhancement or assessment on the land so cultivated.

An adjudication by a competent Court made 60 years ago, dismissing the landlord's claim to rent from the ghatwal, is evidence of the highest order as to the right of the ghatwal in the suit now brought by the landlord for a declaration of right to take rent in future.

THE plaintiff in the cases out of which the two appeals now before us have arisen, who is a putneedar, sues to oust defendants from a certain quantity of land which is in their possession, as trespassers, it being not included within their ghatwalee lands, and they refusing to enter into engagement to pay rent for the same.

The ghatwals, in their written statements, assert that the suit is barred by limitation; that the land in suit has been ghatwalee from before the Decennial Settlement, and that neither plaintiff nor the zemindar have ever had possession of them; that the lands in suit have been held by defendant and his predecessors as ghatwalee on payment of a rent, and have been so demarcated by the survey; that the Issumnovisee on which the plaintiffs rely to prove their case is not the ghatwalee title-deed, but was prepared by the police on the statement of the then ghatwals without enquiry or measurement, and is, therefore, no legal evidence; that no boundaries have been given in the Issumnovisee, and the plaintiff has marked off a piece of land according to his discretion, and has left him a quantity altogether insufficient for the support of the ghatwals.

The Government assist the statement of the ghatwal.

The Lower Court, after other remarks, observes in two of the cases before us—Nos. 342 and 381—"that the judgment of the "16th December 1863, in which the present "plaintiff was respondent, mainly approaches "the circumstances of the present case, and "requires careful consideration. In that "judgment, it is said that 'the Issumnovisee "is admittedly a document filed in 1819 "by the police-officer empowered to receive "and transmit to his superiors the informa-"tion that it contains; that it is notorious "that, in cases of the kind before the "Court, these Issumnovisees are almost "universally produced, and have in some "instances been relied upon by the Govern-"ment in suits to restrain the rights of the "ghatwal, and that they would not have "remained for so many years in the Office "of the Collector without some contradic-"tion or notice on the part of the ghatwal,

"if they had not been transmitted with "the concurrence of the person who held "the post. It is, therefore, entitled to be "regarded as fair *primâ facie* evidence of "what the ghatwal held in 1819 as ghat-"walee. It is for the ghatwal or Govern-"ment to explain how it happened that the "ghatwalee tenure has increased; and, as "to the decision of 1822, it would not be "binding upon a successor who purchases "the putnee-right at a sale under Regula-"tion VIII. of 1819.' This judgment must "govern the present decision, unless it "can be shewn that the ghatwal or Go-"vernment have brought additional evidence "to show that the original ghatwalee tenure "corresponded with its present area, and "was not correctly reported in the Issum-"novisee, and that the grounds of such "judgment are clearly inapplicable to the "present suit." The Judge then entered into the evidence adduced by the ghatwal, to throw doubt on the correctness of the Issumnovisee, and, having examined it attentively, he considered, for reasons given, that the ghatwal had successfully rebutted the *primâ facie* proof which the Issumnovisee was considered to afford, by proving—*first*, that the Issumnovisee has been held by a Court of competent jurisdiction to be a false report; and, *second*, that the area there recorded could not possibly, by arithmetical deduction, be the true area of the ghatwalee. The Judge, therefore, dismissed the plaintiff's suit with costs.

From these two decisions of the Judge, appeals have now been preferred to this Court which open out all the facts in evidence and the law applicable to them.

In a case like the present, it is well to disembarrass ourselves of considerations which should not have been allowed to interfere with the real question at issue between the parties. It is admitted by the plaintiff that the defendants are the ghatwals, and they have gradually cleansed and cultivated the lands now in their possession which are alleged to be in excess of that to which they are entitled under their grants. Now, admitting this to be so, it is quite clear that the plaintiff cannot eject the defendants—that he can only take rents from them; any claim, therefore, to possession must at once be set aside, and the case considered simply with reference to his, plaintiff's, alleged right to receive rent, or not, from the lands in defendants' possession. The defendants in possession have pleaded against the plaintiff, limitation and also prescription. As, however, the plaintiff's cause of action is just within twelve years from the date of his purchase—the time allowed to him by Act XIV. of 1859—it is clear that limitation will not apply. As to the prescriptive title set up by the defendant, that is so intimately connected with the other facts of the case that it can only be determined on a consideration of the entire merits of the suit.

The circumstances of the part of the country in which the present lands are situated are somewhat peculiar. It was, as may be gathered from the Appendix referred to in the 5th Report of the House of Commons—of which, as an historical document, the Court can take cognizance—that, at the time of the Decennial Settlement, it was but sparsely inhabited, a great portion of the land being under jungle. In these circumstances, formal grants of a particular nature were, from the nature of things, impossible; but grants were made of as much land as the grantee could bring into cultivation, he being subject to a small quit-rent. Under grants of this nature, lands were cleared, habitations sprung up, and villages arose. In the case before us, there is no question that the lands in dispute are within the area of the plaintiff's putnee talook. Whether the villages so-called ghatwalee by the defendants were in existence as such at the Decennial Settlement, does not appear from the production of any papers referring to that period. This, however, seems from the evidence produced on the part of defendants to be clear that they have for a very long series of years been gradually bringing the lands of these villages into cultivation; and the first question which arises is, whether the defendants have proved such a continuous and ancient possession of the entire lands in cultivation and now in their possession, as to bar the plaintiff's claim under a prescriptive title reaching back to the Decennial Settlement.

The plaintiff is a purchaser of a putnee talook granted by a zemindar who purchased the estate in 1198 or 1791, about the time of the Decennial Settlement; but at what time the putnee tenure was created, we have been unable to discover, but it was admittedly of old creation. Now, with a view of defeating the prescriptive title set up by the defendant in Case 342, with which alone we are dealing, at present, and, at the same time, of showing the restricted nature of the tenure of the defendant, the plaintiff has filed certain Issumnovisee papers which were filed in

1811, by which it would appear that the ghatwal defendant in Case No. 342 held then only 70 beegahs of land, for which he paid a yearly rent of Rs. 41, within the village of Banoojonee. Now, had the defendant asserted that these papers were prepared *without the knowledge* of the then ghatwals, it would have been necessary in his case to enter at length into the mode of their preparation; but he, in his written statement, admits the knowledge of the then ghatwals of this, but tries to avoid the effect of them by alleging that they were prepared without investigation, and that it is not an unknown fact that the ghatwals had, from various motives, caused to be recorded in the Issumnovisee papers far less quantity of land than what were actually held by them, and that, at the time of the preparation of their documents, no enquiries whatever had been made as to the correctness of their statement. Now, it is notorious, as remarked by the Judges of this Court in their decision in the case of Mr. Erskine *versus* Pran Singh and others, decided on the 15th December 1863, that these papers have, as a rule, been accepted by the Court as good *primâ facie* evidence of the state of a ghatwalee tenure at the period at which they were prepared: this being so, and the defendant in the case, with which we are now dealing, merely trying to get rid of them by the unsupported assertion that the ghatwal acted fraudulently, it remains for him to prove that fraud as part of his case, if necessary. In the meantime, we accept these papers as *primâ facie* proof of the state of the defendant's ghatwalee tenure in 1811; but this does not carry the case very far. Had the tenure set up been one of a *fixed area*, these Issumnovisees would have been good evidence of the extent of that area in 1811; but, under the circumstances of this case, we are precluded from considering that the grant was one of a fixed area, and that these papers show *primâ facie* the quantity of land then brought under cultivation. But the question then arises, even admitting that this quantity of land only was in cultivation in 1811, and that, at the time of plaintiff's purchase, the area now stated by plaintiff to be cultivated is in actual cultivation, what is the very effect of such discrepancy as affects the rights of the parties before us?

We have it clearly in evidence that the defendants have gradually, during a long series of years, from generation to generation, which we may on fair presumption carry back to the Decennial Settlement, brought into cultivation the lands in dispute without any interference from the parties representing the estate, and paying always a fixed quit-rent to them. This long possession and gradual cultivation, in the absence of an express grant, is evidence of an implied grant corresponding with the facts which we have in evidence, *viz.*, a grant of whatever land they might take possession of and cultivate, and thereby bring the facts in evidence into conformity with those which, from the nature of the case, was *à priori* to be anticipated; consequently, to land cultivated under these circumstances, the plaintiff, as dur-putneedar, could have no right to demand increased rent, for it would be covered by the implied grant made by the zemindar anterior to the creation of the putnee tenure, and one, therefore, by which the putneedar would be bound. Had the original occupancy of the defendant commenced, as it did in the case of Kylashnath Roy *versus* Jugunnath Sein, with a ghatwalee tenure of a *fixed number of beegahs*,* then we should have had no hesitation in declaring with the late Sudder Court that "a ghatwal who has been permitted to add field to field and beegah to beegah, and thus to increase his holding, can acquire no greater rights in those lands so added than any other tenant who by the same process increased his holding beyond the extent of the lands for which he has entered into engagements." As it is, we think defendant, the ghatwal, is entitled, as against the plaintiff, to retain in his possession, covered by the quit-rent paid, all the lands which he had cultivated under the implied grant at the date on which the plaintiff brought his action.

* Sudder Dewanny for 1858, page 1716.

As to the land not cultivated in defendant's possession, we have not been shown that, beyond the mere fact of its detention, the defendant has done anything to bring it into cultivation, or in any way to enjoy any profits arising from it. We therefore think that such a bare detention is not within the terms of the implied grant to the defendant, and in itself, as against the zemindar or a person in his position, as is the plaintiff, is a futile claim. It is not included in the enjoyment of lands intended under the implied grant, and, therefore, such land is liable to be assessed by plaintiff under the laws in force.

Under these circumstances, we affirm so much of the order of the Judge as dismisses

the plaintiff's claim as regards the land cultivated by the defendant; but we declare to plaintiff the right to assess the lands uncultivated in the possession of the defendant, according to the laws in force applicable to such matters, with costs in proportion.

As to the Case No. 381, though the facts are very similar, there is one document which, in our opinion, must he considered conclusive evidence of the defendant's title. It is admitted that the lands sued for in this case are identical with a portion of those regarding which the suit was instituted in 1817 by the party then representing the estate, the dur-putneedar, and the ghatwal, and in which the claim of the plaintiff to rent over and above the quit-rent of Rs. 426 over 7¼ villages was dismissed. The present plaintiff is not the privy in estate with the then plaintiff, so he is not in the present case estopped from raising the point as to the extent of plaintiff's grant in this case; but considering that that suit was instituted by the party then representing the estate against the then ghatwals, and that its decision is not impeached on any special ground, such as fraud or collusion, we consider, as evidence of the highest nature as to the right of the defendant, an adjudication by a competent Court made nearly 60 years ago. It is true that that was a suit for rent, and this is a suit for a declaration of right to take rent in future; but in both cases, under the procedure then in force, the issue was the same, *viz.*, the extent of the defendant's rights. Those rights were then determined to be what defendant now contends they are, and on whatever ground we might have decided the case ourselves had the matter come before us, as it did in the Case No. 342, we consider ourselves bound to adhere to that decision, and to hold that the right of the defendant extends to the entire villages, Bassirah and others, both cultivated and jungle, and to declare that plaintiff is not entitled to any more rent than Rs. 426 on account of the entirety of those villages. The appeal in this case, therefore, we dismiss with costs.

The 13th June 1866.

*Present:*

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

**Service of Summons on defendant or respondent.**

Case No. 98 of 1866.

*Regular Appeal from a decision passed by Moulvie Synd Imdad Ali Khan, Principal Sudder Ameen of Tirhoot, dated the 17th January 1866.*

Gopaul Doss (Plaintiff), *Appellant,*

*versus*

Greedharee Doss and others (Defendants) *Respondents.*

*Mr. C. Gregory* for Appellant.

*Baboos Unnoda Pershad Banerjee* and *Onookool Chunder Mookerjee* for Respondents.

Every summons not actually served on a defendant or respondent or his recognized agent, must be stuck up on the house in which the defendant or respondent is dwelling. If the defendant or respondent cannot be found, the summons should be returned to the Court and an order obtained from the Court as to the mode of service.

Remarks on this case in which a decree was passed against the defendants on the second part making them liable for the costs of the defendants of the first part when the former probably never had been summoned or had any notice of the suit.

THIS was a suit upon a Tunkha by which the principal defendants, in 1261 Fuslee, assigned to the plaintiff the rents of Mouzah Koodreah for 1270 and 1271, and of Mouzae Booriain for 1270, 1271, and 1272.

No evidence whatever appears to have been taken, and yet the Principal Sudder Ameen appears to have given a decree as against the Ticcadars of these two mouzahs apparently upon admissions made by Baboos Greedharee Singh and Doorga Dutt Singh, who executed the assignment. He says, with respect to the 1st defendants, Greedharee Singh and Doorga Dutt Singh, who made the admissions, "If, in future, the realization of the decretal amount be not possible from the defendants of the second part, then the plaintiff shall, as a matter of course, be competent to ask for redress from the Court under the terms of the Ikranamah cited by him."

It is quite uncertain, upon the terms of that judgment, what the Principal Sudder Ameen means, and whether he intends to give a decree againt the defendants of the first part or not.

Looking at the examination of Mirza Ahmed Ali and Baboo Dedarnath, pleaders, in favor of the plaintiff, we are disposed

to think that, in all probability, a decree ought to have passed against the defendants of the first part. No attempt was made on the part of the defendants to show that the plaintiff had done any act whereby the liability of the defendants of the first part to guarantee to the plaintiff the payment of the rents for the years named had been discharged, But the appellant has not brought before us the Ikrarnamah on which he sues, and, consequently, we are not in a position to pass any opinion on the subject. It is certain that the Ikrarnamah has not been properly considered by the Principal Sudder Ameen, and the case must, therefore, be remanded to him for trial upon that point.

The defendants of the second part, the Ticcadars, have been made respondents, and are mentioned in a summons issued from this Court. But that summons has not been served upon them, and the manner in which it has been dealt with is such as to cause in our minds considerable anxiety as to the mode in which summonses issuing from the Court of the Principal Sudder Ameen of Zillah Tirhoot are served. On reading the return, it appears that the peadah did not meet with the respondents, or any member of their family, and he therefore attached the Itlanamah to a house facing towards the east in the village in which they are represented by the plaintiff to be residing; but there is nothing to show that they ever resided in that village, or that the summons was ever brought to their notice, or that it was likely that it would ever be so. Every summons not actually served on the party or his recognised agent must be stuck up on the house in which such party is actually residing and dwelling. Section 55 of Act VIII of 1859 lays down the proper course of proceeding in cases where a defendant or respondent cannot be found. It directs that the summons should be returned to the Court, and an order should be obtained from the Court, under Section 57, as to the mode of service.

We cannot, in the absence of the parties of the second part, reverse the judgment against them; but we send the case back to the Principal Sudder Ameen, and desire to express our opinion in very strong terms upon the exceeding impropriety and want of care on his part, not only in passing a decree against parties without any evidence, but actually making them liable for the costs of the defendants of the first part, when very probably these parties have never been summoned at all, or had any notice of the present proceedings.

The appellant must pay the costs of this appeal which has been rendered infructuous by his own neglect in not bringing before us the Ikrarnamah on which he sued.

The case is remanded to the Principal Sudder Ameen for trial.

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The 14th June 1866.

*Present:*

The Hon'ble G. Campbell and A. G. Macpherson, *Judges.*

**Attendance of witnesses (Duty of Civil Court to enforce)—Power of High Court to interfere.**

Case No. 3 of 1866.

*Special Appeal from a decision passed by Mr. A. Pigou, Judge of Hooghly, dated the 31st August 1865, modifying a decision passed by Moulvee Nazeerooddeen Mahomed, Additional Principal Sudder Ameen of that District, dated the 16th June 1863.*

Nilmonee Banerjee (Plaintiff), *Appellant,*

*versus*

Shurbo Mungola Debee (Defendant), *Respondent.*

*Baboo Kishen Succa Mookerjee* for Appellant.

*Baboo Romesh Chunder Mitter* for Respondent.

Every Court is bound to render all reasonable assistance to a party to enforce the attendance of his witnesses.

The Judge below having, without the slightest reference to the interests of the parties concerned and to the facts of the case, refused to grant a coersive process to enforce the attendance of plaintiff's witnesses upon the irrelevant ground that, sitting as a Civil Court, he could not criminally punish the witnesses for non-attendance. the High Court interfered and remanded the case to the Judge with directions to give the plaintiff an opportunity of producing his evidence.

THIS case was remanded for a more complete trial, and the order was especially made that an opportunity should be given to the parties to produce further evidence. The Judge appointed the case for hearing on the 29th of August last. On that day, the plaintiff represented that his witnesses had not attended, and prayed that a coercive process might be issued for their attendance, and the hearing adjourned. Upon this, the Judge passed the following singular order:—

"The Court is of opinion that such attach-"ment is useless; for, if they did appear

"after such attachment, the Court could, "under the Penal Code, inflict no punish-"ment on them."

It seems to us that this order is, on the face of it, wrong and bad. If the Judge, in his discretion with reference to the circumstances of the case, had refused to grant an adjournment, it might have been difficult for us to interfere on special appeal. But when the Judge has, without the slightest reference to the interest of the parties concerned and to the facts of the case, refused to grant a coercive process to enforce the attendance of witnesses, upon the irrelevant ground that, sitting as a Civil Court, he could not punish the witnesses for their non-attendance criminally, we think that we can interfere; and accordingly again remand the case, with directions that an opportunity be given to the plaintiff to produce his evidence, and that the Judge do thoroughly and carefully carry out the spirit of the former remand order and try the case fully. Every Court is bound in justice to render all reasonable assistance to a party to enforce the attendance of his witnesses.

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The 14th June 1866.

*Present:*

The Hon'ble G. Loch and L. S. Jackson,

*Judges.*

**Jurisdiction—Partition.**

Case No. 3181 of 1865.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 23rd August 1865, modifying a decision passed by the Moonsiff of Howalah, dated the 3rd February 1864.*

Mohsun Ali and others (some of the Defendants), *Appellants,*

*versus*

Nuzum Ali (Plaintiff) and others (Defendants), *Respondents.*

*Baboo Mohinee Mohun Roy* for Appellants.

*Baboo Mottee Lal Mookerjee* for Respondents.

A Civil Court can only determine the right to partition of an estate paying revenue to Government. The partition itself can be made by the Collector alone under Regulation XIX., 1814.

*Loch, J.*—In this case, the only point for a Civil Court to determine is whether the plaintiff has a right to a partition or not, if that question was disputed. It had no authority to make the partition itself, or to direct that a partition be made by any local form in use in the district among private parties. A partition of an estate paying revenue to Government can only be made by the Collector under Regulation XIX. of 1814. The plaintiff was at liberty to apply to the Collector for that purpose. We, therefore, reverse that part of the order of the Lower Court which directs the partition to be made, under what is called Gola-Bhag.

The appellant will get his costs.

*Jackson, J.*—I agree. Looking at the certificate and the annexed description of what the plaintiff purchased, it is manifest that he acquired, not merely the specific portion of land, so many kanees, as contended by the special appellant's vakeel, but all the rights of the judgment-debtor, Makur Ali, whatever they were in the talook. If, therefore, Makur Ali had any right of partition, the plaintiff who succeeded to him must be also entitled to it. But the application ought to have been made to the Collector, and not to a Civil Court.

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The 14th June 1866.

*Present:*

The Hon'ble G. Loch and L. S. Jackson,

*Judges.*

**Limitation—Cause of action—Non-suit.**

Case No. 3145 of 1865.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 27th July 1865, affirming a decision passed by the Sudder Moonsiff of that District, dated the 20th June 1864.*

Haradhun Dey (one of the Defendants), *Appellant,*

*versus*

Ram Doss Dey (Plaintiff), *Respondent.*

*Baboo Gopal Lal Mitter* for Appellant.

*Buboo Roopnath Banerjee* for Respondent.

A non-suit gives no new cause of action.

It is perfectly clear that, in this case, at least 21 years and 4 months, and possibly a much longer period, had elapsed between the accruing of the cause of action and the bringing of the present suit in December 1861.

It appears that two separate suits, founded on the same cause of action, had been previously instituted, one after another, in the Moonsiff's Court, and had been successively non-suited, which suits between them occupied the space of 6 years, 4 months, and 29 days. This being deducted from the entire period which had elapsed from the accruing of the cause of action, leaves a time of very nearly 15 years unaccounted for. Plaintiff appears to have succeeded in keeping this matter from the Court below by stating his cause of action to have arisen when the last plaint was non-suited. This, however, is quite untenable. The non-suiting of one or other of the suits gave him no new cause of action. The present case is, therefore, evidently out of time, and the decision of both Courts must be reversed, and the suit dismissed with costs.

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The 14th June 1866.

*Present:*

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

**Guardians of Minors (Compromises by).**

Case No. 120 of 1866.

*Regular Appeal from a decision passed by the Principal Sudder Ameen of Gya, dated the 28th February 1866.*

Bodh Mul, father and guardian of Lekhraj Singh, Minor (Defendant), *Appellant,*

*versus*

Gouree Sunkur (Plaintiff), *Respondent.*

*Baboos Unnoda Pershad Banerjee* and *Dwarkanath Mitter* for Appellant.

*Baboo Mohendro Narain Bose* for Respondent.

Suit laid at Rupees 5,069-10-5-13-8-9.

The acts of guardians on behalf of minors must show the strictest good faith, and must be based on considerations of actual necessity and advantage, not on calculations of possible benefit.

In this case the Court refused to sanction a compromise effected between the guardian and the widow, by which the minor received immediate possession of half the property as consideration for the surrender of the reversion of the other moiety, no interest or advantage being shown in the arrangement.

The facts of this case were given at length in the remand order of this Court, dated 28th November 1865; it is, therefore, unnecessary to re-estate them at length. It is sufficient to observe that the Court considered that the compromise effected between the guardian of the plaintiff, who was a daughter's son, and, therefore, the expectant heir of his grandfather, and the widow of that grandfather, by which the minor received immediate possession of half the property on the condition of his guardian on his part surrendering all claim to the reversion of the other half which the grandmother settled on the defendant, her daughter's daughter's son, and therefore no heir at all under Hindoo Law—cannot be supported unless it can be shown that the transaction was at the time one reasonably beneficial to the boy; that, in fact, the immediate income was so much required for his benefit, and the prospects of the grandmother's life were so good, as to justify an honest and prudent guardian in making such a bargain for the boy's benefit.

On the matter coming before the Principal Sudder Ameen, he was of opinion that no advantage, but the reverse, had accrued to the plaintiff by the arrangement in question; and he therefore decreed plaintiff's claim with mesne-profits and costs.

Defendant now appeals specially, and on examining the evidence which has been produced with the view of satisfying the Court of the beneficial nature of the compromise as regards the minor, we find it is restricted to showing that the age of the grandmother was only 50; and hence we are required to infer that the guardian might fairly have reckoned on an enjoyment of the property by the minor for twenty years during the grandmother's lifetime, as the valid consideration for the surrender of the reversion of the other moiety. But we cannot accept this fact as sufficient to induce us to sanction such a compromise. The acts of the guardian as regards minors must show the strictest good faith, and must be based on considerations of actual necessity and advantage, not on calculations of possible benefit. There seems to have been neither necessity nor advantage in the present arrangement, and we therefore refuse to sanction it. It follows that the plaintiff, being the undoubted heir of his grandfather, is entitled to the property in dispute. We therefore affirm the decision of the Principal Sudder Ameen with costs.

The 14th June 1866.

*Present:*

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

**Suit for house-rent by co-sharer.**

Case No. 34 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Nuddea, dated the 21st December 1865, affirming a decision passed by the Sudder Ameen of that District, dated the 26th July 1865.*

Chunder Kanth Roy and others (Defendants), *Appellants,*

*versus*

Gopeemee Debia and others (Plaintiffs), *Respondents.*

*Baboos Sreenath Doss, Bhowanny Churn Ghose,* and *Prosonno Coomar Roy* for Appellants.

*Mr. R. T. Allan* for Respondents.

The co-sharers in a house, who continued to occupy the whole house to the exclusion of one co-sharer after notice that he would charge them rent for his share of the house, were declared just as liable to pay rent to the co-sharer as they would be for rents of any other species of property.

THERE are no grounds for the special appeal. The plaintiff is the purchaser of the share (four annas) of Nilkant Rai and Seetoo Kant Rai, who were joint proprietors with the defendants, by a purchase made in July 1863. The defendants are the proprietors of a 12-annas share.

The defendants being in possession of the house, the plaintiff in January 1864 gave the defendants notice of his title, and called upon them to come to some settlement with him for the rent of his share of the house, and warned them that. if they did not come to a settlement, they would be charged with rent for the four-annas share at the rate of Rupees 250 for the whole house.

On the 7th of February 1865, the plaintiff commenced this action for rent, and obtained a decree in the Lower Court. The defendants appeal specially, and urge that they are not liable for rents to their co-sharer.

We are of opinion that there is no foundation whatever for this contention. The defendants continuing to occupy the whole house so as to exclude their co-sharer, after notice that they would be charged rent for the share of the house belonging to plaintiff and occupied by them, are just as much liable as they would be for rents of any other species of property.

We dismiss this appeal, therefore, with costs and interest.

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The 15th June 1866.

*Present:*

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

**Right of Fishery.**

Case No. 563 of 1866.

*Special Appeal from a decision passed by the Judge of Rungpore, dated the 30th November 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 22nd March 1865.*

Nobin Chunder Roy Chowdry (Plaintiff), *Appellant,*

*versus*

Radha Pearee Debia and others (Defendants) *Respondents.*

*Baboo Oprokash Chunder Mookerjee* for Appellant.

*Baboos Kishen Dyal Roy* and *Nil Madhub Sein* for Respondents.

It matters not whence the water in which *A* has a right of fishery comes. *A's* right is not lessened, nor *B's* increased, because a portion of the water formerly flowing in *A's* channel has been diverted from it, and because the water of *B's* river now flows through it.

THERE are no grounds for this appeal. The defendants, according to the statement of the Judge as recorded in his judgment which appears to be fully explained by a pencil-note on the grounds of appeal, were admitted to have been formerly in occupation of the fisheries of the river Mamush. The main portion of the stream seems to have been diverted, and the only water, or almost the only water, now flowing in the old channel is derived from the waters of the Burrail. The plaintiff is the owner of

the fisheries in the Burrail; and, as we understand the plaint, he claims the right of fishery in the old course of the Mamush, because the water of his river of Burrail flows through it.

We think the plaintiff's claim in this respect most preposterous. It is a matter of no sort of concern whatever to the plaintiff whence the water in which the defendants have a right of fishery comes; and the defendant's right is not lessened, and the plaintiff's right is not increased, because a portion of the water that formerly flowed in the channel of the Mamush has been diverted from it.

The appeal is dismissed with costs and interest.

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The 15th June 1866.

*Present:*

The Hon'ble C. B. Trevor and H. V. Bayley, *Judges.*

**Limitation—Cause of action—Compromise by Guardian — Dispossession of Minor.**

Case No. 3102 of 1865.

*Special Appeal from a decision passed by the Judge of Jessore, dated the 17th June 1865, affirming a decision passed by the Moonsiff of Magoorah, dated the 7th January 1864.*

Rutnessur Pal Chowdry (Plaintiff), *Appellant,*

*versus*

Dhununjoy Shikdar and others (Defendants), *Respondents.*

*Baboo Bhugobutty Churn Ghose* for Appellant.

*Baboos Mohinee Mohun Roy* and *Bungshee Dhur Sein* for Respondents.

**In a case for possession after dispossession in pursuance of a solenamah inimical to plaintiff's interests, which was executed by his guardian when he was a minor, the cause of action was held to arise from the date of the dispossession, the last of the series of acts prejudicial to plaintiff, and not from the date on which he became aware of the solenamah, which was the first act in point of time injurious to him.**

PLAINTIFF sued, alleging that, when he was a minor, many years ago, his guardian entered into a solenamah inimical to his interests, that this solenamah came to his knowledge on the 28th Jeit 1258, and that, in pursuance of that solenamah, the defendant, on the 15th Bysack 1259, dispossessed him. Hence his suit which was instituted in Srabun 1270.

The defendant pleaded that plaintiff is, on his own showing, out of Court, more than 12 years having elapsed since first the deed which he sues to have set aside came to his knowledge.

The Lower Court found plaintiff out of time, accepting the plea as raised by the defendant.

Plaintiff now appeals specially, urging that his cause of action arose, not on the date on which he became aware of the solenamah, but on the date on which defendant acted on that solenamah, and dispossessed him; and that, consequently, he is within time.

We are clearly of opinion that, in a case like the present, the series of acts which endamaged plaintiff must be considered to be his cause of action, and not the first of them in point of time. Now, the series of acts which formed plaintiff's cause of action culminated in his dispossession in Bysack 1259; it follows that it is from this date, and not from any prior one, that his cause of action really arose. The existence of the solenamah, if not acted upon, and had plaintiff remained in possession, would not have materially affected him. It was only when the solenamah was subsequently acted upon—and under that act plaintiff was dispossessed—that it became necessary for plaintiff to have recourse to the Court.

Under this view, we think the decision of the Lower Court is incorrect. We, therefore, remit the case to the Court of first instance, with directions that the whole merits of the case be entered into, and that any issues either of law or fact arising out of them be clearly and distinctly adjudicated on.

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The 15th June 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Review of judgment (Reasons for).**

Case No. 436 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 21st November 1865, reversing a decision passed by the Moonsiff of Pullas, dated the 9th December 1863.*

Anund Moyee Dossia (Plaintiff), *Appellant*,

*versus*

Kalee Koomar Rokheet and others (Defendants), *Respondents*.

*Baboo Romesh Chunder Mitter* for Appellant.

*Baboos Kalee Mohun Doss* and *Luckhee Churn Bose* for Respondents.

A Court should give reasons, on review of judgment, for coming to a different conclusion from that which it had previously formed.

THE Principal Sudder Ameen, Mr. Penington, admitted a review in this case, without assigning any sufficient reason for so doing. This order is final, and therefore we cannot interfere with it. But, having admitted it, we think he should have thoroughly gone into the merits, and given reasons for coming to a different conclusion to that which he had formed in his previous and better considered judgment. We remand the case to the present Principal Sudder Ameen, with instructions to try the appeal as if it had come up for hearing for the first time.

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The 15th June 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges*.

**Appeal—Costs.**

Case No. 442 of 1866.

*Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 24th November 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 12th April 1865.*

Chooneelal Misser and others (Plaintiffs), *Appellants*,

*versus*

Patroo Deo and others (Defendants), *Respondents*.

*Baboo Kishen Succa Mookerjee* for Appellants.

*Baboo Umurnath Bose* for Respondents.

An appeal will not lie solely on a question of costs.

THIS appeal is solely on a question of costs. We are of opinion that such an appeal will not lie (*see* 2 Weekly Reporter 33), and we dismiss this appeal with costs.

The 15th June 1866.

*Present:*

The Hon'ble G. Loch and F. A. Glover, *Judges*.

**Time for application for review of judgment (Exclusion of holidays)—Stamp Duty—Mesne-profits (Extent of—in suit by Guardian of Minor).**

Case No. 517 of 1865.

*Application for review of judgment passed on the 7th August 1865, in Regular Appeal No. 85 of 1865.*

Shahzada Woola Gowhur, husband of Nooroonissa Begum (Plaintiff), *Petitioner*,

*versus*

Musst. Shah Rukh Begum (Defendant), *Opposite Party*.

*Mr. R. E. Twidale* for Petitioner.

*Mr. C. Gregory* for Opposite Party.

An application for review declared practically within time, and admitted on a 2-rupees stamp, by excluding the Dusserah vacation as *dies non*.

Mesne-profits for more than 6 years may be given in a suit for possession and mesne-profits brought by the guardian of a minor.

WITH regard to the first point taken, we think that the petitioner is entitled to have wasilat. Her claim was considered just, and the kobalah whereby Kykobad was alleged to have alienated the property, spurious. The omission from our judgment was clearly unintentional: the wasilat will, as a matter of course, bear interest until paid. Her right to wasilat is not contested by the other side, but it is urged that the application for review should not be admitted at all, or at least not unless the petition is engrossed on a full stamp. But it appears that the Dusserah vacation intervened between the date of the judgment and the three months allowed for a petition of review, and it is not denied that the application was filed on the first open day after the holidays. The holidays must be considered as *dies non*, and the petitioner was, we think, practically within the 90 days allowed by law, and was entitled to come in on a two-rupees stamp.

Mr. Gregory further objects that the wasilat can only be given for 6 years, and that the mere joining the suits for possession and mesne-profits together will not give the petitioner a larger period of limitation for wasilat than he would have had, had he sued for them separately (*vide* 3 Weekly Reporter, page 13; and 3 Weekly Reporter,

page 38). But under the circumstances of this case, and considering that the petitioner is even now a minor, we see no reason why she should lose any portion of her rights merely because she is suing through a guardian. There can be no question that, on her attaining majority, she could have sued for the entire sum due to her.

With regard to the Principal Sudder Ameen's order on the 27 beegahs, we have not, in our judgment, interfered with the Lower Court's order, and the judgment on that point will stand.

On the question of costs of Hamidunnissa, this person did not appeal, and therefore she will be made liable to pay them herself. Our order on this point is reversed. Costs in proportion.

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The 16th June 1866.

*Present:*

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

**Limitation—Minors.**

Case No. 84 of 1866.

*Regular Appeal from a decision passed by the Deputy Commissioner of Lohardaga, dated the 27th July 1865.*

Poorun Singh, Pauper (Plaintiff), *Appellant,*

*versus*

Kasheenath Singh (Defendant), *Respondent.*

*Baboo Khettur Mohun Mookerjee* for Appellant.

No one for Respondent.

The mere fact of a plaintiff not suing within 3 years after his attaining majority will not, in cases where there is a general limitation of 12 years, bar his suit if brought within 12 years of the time at which his cause of action accrued.

THE plaintiff in this case sued in *formâ pauperis* to recover possession of certain landed property by right of inheritance. He claimed as nearest of kin and heir to one Heera Singh, the grandson of Gobind Ram, whose son, by a second marriage, plaintiff alleged himself to be. He fixed the date of his dispossession in 1863, up to which time he pleaded that Kasheenath, the defendant, a descendant of a younger brother of his grandfather Toolsee Ram, and his own cousin, had managed the property for him, he being a minor. In 1863, however, Kasheenath got rent-decrees against several of the ryots, and exercised other rights of separate ownership, and so dispossessed plaintiff of his property.

Kasheenath denied plaintiff's heirship to Heera Singh—denied, in short, that he was any relation or had any claim, and, for the rest, pleaded limitation under Clause 5, Section 1, Act XIV. of 1859—the summary order of the Civil Court rejecting plaintiff's application to have the property in dispute (and which had been attached by a judgment-creditor of the defendant Kasheenath), released to him as heir of Heera Singh, having been passed on the 18th of February 1857.

The Deputy Commissioner threw out the plea of limitation under Clause 5, Section 1 of Act XIV., but held the plaintiff to be barred by the provisions of Section 11 of the same Act, he not having sued within 3 years from the date of his attaining majority.

It is urged before us in appeal that the question of minority was not raised by either party in this case, and should not have been considered, and that, as the dispossession by Kasheenath did not take place till 1863, and this suit was instituted in 1864, the plaintiff was clearly within time.

It is not material, we think, to consider the appellant's objection to the Deputy Commissioner's proceedings with regard to the first issue, because there can be no doubt that Section 11 of the Act does not apply to the present case. There is not a "scintilla" of evidence to prove that Kasheenath held the property in trust for the appellant up to 1863; not a single witness speaks to the fact, and the documentary evidence is altogether opposed to it. The appellant's cause of action, therefore, must date from the death of Heera Singh, from May 1853 that is; and, as Act XIV. of 1859 was not intended to place minors in a worse position than they were before, but rather to give them extra privileges, the mere fact of a plaintiff not suing within 3 years of his attaining majority will not, in cases where there is a general limitation of 12 years, bar his suit, if brought within 12 years of the time at which his cause of action accrued. And as the present suit was instituted in July 1864, the plaintiff is within time (5 Weekly Reporter 219, Luchman Singh and others, Appellants).

We, therefore, reverse the Deputy Commissioner's order on the issue in bar, and, as all the evidence on the facts is before us, proceed to dispose of the case on its merits.

Now, the evidence in support of appellant's plea, that he is the son of Gobind Ram by his second wife, is of the most unsatisfactory description.

All the witnesses admit that the appellant's mother took to evil courses after the death of her husband, but endeavour (all but one that is) to make out that Poorun Singh was born before Gobind Ram died. Their evidence, however, is so utterly discrepant and contradictory on other important points, that we have no hesitation in rejecting it altogether.

For instance, some of the witnesses declare that Poorun was 8 months old when his father died, and 10 years old when his mother ran off with Gooroo Churn. Another says that Poorun was 4 or 5 years old when Gobind died, another that plaintiff's mother never went off with any one, another that Poorun was 3 years old when his mother took to evil courses, another that he was one or two years of age then, another that he was 8 months only.

When witnesses differ so irreconcileably on such important points, it is impossible to place any reliance on their statements that Poorun was the son of Gobind, or that he was born during that person's lifetime. To prove such matters, the best evidence should have been produced—the evidence of relatives and near friends of the family—the evidence of the family Gooroo, and Poorun's horoscope itself. In all respectable Hindoo families, horoscopes are drawn up at the time of birth, and, were Poorun the person he represents himself to be, no doubt such a document would be forthcoming. The evidence of the mother herself (for she is admitted to be still alive) would have been useful. But nothing of this kind has been adduced; and the Court has been left to decide the question of plaintiff's heirship on evidence which is most insufficient and unsatisfactory.

There is, on the part of the respondent, a quantity of direct evidence to the effect that Poorun was not born till some ten years after Gobind's death.

But, whatever weight we might be disposed to attach to this evidence, as opposed to that of the appellant, we do not think it necessary to rely upon it. As the case stands, Kasheenath is undoubtedly in possession of the disputed property, and has been so since 1853; and it would be in the highest degree unjust to disturb that possession, on evidence such as has been produced by the appellant.

We think that the plaintiff has altogether failed to prove his case, and we therefore dismiss this appeal with costs.

The 16th June 1866.

*Present:*

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

**Appeal—Execution of decree (affecting third party)—Priority of attachment (Proof of)—Limitation (Suit to set aside summary order).**

Case No. 53 of 1866.

*Regular Appeal from a decision passed by the Principal Sudder Ameen of Rajshahye, dated the 30th November 1865.*

Gobindnath Sandyal and others (Plaintiffs), *Appellants,*

*versus*

Ram Coomar Ghose (Defendant), *Respondent.*

*Baboos Onookool Chunder Mookerjee* and *Unnoda Pershad Banerjee* for Appellants.

*Baboos Dwarkanath Mitter, Sreenath Doss,* and *Romesh Chunder Mitter* for Respondent.

Suit laid at Rs. 80,000.

No appeal lies from an order passed in execution of a decree between either of the parties to the suit and a third party, but a regular suit may be brought to set aside the order.

Priority of attachment must be established by clear proof; casual allusion to it in a proceeding in adjustment of account is not sufficient.

*Quære.*—Whether, with reference to Clause 5, Section 1, Act XIV. of 1859, a suit will lie to set aside a summary order after the expiration of one year.

THIS suit is brought to set aside certain orders passed by the High Court in execution of a decree which the plaintiffs state are prejudicial to their interests. The plaintiffs, whom we may call the Sandyals, obtained a decree against the Bhuttacharjee defendants so far back as the year 1828. In execution, they sold certain estates of the Bhuttacharjees and purchased them. Subsequently, the sale was set aside, and the Bhuttacharjees obtained a decree against the Sandyals by which they were restored to the possession of those estates, and the Sandyals were held to be liable to the Bhuttacharjees for the mesne-profits of the estates while these had been in their possession. The Sandyals carried on execution of their decree against the Bhuttacharjees, and the Bhuttacharjees similarly took out execution of their decree against the Sandyals, and an account was taken of the sums mutually due between those parties, resulting, in the first Court, in a large balance being found in favor of the Bhuttacharjees; but ultimately, on appeal,

on the 9th February 1864, the balance was declared to be Rs. 1,86,657 in favor of the Sandyals. While these proceedings were going on, one Anund Mohun Ghose, who also held a decree against the Bhuttacharjees, in execution of that decree, requested that the decree obtained by the Bhuttacharjees against the Sandyals might be attached and sold to liquidate their debt to him. The first Court refused to attach the decree, on the objection of the Sandyals, who claimed a right to set off the amount of the decree of the Bhuttacharjees against sums which the Bhuttacharjees already owed them under their decree. On appeal to the High Court on the 5th January 1863, the orders refusing attachment were set aside, and Anund Mohun Ghose was declared entitled to attach. Subsequently, on a further attempt being made by the Sandyals to have the amount due by them to the Bhuttacharjees set off against the sum due by the Bhuttacharjees to them, the High Court, on the 16th January 1865, passed an order based, as the Judges stated, on the Court's previous order of the 5th January 1863, reversing the order of the first Court allowing a set-off.

This suit is brought to set aside the orders of the 5th January 1863 and 16th January 1865, and for a determination of the rights of the Sandyals to have the amount of mesne-profits decreed against them in favor of the Bhuttacharjees set off against the larger sum due by the Bhuttacharjees to them.

The defendant, Ram Coomar Ghose, who now represents Anund Mohun Ghose, asserts his right to attach and sell the decree of the Bhuttacharjees against the Sandyals, partly on the ground of the priority of his attachment of that decree, and partly on the orders in execution passed by the High Court which it is said are final and conclusive.

The Principal Sudder Ameen was of opinion that no suit would lie to set aside the orders passed in execution of decree under Section 209, Act VIII. of 1859, and that the orders of the High Court, dated the 5th January 1863 and 16th January 1865, were conclusive in rejecting the claim of the plaintiffs. He accordingly dismissed the suit, and the plaintiffs now appeal from those orders.

The first portion of the argument before us was addressed to the point that the High Court's orders of the 5th January 1863 and 16th January 1865 were passed without jurisdiction, inasmuch as, by Section 364, Act VIII. of 1859, it has been enacted that "no appeal shall lie from any "order passed after decree, and relating to "the execution thereof, except as is herein-"before expressly provided;" and the Act contains no provision for any appeal from an order passed under Section 209, or for an appeal from any order passed under Section 246 disallowing an attachment which is opposed by a third party, who was not a party to the original suit. We think that there is great doubt whether the High Court had jurisdiction to entertain the appeals upon which the orders, dated the 5th January 1863 and 16th January 1865, were based. In execution of decree, an appeal lies to a higher Court, under Section 11, Act XXIII. of 1861, in certain questions therein mentioned arising between the parties to the suit; but an appeal does not lie to a higher Court on any order passed on other questions in execution of decree, except when it is expressly provided in Act VIII. of 1859. It is clear that there is no such provision as respects any order passed under Section 246, but, on the contrary, that Section distinctly lays down that "any "order passed by the Court under it shall "not be subject to appeal, but the party "against whom the order may be given "shall be at liberty to bring a suit to estab-"lish his right within one year from the "date of the order." When, therefore, Ram Coomar Ghose sought to have the decree of the Bhuttacharjees against the Sandyals attached, and that claim was disallowed on the objection of the Sandyals, the order disallowing their claim was not subject to appeal. It is, however, doubtful also, as argued before us, whether a suit will lie to set aside a summary order after the expiration of one year, having regard to the Law of Limitation (Clause 5, Section 1, Act XIV. of 1859); and this suit is brought after the expiration of that time. We do not consider it necessary to decide this question, because we are of opinion that the decision of the High Court, dated 5th January 1863, did not in any way touch upon the real question now before us as to the right of the Sandyals to the set-off which they claim, but rather ruled that, whatever might be their rights in that matter, Ram Coomar Ghose was still entitled, at that stage of the proceedings, to attach the decree of the Bhuttacharjees against the Sandyals. Ram Coomar Ghose was undoubtedly entitled to the attachment he then prayed for. The decree of the Bhuttacharjees related, not only to the mesne-profits, but also to the estates on which those mesne-profits were due; and even as

regards the mesne-profits, it was at that time still an open question whether, on the balance of account between the Sandyals and Bhuttacharjees being struck, it would not appear that the Bhuttacharjees would be entitled to a surplus from the Sandyals. In fact, on the first enquiry, it was ascertained that the account was in their favor, and it was only on appeal, under Section 11, Act XXIII. of 1861, that the balance of account was decreed against them. Ram Coomar Ghose's right to attach was therefore undoubted, whatever might be the ultimate result of such attachment. The orders of the High Court of the 5th January 1863 went to this extent and no further, and, even if we could hear a suit to set those orders aside, we should dismiss it. To enable the plaintiff to obtain a decree in this suit, it is not necessary to set aside those orders.

It is not denied that this suit has been brought in time to set aside the orders passed in execution on the 16th January 1865, on the objection of Ram Coomar Ghose to the demand of the Sandyals to have the decree against them set off against their decree against the Bhuttacharjees.

Baboo Dwarkanath Mitter, for defendants, here also raised an *in limine* objection that no suit will lie to set aside orders passed in execution as between rival decree-holders, and that all such claims must be decided by the Court which executed the decree. In support of this view, he referred to the precedent of this Court, page 181 of the Special Number of the Weekly Reporter, Special Appeal No. 3474 of 1863. This case is not, in all its facts, analogous to that case. That was a question as to the distribution of the proceeds of a certain sale made on the application of several decree-holders. The Court, in execution, had acted in direct opposition to the law, but it was held that no suit would lie to set aside the illegal act. The present is not a question regarding the distribution of the assets of a judgment-debtor, but as between two rival decree-holders, whether the one can be allowed to proceed at all against a certain portion of the estate of his judgment-debtor, having regard to the provisions of Section 209, Act VIII. of 1859. It is to be recollected also that this suit is not brought to set aside the orders passed by the Court which executed the decree, but the orders passed by the High Court on appeal from those orders. The only ground on which the High Court could here also have had jurisdiction would be that Ram Coomar Ghose in some way stood in the position of the Bhuttacharjees. We consider that any attachment by him would not place him in that position. He would still remain a third party opposing an application which was not objected to as between the parties to the suit. The High Court would consequently have no jurisdiction to try any appeal from the orders of the Court executing the decree as between the Sandyals and Ram Coomar Ghose. If, then, the decision of the first Court is final, that would rule the determination of this suit. But we hold that it is not final, and that a regular suit can be preferred to set aside orders passed in execution, not between the parties to the suit, but between either of these parties and a third party. As respects questions between the parties, Section 11, Act XXIII. of 1861, enacts that an appeal may be preferred, but there shall be no further civil suit. As respects questions not between the parties, no appeal is allowed, but the orders passed are open to further enquiry on the institution of a regular suit. We cannot hold that the Legislature intended that any incidental question not between the parties to the suit was to be finally and conclusively decided by a summary order without any further power of revision. The law admitted of no appeal from such order, but the parties were still at liberty to re-open the question in a regular suit. There is no bar to the hearing of such a suit in Sections 1 and 2, Act VIII. of 1859. There had been, in the words of Section 2, no "former suit" on the same cause of action, but only an application and an order; and therefore the Civil Courts can take cognizance of it.

Section 209, Act VIII. of 1859, is in the following words: "If there be cross-decrees "between the same parties for the payment "of money, execution shall be taken out "by that party only who shall have obtained a decree for the larger sum, and for "so much only as shall remain after deducting the smaller sum, and satisfaction shall "be entered on the decree for the larger sum, "as well as satisfaction on the decree for the "smaller sum." Looking to the simple direct meaning of these words, it would appear that this Section was conclusive on the point in dispute. The decree for the smaller sum *ipso facto* merges in the decree for the larger sum. Execution on the former cannot be taken out.

But it is said that this enactment contains a rule, not only affecting the procedure between the parties themselves—that it would

prevent the Bhuttacharjees from executing their decree against the Sandyals—but that the enactment does not apply when a third party comes on the scene as representative of the Bhuttacharjees, either under an assignment from them, or, as in this case, as having attached the rights of the Bhuttacharjees. In support of this view of the law, Baboo Dwarkanath Mitter referred to a precedent of this Court, page 23, Volume 5, Weekly Reporter, Miscellaneous Appeal No. 697 of 1865. Admitting, for argument, that the law herein laid down is correct, and that an assignment by a judgment-debtor does defeat the provisions of Section 209 of Act VIII., we proceed to consider whether the act of Ram Coomar Ghose, in attaching the decree in question, has the same effect, or what effect it has, looking to the circumstances of that attachment and the conduct of the parties. In the first place, it is not clear (and though the question was put by us, we could obtain no answer to it) on what date the attachment took place. To enable the party attaching to put in force any priority of claim to the decree for mesne-profits, it must be clearly shewn to us that there was a priority of attachment on his part. It is not in fact shewn to us that there has been any direct attachment at all. The first Court, in 1861, refused the demand for attachment. The High Court, on appeal in May 1862, allowed the attachment. But there is nothing to shew that any attachment really took place, except a casual allusion to it in a proceeding in adjustment of account between the Sandyals and Bhuttacharjees, dated June 1863. On the other hand, it is certain that the claim of the Sandyals to have the decree against them set off against the decree in their favor was put forward to the Courts as soon as they were in a position to make it. In fact, they put it forward long before the adjustment of accounts took place, and before they knew whether, on that adjustment, their decree or that of the Bhuttacharjees would be for a larger sum. If it could be shewn that they had exhibited any negligence in putting the law in force, and it was also shewn distinctly that Ram Coomar Ghose had attached the Bhuttacharjee's decree at such a date as gave him a prior claim to it, then, on the view of the law laid down in the precedent above quoted, the claim of the Sandyals in this suit might be liable to dismissal, and Ram Coomar be allowed to execute the decree of the Bhuttacharjees against the Sandyals. But we consider that no such negligence is shewn on the part of the Sandyals. On every possible occasion they pressed their rights to the set-off, and never slept over them. The execution of decree, as between the Sandyals and Bhuttacharjees on the subject of mesne-profits, remained pending the adjustment of the accounts between them, and neither the one nor the other could enforce his decree until such adjustment took place. It was said that the Sandyals might have attached the decree just as Ram Coomar Ghose did, but no attachment is required previous to putting in force the provisions of Section 209, Act VIII. of 1859. That decree was for landed estate as well as mesne-profits.

The attachment of Ram Coomar Ghose, if it took place at all, is still good as respects those estates, but as respects the sum of money which was decreed against the Sandyals in favor of the Bhuttacharjees, and which has been adjusted in accounts between them, we hold that, both under the law and on the ground that the Sandyals made the earliest possible application for the enforcement of that law, the Sandyals are entitled to the benefit of that law, and that is to have the account against them struck off on view of the larger account in their favor.

Even if it could be shewn to us that Ram Coomar Ghose attached the decree in 1860 or 1861, we should still hold that that attachment did not defeat the adjustment of accounts which was then going on between the Sandyals and Bhuttacharjees. It would, however, stand good as respects the decree for possession of the estates, or as respects any surplus which, on such adjustment, might appear in favor of the Bhuttacharjees.

We therefore reverse the decision passed by the Principal Sudder Ameen, and declare the plaintiff's rights to have satisfaction of the Bhuttacharjees' claim on their decree recorded on that decree, and to have satisfaction of the amount of that decree also recorded on the plaintiff's own decree against the Bhuttacharjees. The costs of this suit will be paid by Ram Coomar Ghose, with interest at 12 per cent. per annum until paid.

The 18th June 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Arbitration—Defamation—Damages—Social position.**

Case No. 60 of 1866.

*Special Appeal from a decision passed by the Officiating Judge of Beerbhoom, dated the 7th November 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 2nd March 1865.*

Rum Soondur Mookerjee and others (Defendants), *Appellants,*

*versus*

Ram Shurun Mookerjee and others (Plaintiffs), *Respondents.*

*Baboo Issur Chunder Chuckerbutty* for Appellants.

*Baboo Kishen Succa Mookerjee* for Respondents.

When all the parties did not agree to an arbitration, the award is not illegal against those who did agree.

Greater damages are not necessary for defamation of the character of a Principal Sudder Ameen's Vakeel than for that of a Sudder Ameen's Vakeel.

THIS was a suit for damages for defamation of character brought by the plaintiff against three persons who, he alleged, had maliciously preferred a charge of theft against him. Two of them agreed that the case should be referred to arbitration. The third did not. The Judge separately tried the claim, as respects the third defendant, irrespective of the award of arbitration; but agreeing with the result come to by the arbitrators, the decree actually passed against *all* the defendants.

On special appeal, it is said that, as all parties did not agree to the arbitration, the award even against those who did agree to it is illegal; but we cannot see any illegality in it, and still less reason to interfere when the Judge and the arbitrators arrived at the same conclusions in their respective separate capacities.

It is then said that the Judge is in error in stating that the plaintiff is a *principal* Sudder Ameen's Vakeel, whereas he is a Sudder Ameen's Vakeel; and that the damages payable on a malicious attack on the character of the one should be calculated at a smaller amount than in the case of the other. We think that the question of the Court in which the plaintiff was practising was not an important element in fixing the damages, the social position being much the same.

The appeal is dismissed with costs.

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The 18th June 1866.

*Present:*

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

**Power of High Court (to form independent opinion on the evidence)—Time for filing documents—Onus probandi—Plea of Putnee.**

Case No. 386 of 1865.

*Regular Appeal from a decision passed by Baboo Kedarnath Banerjee, Officiating Additional Principal Sudder Ameen of East Burdwan, dated the 19th August 1865.*

Opendro Narain Ghose (Defendant), *Appellant,*

*versus*

Bajpayee Rajah Keshub Chunder Deb and others (Plaintiffs), *Respondents.*

*Baboos Kishen Kishore Ghose* and *Dwarkanath Mitter* for Appellant.

*Messrs. R. V. Doyne* and *J. S. Rochfort* and *Baboo Onookool Chunder Mookerjee* for Respondents.

Suit laid at Rs. 5,613-11-14.

Case in which the High Court formed an independent opinion upon the evidence and came to an opposite conclusion to that of the Court below, the Judge who decided the case not having heard the witnesses.

Remarks on the impropriety of allowing documents to be filed after most of the witnesses had been examined, without any explanation of their being tendered at that late period, and without any enquiry whether they were relevant or otherwise, more especially one document filed after evidence and argument concluded, though it had been in plaintiff's hands before the commencement of suit.

Where a defendant pleads a putnee tenure, the *onus* of proof is on him in the first instance. But when he sets up and proves by credible evidence the creation by the plaintiffs of an inferior tenure entitling him to hold the estate, he has discharged the burden, and it then lies on the plaintiffs to displace or explain away that evidence.

WE have no doubt that in this case the judgment of the Court below must be reversed. The respondent's case was argued

with singular zeal and ability by Mr. Doyne; but neither his argument nor the reasons assigned in the judgment of the Principal Sudder Ameen are, in our opinion, sufficient to outweigh the evidence adduced by the defendant, and upon that evidence we think he ought to have had the Court's decree.

The plaintiffs being zemindars of the estate Lot Bhutooria in the district of Burdwan, sued to recover possession of that estate of which they alleged the defendant to be wrongfully in possession.

They stated that defendant's paternal grandmother, Bindoo Moyee, had held an ijarah (or farming lease) of the estate from 1249 to 1268 B. S., and that, on the termination of that lease, the plaintiffs going to enter on the estate, defendant set up a false putnee and refused possession. The proceedings in the Criminal Court had ended in the defendant being retained in possession, and thus a regular suit was necessary.

Defendant's statement shortly was that plaintiffs, being deeply indebted, had made a *benamee* conveyance of the estate to Bisheshur Roy Chowdhry, a relative and dependant of their own; that there had been a farming lease originally, but that plaintiff's necessities having increased, they had afterwards—that is, in 1260 B. S.—granted him a putnee of the estate, receiving a further sum of money to be applied to the payment of their debts.

The Principal Sudder Ameen, whose action in this case, we are bound to say, has been extremely dilatory, permitted the plaintiffs to file their written statement considerably later, and by way of reply.

In that statement, after noticing minor matters, they set forth argumentatively several considerations upon which they say the averment of a putnee must be false.

The suit after much delay went to trial. A great deal of evidence, oral and documentary, was adduced on both sides, and the Principal Sudder Ameen finally decreed for plaintiffs.

We think it as well to say at the outset that we have felt ourselves at liberty to deal with the evidence as it was read to us, without attributing that weight to the opinion of the Court below which it is usual to allow.

This case was originally instituted before Pundit Sreenath Bidyabagish, who was then Principal Sudder Ameen, on the 10th Octobear 1863.

Defendant's written statement, 16th January 1864.

Plaintiff's ditto ditto, 17th February 1864.

Issue fixed, 20th February 1864.

Petition by Srimunt Roy, a *pro formâ* defendant, 10th March 1864.

Petition of Hurish Chunder Bhuttacharjee, an Intervenor, 16th July 1864.

The proceedings, if they can be called proceedings and not delays, were so far before the same Judge.

The case afterwards came on before Mr. J. Reily, the successor of Sreenath Bidyabagish, and before this gentleman various petitions were filed and a number of witnesses were examined between January and March 1865.

In July of that year, we find the case coming before Baboo Kedarnath Banerjee, the Additional Principal Sudder Ameen, and he allowed at that late stage, after most of the witnesses had been examined, a very great quantity of documents to be filed and placed on the record, without, as far as we can see, any explanation of their being tendered at that late period, and also without any enquiry whether they were relevant or otherwise.

Some further papers were filed in August without even the signature of the Principal Sudder Ameen. On a very flagrant instance of this we shall have to remark presently. But on the whole, we are bound to say that the suit has not been in any respect tried or dealt with intelligently in conformity with the directions of the Code of Civil Procedure, and that we think ourselves quite as competent to come to a conclusion upon the evidence as the Court below, where the deciding Judge, like ourselves, had seen the most part of it only on paper, and where the hearing was protracted through a period of nearly two years.

It is chiefly on this ground that we think ourselves entitled to deal with the evidence more strictly than we otherwise should, coming to an opposite conclusion to that of the Court below.

The Principal Sudder Ameen observes: "When the defendants admit that the disputed property belonged to the plaintiffs, "and when they, the defendants, plead "purchase and putnee settlement, the *onus*. "of proof in this case lies upon them."

No doubt, as they resist the plaintiffs' right to enter on their own estate, the burthen does so lie in the first instance.

It appears to us that, when the defendant sets up and proves by evidence which is in itself credible, the creation by the plaintiffs of an inferior tenure which entitles him to

hold the estate, he has discharged himself of that burthen, and it then lies on the plaintiffs to displace or explain away that evidence.

Now, it appears to us, after an attentive hearing and consideration of that evidence, that the defendant's case was in the condition we have described.

His allegation was that some of the plaintiffs and the ancestor of others being the owners of the estate at that time, had personally, and for their own benefit, given the putnee and executed the deed; that instead of the signatures of the real proprietors, the seal of Bindoo Moyee (the widow of Bisheshur, the first *benamee* proprietor, and mother and guardian of Sreemunt, whose name has been subsequently used) was impressed; that a portion of the consideration-money was then paid over, and the remainder subsequently applied to the plaintiffs' purposes; and that the defendant had afterwards accounted as putneedar to the plaintiffs for the rent of the estate.

These allegations, we think, have been fully and overpoweringly proved in the Court below, and our further examination of some of the witnesses to whom, finding them in Court, we thought fit to put certain questions, has still further satisfied us on this point.

The most important witness in the case is Pearee Mohun Bose, and his evidence is full and clear, and, to our mind, satisfactory. The only reason for doubting his veracity which has been suggested to us is his relationship to the putneedar—that of maternal uncle. That such a relation, being a Hindoo, can have no direct interest in the result of the suit, is obvious. He was agent to his sister at the time of the alleged transaction, and may be still in his nephew's employ. But we cannot see in this circumstance any sufficient inducement to a man of respectable family and in good circumstances, to commit deliberate and gross perjury in support of a forged instrument. And his testimony does not seem to us to have the character of falsehood; on the contrary, we think it straightforward and consistent. The Principal Sudder Ameen, commenting upon his evidence, observes that he deposed, in contradiction to some of the other witnesses upon the "material point," *viz.*, whether the consideration-money, Rupees 6,000, had been paid in the assembly where the pottah was executed.

There is some slight discrepancy on that point; but in the first place, that was not the material point. The plaintiffs did not plead non-payment of the consideration-money. Srimunt Roy, the late *benamee* proprietor, who, then a boy, was present with his mother Bindoo Moyee on the occasion, admits and deposes that the putnee was executed; and the real question is whether it was executed by, and was the act of, the plaintiffs. Upon a matter of detail such as the payment of this money, in full or in part, at one time or at another, there might well be some disagreement, between the witnesses, several of whom had little interest in the matter; and, if there be disagreement, we should not hesitate to accept the statement of Pearee Mohun, who was actively concerned in the matter, and who would for several reasons be the most likely to recollect with accuracy; but we should not for that reason discredit the testimony of the other witnesses.

But the decisive circumstance adduced by the Principal Sudder Ameen to dispose of Pearee Mohun Bose's credibility is this: Pearee Mohun stated that Rajah Damoodur Chunder (an ancestor of some of the plaintiffs, and in his time the leading member of the family) affixed to the putnee-deed the seal bearing the name of Bindoo Moyee.

"Now," says the Principal Sudder Ameen, "it appears from a copy of a *Vakalutnamah* "of the 21st Magh 1259, executed by Bindoo "Moyee and filed by the plaintiffs, that "Bindoo Moyee was in the habit of using a "seal before the date of the putnee-pottah, *i.e.*, "before 1260. This seal, however, was "not put on this pottah; the seal affixed "was of the year 1260."

This copy of a *Vakalutnamah* appears to have been taken from one filed in a suit in a Moonsiff's Court, and came from the Judge's office in Zillah Nuddea.

Now, before the Principal Sudder Ameen proceeded to attribute perjury to the witness in so trifling a circumstance as this, he was bound to inspect the original *Vakalutnamah*, and to enquire into the circumstances under which it had been originally filed. But, independently of this, we are obliged to say that this paper was most unfairly and irregularly admitted on the record, so that the defendant was completely taken by surprise.

Long after the time for receiving exhibits—long after the witnesses had been examined—after even the arguments of pleaders had concluded—this paper was put in, on the 12th August, and judgment was delivered on the 19th of that month; and this, although the endorsement on the copy plainly shows that the plaintiffs had had it in their

hands ever since the 17th January 1863, some months before they commenced the present suit. It is impossible to avoid the conclusion that, having the suit in contemplation, and knowing they would be met with a pottah bearing Bindoo Moyee's seal, the advisers of the plaintiffs provided themselves with this paper, which they kept in reserve till the last moment, and then filed it when the defendants had no opportunity of meeting it. That the Lower Court, by excessive easiness, should have lent itself to such a stratagem, is a matter of surprise and of regret.

Supposing, however, that the fact were so—that a seal of the kind now put forward had been in use, *and not been displaced by a new seal made in 1260*—for that is what we must believe—could the defendant, who had been holding as ijaradar for years under this very *benamee*, have failed to know it? and, knowing it, could Pearee Mohun Bose, a man of business, having to propound a pottah of the year 1260, have been so inconceivably stupid as to produce one with the wrong seal?

But we think it quite clear that either this seal was never used at all for Bindoo Moyee, or that, if made and used at all, it must have been promptly cancelled by reason of its bearing the name of *Srinath* instead of *Srimunt*, the *benamee* infant proprietor—a mistake natural enough when the plaintiffs were making use of the name of a child, the son of another person, and which would naturally be corrected when it came to be discovered.

An adroit but not an unfair use was made by Mr. Doyne of a certain inconsistency between the defendants' case as made before the Criminal Court, and apparently in some other proceedings in the Moonsiff's Courts, and their case now. He showed with much force and ingenuity that, although they now broadly asserted the putnee to have been made and granted by the plaintiffs in person, they had formerly shown a disposition to set up the right of Bindoo Moyee and Srimunt as independent owners.

But it must be borne in mind that the difficulty was mainly of the plaintiff's own creation. They had kept up, for a series of years, and for purposes akin to fraud, a sham ownership of this estate in the names of Bisheshur Roy and of his successors. They had caused those names to be used in every act of ownership connected with the estate. They had even gone so far, if the plaintiff's case be true, as to have the deed providing, in connection with the putnee, for the liquidation of their own debt by instalments, drawn up and executed as if by Bindoo Moyee; and although in their private dealings with persons in their confidence they acted without disguise, yet they never, in formal transactions or in proceedings in Court, threw off the mask of *benamee*.

Under these circumstances, is it surprising if the defendants could not at first determine how to shape their case? But we do not find in the course which they have taken any intention to mislead; and in this case, at all events, from first to last, their contention has been uniform.

The putnee pottah and the simultaneous kistbundee were immediately registered with the usual formalities, and the plaintiffs were represented on that occasion by the plaintiff's Naib, Dinonath Banerjee, and a Mooktar named Chundro Bhoosun Mitter. The former has kept out of the way and evaded every process to bring him into Court for the purpose of testifying. The latter was examined, and we are satisfied that he was on various other occasions employed by the plaintiffs: he is the nephew of an old servant of theirs; and we have no doubt that, in registering this document, he really acted under instructions received from them.

The reasoning of the Principal Sudder Ameen as to the alleged intimacy of defendant's Mooktar, Nil Comul Ghose, with a person named Doorga Doss Ghose, and the suggestion that he might therefore have had a seal forged, is one of the most extraordinary that we have ever met with in a judicial decision.

We have examined this man Nil Comul, and we think his statements essentially true.

There are various other facts which, to our mind, irresistibly confirm the truth of the defendant's case. Some of them are the following.

It is distinctly proved, by independent and trustworthy evidence, that, about the time alleged as the date of the putnee, the plaintiffs were looking about for some one to take a putnee, and that a negotiation was commenced with Kumalooddeen Chowdhry, who actually advanced money on the strength of it, and that such negotiation was broken off on account of its being thought advisable to make the arrangement with the defendant.

Then it seems that an assignment of the putnee rent was made in favor of Bamun Doss Mookerjee, a well-known money-lender, who had sued the plaintiffs upon it. Every

effort has been made to induce this person to appear as a witness, but he has disobeyed the summons and has paid a heavy fine rather than appear; and the Principal Sudder Ameen, though applied to to call for the record of the suit in which the deed of assignment had been filed, refused to do so on the ground that the suit was still pending—which was no reason at all. The defendant has thus been placed in difficulties as to the production of evidence which would have materially strengthened his case.

Again, in proceeding before the Collector of Burdwan for mutation of names as to this estate, one of the plaintiffs presented a petition in which he alleged that Rajah Damoodur Chunder (then deceased) had made this putnee in fraud of his co-sharers. This petition was afterwards withdrawn or not pressed. We presume it was felt to have been a false move.

Then we see no reason whatever for doubting that the re-conveyances from Srimunt Roy to the Ranees, wives of the plaintiffs, and that to Hurish Chunder Bhuttacharjee, were executed as stated, and they expressly refer to the putnee.

The evidence of Srimunt himself is in favor of the defendants on this as well as on other points in the case.

Attempts have been made to weaken the credit of Srimunt, it seems to us without success.

He is a relative of the plaintiffs' family, and his father, as they say, was a trusted servant. He is himself a young man of respectability, not dependant, as alleged, on the defendant, and having apparently no connection with him beyond the fact of his having held an ijarah under him for three years, which was given up as it did not pay.

These later kobalas appear to be merely another phase of the *benamee* arrangements, and not to affect the real beneficial ownership.

The Principal Sudder Ameen remarks that the ijarah-deed bore the signature of the Rajah in person, and thence infers that the putnee, if genuine, would also have been signed by the Rajah. But on this Baboo Kishen Kishore Ghose, we think not unfairly, observes that the kobalas, though ostensibly bearing date before the creation of the farm, were secret documents which never saw the light for years afterwards, and they are just as likely to have been antedated as not; and, besides, we observe that, in the friendly suit brought by Bisheshur to obtain possession under those kobalas, the defendant intervened and succeeded in having his farm maintained, which would be inconsistent with a genuine conveyance to Bisheshur before the date of the farm.

We have set forth some of the reasons, though by no means all of them, which have led us to a different conclusion from that which the Lower Court has arrived at.

There are other arguments which the Principal Sudder Ameen has used which we do not think it necessary to answer, as we think them of no great force; and we have already observed that we consider ourselves at liberty to form an independent opinion upon the evidence.

We have given the case a very careful consideration, and we think ourselves bound to reverse the judgment of the Court below, and to decree for the appellants, defendants, who will recover from the respondents all costs in both Courts.

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The 19th June 1866.

*Present:*

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

**Damages for false charge—Proof of malice and probable cause.**

Case No. 2681 of 1865.

*Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 13th June 1865, affirming a decision passed by the Deputy Commissioner of Lohardaga, dated the 8th September 1864.*

Heera Chand Banerjee (Plaintiff), *Appellant,*

*versus*

Banee Madhub Chatterjee (Defendant), *Respondent.*

*Baboo Greeja Sunkur Mojoomdar* for Appellant.

*Baboo Sham Lal Mitter* for Respondent.

Suit for damages for a false charge. HELD that an accusation which has been held by a Criminal Court to be unfounded is sufficient *primâ facie* evidence that the

accusation was maliciously brought, and that it is for the accuser (defendant) to rebut that evidence by showing that he had reasonable and probable cause for making the accusation.

THIS was a suit to recover damages for defamation of the plaintiff's character by bringing against him a false charge of criminal breach of trust. Both Lower Courts have held that the plaintiff (special appellant) had not shown that the prosecution was malicious, but that it was instituted hastily and without due caution. They, therefore, gave plaintiff a decree for Rs. 50, the estimated amount of his expenses incurred in proceeding to Ramlea to defend himself, with proportionate costs.

We think that the Judicial Commissioner has mistaken the meaning of the law in the case. When a party has been acquitted of a criminal charge preferred against him, the presumption is that the charge was malicious, and it is for the accuser to rebut that charge, and not for the accused to bring strict proof of malice. An accusation which has been held by a Criminal Court to be unfounded is sufficient *primâ facie* evidence that that accusation was maliciously brought; and it is for the accuser, when in his turn a defendant, to rebut that evidence by showing that he had reasonable and probable cause for making his accusation.

The Judicial Commissioner has proceeded on entirely the opposite supposition, and because the special appellant was only able to prove hastiness, and not malice, has given him only his travelling expenses, and nothing as damages. We remand the case to him with reference to the remarks above noted, and to call upon the defendant to show that he had reasonable cause for making his charge.

If he cannot show that he had such cause, the mere absence of malice will not exonerate him. The injury which is the basis of the present suit exists only when malice is combined with want of probable cause. "Malice alone is not sufficient, because a person actuated by the plainest malice may nevertheless have a justifiable reason for the prosecution." (Collet's Torts, Sec. 72)

The case will go back to the Court of first instance, which will find (1) whether the defendant is able to show that he had a reasonable and probable cause for making the charge, and (2), if he failed in that, will decide in the second place the measure of damages demandable from him.

Costs will follow the result.

The 19th June 1866.

*Present:*

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

**Sale by Guardian of Minor—Adequacy of consideration—Mala fides.**

Case No. 37 of 1866.

*Regular Appeal from a decision passed by the Judge of Tirhoot, dated the 26th August 1865.*

Baboo Kumola Pershad Narain Singh (Plaintiff), *Appellant,*

*versus*

Nokh Lal Sahoo and others (Defendants), *Respondents.*

*Messrs. A. T. T. Peterson* and *R. T. Allan* and *Baboo Onookool Chunder Mookerjee* for Appellant.

*Mr. R. V. Doyne* and *Baboos Mohesh Chunder Chowdhry, Unnoda Pershad Banerjee,* and *Dwarkanath Mitter* for Respondents.

Suit laid at Rupees 3,50,774-4.

Sale by guardian of a minor upheld, there being proof of pressing valid necessity, and no proof either of undue advantage taken of the guardian by the purchaser, or of the existence of fiduciary relation between the guardian and the creditors, or of the inadequacy of the price at the time when the property was sold.

Inadequacy of consideration is not conclusive proof of *mala fides.*

THIS is a suit to set aside a deed of sale of ten mouzahs executed by the guardian of the plaintiff during his minority, in order to pay off a debt contracted by the father of the minor. The plaintiff's case, at first, was that the debt was due on a bond which was fraudulent; but this view of the case was abandoned in the Lower Court, and the plaintiff there rested his case on the allegations that the decree-money was inconsiderable, and that other arrangements, such as a zur-i-peshgee lease or a sale of the portion of the property, could easily have been resorted to; that ignorant women were deceived when incapable of exercising a proper judgment; and that, had proper discretion been exercised, and notice been given, other persons would willingly have come forward, either to buy a portion of the estate, or to lend money on a mortgage.

Nokh Lal Sahoo and others, who are the decree-holders and purchasers, filed a written statement alleging that part of the lands purchased had lately been taken out of their lands by a suit gained by the Maharaja of Hutwa; that, under the decree or decrees

which had not been fraudulently obtained, the whole estate of the plaintiff's father had been allotted for sale, and that the conveyance of a portion under such circumstances was positively beneficial to the minor, and was a judicious act; that the guardians were not ignorant and shallow persons, but able to read and write; that no one else came forward to purchase, and that a fair price was given.

The Judge, in a very full decision, has ruled that the suit cannot proceed in regard to the Dearas of Sohajepore lately decreed to the Maharaja of Hutwa; that on the main question there is no proof of fraud sufficient to vitiate the sale; that no fiduciary relation existed between the purchasers, defendants, and the guardians; that the price, at the time, was not grossly inadequate, and that the sale must stand good.

In appeal, the case has been most fully argued by Mr. Peterson and Mr. Allan for the plaintiff, appellant, and by Mr. Doyne and Baboo Unnoda Pershad for the respondents.

Reference has been made to the decisions noted in the margin* as bearing on the general question of purchasers from guardians during the minority of the heirs.

* Sudder Dewanny Adawlut, 1859, page 615.
Ditto Ditto ditto page 917.
Ditto Ditto ditto page 1643.
Moore's Reports, Volume VI., page 393.
Sutherland's Weekly Rep. Vol. I., page 324.
Ditto Ditto Vol. II., page 325.
Ditto Ditto Vol. IV., page 71.
Ditto Ditto Vol. V., pp. 231 & 245.

A considerable deal of oral evidence has been taken in this case, all of which has been read to us. The mother and guardian and two other ladies have been examined by commission, and there are several important documents regarding the conduct of the guardians and of the purchasers, defendants, previous to this litigation, which have had our careful attention.

There is a circumstance which takes one portion of this case out of the class in which it becomes incumbent on the purchaser to bring himself within the rule laid down in the well-known case of Hanooman Pershad Pandey (Moore's Reports, Volume VI.), and that is, that the existence of a necessity in this case is no longer matter for any doubt. The father of the minor had incurred debts which, we are told, were originally only 18,000 rupees, but this sum by interest had swelled to 53,905 rupees, and it is quite certain that these debts were disputed in two suits in the Courts of the Sudder Ameen and Principal Sudder Ameen, the decision being confirmed on appeal, in the Courts of the Judge and of the late Sudder Court, in April and November 1846 respectively. It is not competent for us to go into the merits of these decrees which adjudged the liability of the father of the minor, and consequently of his property; and we may add, looking to the pertinacity with which the claims were disputed, that there can be no doubt that the plaintiff has done rightly in withdrawing the allegation of fraud in the said suit, as one quite untenable by a man in his position.

The real question, then, at issue in this contest is, whether the Mahajuns, creditors, are shewn to have taken any undue advantage of the position and want of knowledge of the females, and whether, owing to any deception or concealment, the mouzahs were sold for a price grossly inadequate, or manifestly far below their market-value.

The deed of sale was executed on the 25th of Falgoon 1254, or some time in February 1847. It recites the debt due on the two decrees, the inability of the guardians to raise money for their liquidation, and the sale of the mouzahs for the sum of 46,105 rupees.

Regarding the sale, the ladies, as we have observed, have been examined by commission, and 18 other witnesses have been examined on the part of the plaintiff, their evidence tending to show inadequacy of price, as well as readiness on the part of others, at the time of the sale, to have purchased portions of the property at a higher price than what it fetched.

Twelve witnesses have been examined for the defence, and their evidence, amongst other things, touches on the assets of the property and on its market-value.

The evidence of the ladies—Musst. Karnophool, Bohoop Koer, and Ramessur Koer—is generally to the effect that they trusted their own Mookhtars, who brought them blank stamp-papers to which they affixed their names from pure ignorance; that they were incapacitated, by reason of grief and other causes, from going into particulars, and that they were otherwise incapable of exercising a right judgment; that they were told that there was no other means of raising money, and that they trusted the Mookhtars because they were old servants, and persons not likely to deceive them.

We are inclined to view these depositions much in the same light as that in which the Judge has viewed them. These ladies can

read and write; they came all the way from their own residence to the sudder station of Tirhoot, to make arrangements for the preservation of the property; and we do not see that there was anything to have prevented them from consulting their friends and relations previous to coming to a final decision. They never turned off their servants, the said Mookhtars, although they admit that they were afterwards informed of the deceptions practised on them; and it is in evidence that these Mookhtars are dead, and so they cannot be put into the witness-box to explain the transaction.

Moreover, the allegation of blank stamp-papers, to which they carelessly affixed their names, was never mentioned in a petition to the Judge afterwards presented on the 4th of September 1849, nor in one presented to the Collector against the registration of the defendants' names on the 10th of July 1855, although in this petition the validity of the sale is impeached, and a variety of topics are alleged, into which the Collector, whose only duty was to register the name of the party actually in possession, could not by any possibility enter.

We are, therefore, justified in not attaching any weight to the description now given by these ladies, in the evidence, of the way in which their consent was obtained from them. There was the existence of a heavy debt on the estate. Twenty-five Mouzahs had been allotted for sale. The guardian and other ladies, by their own showing, had come to the head station of the district to make arrangements for saving the property. Publicity had been fully secured, and there was no reason why the Mookhtars, who were old servants of the family, should have deceived the guardians, or, as is hinted, should have colluded with the judgment-creditors in order to prejudice the heirs and to damage the property.

We must remember, too, that there was no fiduciary relation existing between the guardians and the creditors. The latter had all along been kept, as is urged, at arm's length. Their liens had been unjustly repudiated. Their two suits were only gained after protracted litigation. Resistance was afterwards made to their obtaining registration of their names, and the whole of the proceedings show that the defendants were simply in the position of lenders and judgment-creditors seeking to avail themselves of their lawful rights and claims. There is nothing in any petitions presented on the part of the ladies previous to the sale in February 1847 to lead to the inference that they were in ignorance of the real position of the affairs of the estate.

But, still, it is in our opinion very necessary that the purchasers should show that the price paid for the mouzahs was not grossly or absurdly inadequate, and was not such a price as would support the contention of the appellant, that the purchasers, in their anxiety to make a good bargain for themselves, had concealed facts or had prevented other intending purchasers from coming forward, or had used their own means of knowledge and their opportunities to the manifest prejudice of the estate and of the minor's interest.

A great deal of evidence has been gone into on this head. Several of the witnesses for the plaintiff say that they came to Mozufferpore, the head station of the district, intending to offer sums of 26,000 rupees for one village; that land in the neighbourhood of the estates is worth 50, or 60, or even 70 rupees a beegah; that one mouzah alone —Sohajepore—with its Dearas or alluvial lands, contains an area of 10,000 beegahs; that the whole property sold would be worth not half a lakh, but two lakhs of rupees; and that, on their enquiry as to the possibility of purchase, they were put off with sundry excuses by the agents of the guardians; and so nothing was done.

We observe, however. that some of the witnesses who make these statements are not, by their own showing, possessed of very large means, and that they were very young at the time when these transactions took place, and we think this evidence is justly liable to the comments made on it by the Judge in page 13 of the printed judgment. The Judge had the advantage of seeing these witnesses, and his notes of the evidence are very full, clear, and satisfactory.

The plaintiff has, however, produced a *jummabundee* of the mouzahs, by which he wishes to corroborate the evidence of the witnesses. This document purports to show the amounts of the assets realizable on some 18 mouzahs for the year 1255, or the year after the sale. The gross amount is 13,681 rupees, and at 10 or 15 years' purchase, this would show a market-price considerably beyond that given by the Mahajuns for 10 mouzahs. But there is nothing to show that this estimate was ever realized, and it is well known to us that these estimates of their assets by zemindars of the rents of their properties are often

conjectural, vague, and wholly incapable of realization.

On the other hand, the defendants have given oral evidence to show that the value of the property and the market-value of land per beegah were and are much less, and that, besides their own liens, it was burdened with a number of *zur-i-peshgee* leases, which must have been widely known, and which must have acted as a powerful deterrent to speculators and purchasers. This oral evidence seems to us more credible than that adduced by the plaintiff.

The defendants, besides their purchase, took a fresh mortgage on two mouzahs for the remainder of their debt, which was about 7,000 rupees, and which was not extinguished by the sale: this was on the 26th of February 1847, or one day after the sale. This document, which is not impugned, and on which the defendants have sued subsequently, shows that other encumbrances, aggregating 11,100 rupees, had been created on several of the 10 mouzahs, and that they were outstanding. The purchasers actually lent money to clear off these encumbrances, and took other property being the villages of Ushti and Gogooli for their loan. The Mahajuns, moreover, were willing, for prompt payment, to remit about 5,000 rupees of the debt.

But, it is said for the appellant, the defendants in the suits which they themselves brought against the Rajah of Hutwa, have valued part of this very property or Sohajepore, at no less a sum than 98,973 rupees. The value of this is however, we see, stated *tukminun*, or conjecturally. The suit itself is valued, according to the ordinary rule in such cases, at three times the Government revenue, or at 4,006. We must remember that the property may have increased considerably in value, as all landed property in rich and populous districts has increased during the last ten years, and that, after all, not much reliance is to be placed on the conjectural estimate of a litigant suing for property to which he conceives himself entitled. In Twyne's case (Smith's Leading Cases, Volume I., page 1) it is laid down, we observe, that "inadequacy of consideration "can in no case be said, as a proposition of "law, conclusively to establish *mala fides*." In the case before us there is no question of family affection or "natural love," as in the case just cited.

On the whole, we have come to the conclusion that it is not shown that the ladies were in any way under the undue influence of the Mahajuns, or that any deception was practised on them, or that there was anything to prevent their consulting their natural protectors and relatives, or that they could have relieved the estate from its undoubted pressure by any other means. We are of opinion that the well-known ruling in the case of Hanoomhan Pershad Pandey, already alluded to, is quite in favor of the respondents, and that they have fairly brought themselves in a position to claim the benefit of the same. There *was* a necessity, and it was pressing. To sell a portion of a large estate in order to save the whole of it from a public auction, at which high or even fair prices are not always realized, and are very much dependent on chance, was actually a benefit to the minor. It is quite possible that the estates, or the part of them sold, may be worth much more now than they were in 1847. Indeed, we may feel some confidence in asserting that the said properties would realize a much higher sum if brought into the market at this present time. But looking to the indebtedness of the father, and to the host of petty encumbrances with which this very property was burdened at the time when the defendants purchased it, we do not feel warranted in affirming that, even then, it was sold for a price disproportionately inadequate, or for a price which, coupled with all the other facts and circumstances, would justify us in annulling the sale, and, as urged by Mr. Peterson, in replacing the appellant in possession of his property, on the sole condition that he should repay the Mahajuns their original debt, the interest being set off against the proceeds which they had enjoyed. We do not think the observations recorded at pages 615 and 917 of the Sudder Dewanny Adawlut Decisions applicable to the present suit. Those recorded at page 1,647 of the same Volume are much more to the purpose; and again referring to the case of Hanooman Pershad Pandey therein alluded to, we may quote their Lordships' words, and so dispose of this case: "The actual pressure on the estate, "the danger to be averted, or the benefit to "be conferred on it, in the particular in-"stance, is the thing to be regarded. But, "of course, if that danger arises or has "arisen from any misconduct to which the "lender has been a party, he cannot take "advantage of his own wrong to support a "charge in his own favor against the heirs, "grounded on a necessity which his wrong "has helped to cause." Applying these grave and weighty observations to the case

before us, we think that the Mahajuns, having established indisputably the existence of a pressure on the estate, not founded on any necessities of their own causing, but on the extravagance of the father, have not been shewn to have practised any deception on the guardians, or to have prevented intending purchasers from coming forward, or to have used their advantages with any unfairness or with anything more than that regard for their own interests by which persons in such a case might fairly be actuated, or to have bought the property for a sum, under all the circumstances, greatly inadequate to the real value of the estates at the time.

In this view, we affirm the decision of the Judge, and we dismiss this appeal with all costs.

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The 19th June 1866.

*Present:*

The Hon'ble G. Campbell and A. G. Macpherson, *Judges.*

**Reversioner—Execution of decree.**

Case No. 38 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Gya, dated the 27th October 1865, affirming a decision passed by the Sudder Ameen of that District, dated the 5th April* 1865.

Koraj Koonwar (Plaintiff), *Appellant,*

*versus*

Komul Koonwar and others (Defendants), *Respondents.*

*Mr. R. E. Twidale* for Appellant.

*Mr. C. Gregory* for Respondents.

The rights of a reversioner entitled to succeed on the death of a childless Hindoo widow, if he shall happen to survive her, cannot be sold in execution of a decree of Court.

In this case, the only question which it is necessary for us to decide is whether the rights of a so-called reversioner—of one who will succeed as next heir if he be alive at the time of the death of a childless Hindoo widow—can be sold in execution of a decree of Court. If such rights cannot be so sold, the appellant's suit could not lie.

The right of the reversioner in this case is not an absolute or existing right; it is one which may never arise, being purely contingent on his surviving the widow. Such a right, we think, cannot be the subject of sale in execution of a decree. It appears to us that Act VIII. of 1859 contemplates the sale only of actual subsisting rights, not of merely contingent or possible rights which may never arise. In this view of the case, the appellant when he purchased took nothing by his purchase. His suit has, therefore, been properly dismissed; and we dismiss this appeal also with costs.

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The 20th June 1866.

*Present:*

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

**Sale by Guardian—Payment of Sradh expenses by Minor or posthumous Son—Onus Probandi (appropriation of money to maintenance of Minor).**

Case No. 465 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Tipperah, dated the 14th December 1865, affirming a decision passed by the Moonsiff of Begumgunge, dated the 21st April 1865.*

Sukeenah Banoo (one of the Defendants), *Appellant,*

*versus*

Huro Churn Buruj (Plaintiff), *Respondent.*

*Baboo Sreenath Banerjee* for Appellant.

*Baboo Luleet Chunder Sein* for Respondent.

The payment of a debt incurred in conducting the *sradh* of a father is incumbent upon a son whether he is of age or a minor or a posthumous son.

The purchaser is not bound to prove that the sum borrowed was appropriated for the maintenance of the minor.

This was a suit to set aside an alienation made by the mother and brother of the plaintiff during his minority.

The necessity recited in the bill of sale is payment of debts incurred in performing the *sradh* of the father, and the maintenance of the minor, the plaintiff.

The Courts below have held that the money went to pay off the expenses of the *sradh*, and not that of the minor's maintenance, because the *sradh* of the father could not have been performed by the plaintiff, inasmuch as he was not born at the time the father died. He was not liable to pay any portion of the debt incurred for that purpose.

With reference to the debt incurred for maintenance, the Courts below held that the *onus* of proving that the sum borrowed was appropriated for the purpose of the

maintenance of the minor, was on the purchaser, special appellant before us, and that he had failed to prove such appropriation.

We are clearly of opinion that both the Lower Courts are wrong. The payment of a debt incurred in conducting the *sradh* of a father is incumbent upon a son whether he was of age or a minor, or a posthumous son of the deceased. (*See* page 297, Volume II., Macnaghten's Hindoo Law.)

The Courts below are also wrong in throwing the *onus* upon the purchaser of proving the appropriation of the monies borrowed. This is contrary to the ruling of the Privy Council in the well-known case of Hanooman Pershad Pandey.

Finding, therefore, that the sale was made for purposes such as are recognized as legal necessities under the Hindoo Law, we reverse the decisions of the Lower Courts, and decree this appeal with costs in all the Courts with interest payable by the respondent.

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The 20th June 1866.

*Present:*

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

**Onus probandi—Joint Hindoo Family—Separate acquisition — Evidence.**

Case No. 459 of 1866.

*Special Appeal from a decision passed by the Officiating Judge of Jessore, dated the 28th November 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 30th June 1865.*

Sreenath Nag Mozoomdar (Plaintiff), *Appellant,*

*versus*

Mon Mohinee Dossia (Defendant), *Respondent.*

*Baboo Chunder Madhub Ghose* for Appellant.

*Baboo Dwarkanath Mitter* for Respondent.

Suit against a brother's widow for contribution in respect of a decree for rents from 1259 to 1264 under a lease acquired in 1255 by the father of the parties in the name of the plaintiff before the family separated in 1258. HELD that the *onus* of proving that the lease was not joint was on the party who set up the plea that it was the self-acquired property of one member of a joint family.

An admission by the widow's husband that the lease was the joint property of himself and the plaintiff, though not an estoppel, was held to be good evidence to be rebutted by the widow.

THIS was a suit for contribution brought by one brother against the widow of his deceased brother, on the allegation that, when the family were joint in food and estate, a lease was taken by the father of the parties, or by Gopeenath, in the name of one of the sons, or of the plaintiff, Sreenath. The zemindar sued Sreenath alone, as his name alone appeared in his Serishtah—and, in doing this, he acted strictly according to law—for the rents due for a period ranging from 1259 and 1264, and obtained a decree against Sreenath alone.

Sreenath paid the sum due, and now sues his brother's widow, as stated above, for contribution.

There has been considerable contention before us as to who is to bear the burthen of proof in this case. It is true that it has been found that the family separated in estate in 1258, but the lease in question was acquired in 1255, when the family was admittedly joint. It is to the date of the acquisition we must look, and not to the date of separation, which is admittedly subsequent to the acquisition. The *onus*, therefore, of proving that the lease was not joint is clearly upon the party who sets up the plea that it was the self-acquired property of one member of a joint family. The case must be remanded in order that the Judge may throw the *onus* on the right party.

We would also call his attention to the admission of Jugut Chunder, the husband of the special respondent, to the effect that the lease was the joint property of himself and the plaintiff. This admission is to be found in the replication filed by the two brothers in the bond-suit brought against the lessor, the zemindar, Issur Chunder. This admission, though it may not amount to an estoppel, is unquestionably a very weighty piece of evidence which must be successfully rebutted by the special respondent before she can hope to succeed.

The Judge will re-try the case with reference to these remarks. The costs to follow the result.

before us, we think that the Mahajuns, having established indisputably the existence of a pressure on the estate, not founded on any necessities of their own causing, but on the extravagance of the father, have not been shewn to have practised any deception on the guardians, or to have prevented intending purchasers from coming forward, or to have used their advantages with any unfairness or with anything more than that regard for their own interests by which persons in such a case might fairly be actuated, or to have bought the property for a sum, under all the circumstances, greatly inadequate to the real value of the estates at the time.

In this view, we affirm the decision of the Judge, and we dismiss this appeal with all costs.

---

The 19th June 1866.

*Present:*

The Hon'ble G. Campbell and A. G. Macpherson, *Judges.*

**Reversioner—Execution of decree.**

Case No. 38 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Gya, dated the 27th October 1865, affirming a decision passed by the Sudder Ameen of that District, dated the 5th April* 1865.

Koraj Koonwar (Plaintiff), *Appellant,*

*versus*

Komul Koonwar and others (Defendants), *Respondents.*

*Mr. R. E. Twidale* for Appellant.

*Mr. C. Gregory* for Respondents.

The rights of a reversioner entitled to succeed on the death of a childless Hindoo widow, if he shall happen to survive her, cannot be sold in execution of a decree of Court.

In this case, the only question which it is necessary for us to decide is whether the rights of a so-called reversioner—of one who will succeed as next heir if he be alive at the time of the death of a childless Hindoo widow—can be sold in execution of a decree of Court. If such rights cannot be so sold, the appellant's suit could not lie.

The right of the reversioner in this case is not an absolute or existing right; it is one which may never arise, being purely contingent on his surviving the widow. Such a right, we think, cannot be the subject of sale in execution of a decree. It appears to us that Act VIII. of 1859 contemplates the sale only of actual subsisting rights, not of merely contingent or possible rights which may never arise. In this view of the case, the appellant when he purchased took nothing by his purchase. His suit has, therefore, been properly dismissed; and we dismiss this appeal also with costs.

---

The 20th June 1866.

*Present:*

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

**Sale by Guardian—Payment of Sradh expenses by Minor or posthumous Son—Onus Probandi (appropriation of money to maintenance of Minor).**

Case No. 465 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Tipperah, dated the 14th December 1865, affirming a decision passed by the Moonsiff of Begumgunge, dated the 21st April 1865.*

Sukeenah Banoo (one of the Defendants), *Appellant,*

*versus*

Huro Churn Buruj (Plaintiff), *Respondent.*

*Baboo Sreenath Banerjee* for Appellant.

*Baboo Luleet Chunder Sein* for Respondent.

The payment of a debt incurred in conducting the *sradh* of a father is incumbent upon a son whether he is of age or a minor or a posthumous son.

The purchaser is not bound to prove that the sum borrowed was appropriated for the maintenance of the minor.

This was a suit to set aside an alienation made by the mother and brother of the plaintiff during his minority.

The necessity recited in the bill of sale is payment of debts incurred in performing the *sradh* of the father, and the maintenance of the minor, the plaintiff.

The Courts below have held that the money went to pay off the expenses of the *sradh*, and not that of the minor's maintenance, because the *sradh* of the father could not have been performed by the plaintiff, inasmuch as he was not born at the time the father died. He was not liable to pay any portion of the debt incurred for that purpose.

With reference to the debt incurred for maintenance, the Courts below held that the *onus* of proving that the sum borrowed was appropriated for the purpose of the

maintenance of the minor, was on the purchaser, special appellant before us, and that he had failed to prove such appropriation.

We are clearly of opinion that both the Lower Courts are wrong. The payment of a debt incurred in conducting the *sradh* of a father is incumbent upon a son whether he was of age or a minor, or a posthumous son of the deceased. (*See* page 297, Volume II., Macnaghten's Hindoo Law.)

The Courts below are also wrong in throwing the *onus* upon the purchaser of proving the appropriation of the monies borrowed. This is contrary to the ruling of the Privy Council in the well-known case of Hanooman Pershad Pandey.

Finding, therefore, that the sale was made for purposes such as are recognized as legal necessities under the Hindoo Law, we reverse the decisions of the Lower Courts, and decree this appeal with costs in all the Courts with interest payable by the respondent.

---

The 20th June 1866.

*Present:*

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

**Onus probandi—Joint Hindoo Family—Separate acquisition — Evidence.**

Case No. 459 of 1866.

*Special Appeal from a decision passed by the Officiating Judge of Jessore, dated the 28th November 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 30th June 1865.*

Sreenath Nag Mozoomdar (Plaintiff), *Appellant,*

*versus*

Mon Mohinee Dossia (Defendant), *Respondent.*

*Baboo Chunder Madhub Ghose* for Appellant.

*Baboo Dwarkanath Mitter* for Respondent.

Suit against a brother's widow for contribution in respect of a decree for rents from 1259 to 1264 under a lease acquired in 1255 by the father of the parties in the name of the plaintiff before the family separated in 1258. HELD that the *onus* of proving that the lease was not joint was on the party who set up the plea that it was the self-acquired property of one member of a joint family.

An admission by the widow's husband that the lease was the joint property of himself and the plaintiff, though not an estoppel, was held to be good evidence to be rebutted by the widow.

THIS was a suit for contribution brought by one brother against the widow of his deceased brother, on the allegation that, when the family were joint in food and estate, a lease was taken by the father of the parties, or by Gopeenath, in the name of one of the sons, or of the plaintiff, Sreenath. The zemindar sued Sreenath alone, as his name alone appeared in his Serishtah—and, in doing this, he acted strictly according to law—for the rents due for a period ranging from 1259 and 1264, and obtained a decree against Sreenath alone.

Sreenath paid the sum due, and now sues his brother's widow, as stated above, for contribution.

There has been considerable contention before us as to who is to bear the burthen of proof in this case. It is true that it has been found that the family separated in estate in 1258, but the lease in question was acquired in 1255, when the family was admittedly joint. It is to the date of the acquisition we must look, and not to the date of separation, which is admittedly subsequent to the acquisition. The *onus*, therefore, of proving that the lease was not joint is clearly upon the party who sets up the plea that it was the self-acquired property of one member of a joint family. The case must be remanded in order that the Judge may throw the *onus* on the right party.

We would also call his attention to the admission of Jugut Chunder, the husband of the special respondent, to the effect that the lease was the joint property of himself and the plaintiff. This admission is to be found in the replication filed by the two brothers in the bond-suit brought against the lessor, the zemindar, Issur Chunder. This admission, though it may not amount to an estoppel, is unquestionably a very weighty piece of evidence which must be successfully rebutted by the special respondent before she can hope to succeed.

The Judge will re-try the case with reference to these remarks. The costs to follow the result.

The 21st June 1866.

*Present:*

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

**Sale by Hindoo Widow—Right of purchaser to possession (without proof of necessity).**

Case No. 152 of 1866.

*Special Appeal from a decision passed by the Judge of Tirhoot, dated the 13th May 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 21st September 1864.*

Bogooa Jha (one of the Defendants), *Appellant,*

*versus*

Lal Dass (Plaintiff), *Respondent.*

*Messrs. R. E. Twidale* and *A. A. Sevestre* for Appellant.

*Mr. C. Gregory* and *Baboo Chunder Madhub Ghose* for Respondent.

The purchaser from a Hindoo widow who is still living is entitled to possession of the property sold, whether there was necessity for the sale or not.

PLAINTIFF, the purchaser from a Hindoo widow, who is still living, sued the defendant, the nephew of the husband of the widow, for possession of the property sold to him.

Defendant pleads that a Hindoo widow has no power to sell, and, moreover, that he is entitled to retain possession under a deed of gift executed by the widow on a date prior to that on which the alleged deed of sale is said to have been executed.

The first Court found the deed of gift propounded by defendant a genuine instrument, and plaintiff's deed of sale fraudulent. It therefore dismissed the plaintiff's claim. The Judge, on appeal, found the deed of gift of defendant spurious, and plaintiff's deed of sale genuine. As, then, the widow was living, and defendants were not entitled to immediate possession, he gave plaintiff a decree with costs.

Defendant now appeals specially, urging that, as plaintiff has not proved necessity for the sale, he was not entitled to possession at all.

We think this reason will not stand. Plaintiff, whilst the widow is living, is entitled to possession whether there be necessity or not—the defendant's attempt to support his own right to possession by a forged deed having failed, and plaintiff is clearly entitled to what he has got; it remains for defendant, reversioner, to protect his interest in any way he thinks fit.

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The 21st June 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Appeal (by defendant who did not appear).**

Case No. 3155 of 1865.

*Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 15th June 1865, modifying a decision passed by the Principal Sudder Ameen of that District, dated the 26th March 1863.*

Jugunnath Chatterjee and others (some of the Defendants), *Appellants,*

*versus*

Messrs. Gordon, Stuart, and Co. (Plaintiffs), and others (Defendants), *Respondents.*

*Baboo Kishen Succa Mookerjee* for Appellants.

*Baboos Unnoda Pershad Banerjee* and *Khetturnath Bose* for Respondents.

A defendant, who did not appear, although his interests are identical with those of the plaintiffs who have not appealed, cannot appeal against the judgment passed in favor of his co-defendants.

THE special appellant in this case is one of the defendants below. The plaintiffs, who hold their title as putneedars of Gopeenathpore from him, brought an action to recover possession of land from the proprietors of an adjoining talook called Boorhumpore, and made their landlord a *pro formâ* defendant. The suit has ultimately been dismissed, as plaintiffs who sued for a declaration of title were unable to prove possession. The special appellant did not appear in the Court below, but now seeks in special appeal to set aside the judgment adverse to his putneedars, alleging that the Judge should, on the remand, have allowed plaintiffs further opportunity of producing fresh evidence. We do not think that the petitioner is in a position to bring a special appeal. He was a defendant in the case, but did not appear; and, though his interests are identical with

those of the plaintiffs who have preferred no appeal, yet he cannot, we think, be allowed to occupy their position and appeal against a judgment favorable to his co-defendants. We dismiss the appeal with costs.

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The 21st June 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Estoppel—Decree for rent—Suit for declaration of lakheraj.**

Case No. 3333 of 1865.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Rungpore, dated the 17th August 1865, affirming a decision passed by the Moonsiff of Bhotemary, dated the 25th April 1865.*

Dukheena Mohun Roy Chowdhry (one of the Defendants), *Appellant,*

*versus*

Kasheenath Chatterjee and others (Plaintiffs), *Respondents.*

*Baboos Kishen Dyal Roy* and *Kalee Prosunno Dutt* for Appellant.

*Baboos Greeja Sunker Mozumdar* and *Issur Chunder Chuckerbutty* for Respondents.

A mere decree for rent of certain lands in a suit in which no question as to the lands being lakheraj was put in issue or decided cannot operate as an estoppel to a suit to obtain a declaration that the same lands are lakheraj.

It is true that the appellant, in a previous suit, got a decree from the Revenue Courts for the rents of the land which the respondent seeks in this suit to have declared to be his lakheraj land. But we do not think that the former suit is any bar to this one, or that the respondent is estopped by it from suing to obtain a declaration that the land is lakheraj; for in the former suit it is clear that the question—the question of whether the land was lakheraj or not—was never properly put in issue, and was never distinctly decided.

Of course, the rent-decree which the appellant obtained will stand good so far as relates to the rents to which it referred. But the present appeal must be dismissed with costs.

The 25th June 1866.

*Present:*

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

**Hindoo widow—Maintenance.**

Case No. 80 of 1866.

*Regular Appeal from a decision passed by the Principal Sudder Ameen of Nuddea, dated the 14th December 1865.*

Ahollya Bhai Debia (Defendant), *Appellant,*

*versus*

Luckhee Monee Debia (Plaintiff), *Respondent.*

*Mr. Barrow* and *Baboo Romanath Bose* for Appellant.

*Baboo Dwarkanath Sein* for Respondent.

Suit laid at Rs. 35,311.

A Hindoo widow who, for no improper purpose, leaves her husband's family, does not thereby forfeit her right to maintenance.

*Seton-Karr, J.*—This is an appeal against a judgment of the Principal Sudder Ameen decreeing to the plaintiff, who has voluntarily left the family of her late husband, the sum of 100 rupees as monthly maintenance.

The plaintiff is a Hindoo widow, in a family governed by the Law of the Mitakshara, and she has sued the widow of Gunga Gobind Dhobe, who was the nephew of her husband, for the sum of Rs. 299-4 a month, together with arrears, amounting to the large sum of Rs. 35,311.

The Lower Court has refused the arrears, and has decreed a sum of Rs. 100 a month from date of suit.

The plaintiff's case is that, after the death of her own husband in 1251, she had been in joint possession of the properties with Gunga Gobind, receiving maintenance from him up to his death in 1261; that she separated from the family in 1262, and sued ineffectually for her share of the properties, the Court then ruling that the family was governed by the Mitakshara Law; and that, under that decision, she has a full right to demand and receive a monthly allowance for her support.

It is quite clear that limitation cannot apply to this suit as far as it is brought to fix the maintenance for the future.

Reference has been made in appeal by the appellant to the cases reported in S. D. Adawlut Decisions, 1850, page 422, and 1852, page 796, which support the position

that a plaintiff after a voluntary separation, not based on any plea of ill-usage, has no right to a separate maintenance.

No charge is made by the defendants of any unchastity or criminal conduct on the plaintiff's part. It is merely urged that she ought to reside with the family or relatives of her late husband; and, in appeal, the defendants profess to be willing to give her food and clothing, which is all that the Hindoo Law (Mitakshara, Chapter II., Section I., Verse 12) allows.

In this case, the principle laid down by Peel, C.J., and published at page 335 of Volume I. of Shama Churn's Vyavashta Darpana, is one well worthy of deep attention. The views there fully enunciated are in conformity to a ruling of the Privy Council, and to the liberal spirit in which the Courts of this country ought to administer the Hindoo Law as applicable to widows. Residence with the relations of the deceased husband is, after all, a moral and not a legal duty, and no forfeiture ought to be imposed on a widow who, for no immoral purposes, shows a preference for a residence elsewhere than with her husband's family, who are bound to give her support.

It is urged by the appellants that their witnesses show that a custom exists in the family whereby widows only receive, for their support, portions of what is daily offered to the family idols; and we have heard the evidence on this point, but it by no means supports the allegation that any such custom is binding on all widows of the family, and that it ought to prevent our applying the principles of the Mitakshara Law, fairly interpreted, to the case.

The only question, then, that remains, is the amount of the allowance, and on this point we think the Principal Sudder Ameen has fixed the rate too high. Looking to the amount of the property and the circumstances of the family, as well as to the requirements of the widow and to the precedents quoted, the sum to be paid by the defendants from date of suit should be fixed at Rs. 25 a month. The decree of the Lower Court should be modified accordingly, and costs will be given in proportion in both Courts.

*Macpherson, J.*—I concur in the proposed order. The case is not barred by limitation, because it is evident that, from the time of her husband's death up to within twelve years of the institution of the present suit, the plaintiff was maintained out of her husband's estate. I think that, as decided by the Supreme Court in the case of Jadoomonee Dossia *vs.* Khetter Mohun Seal (July 21st, 1854), the plaintiff's leaving the house of her husband's relatives does not entail any forfeiture of her right to maintenance. And the appellant entirely fails to prove that, by any custom of the family, a widow who, for no unchaste or improper purpose, leaves her husband's family, loses her right to be maintained.

Considering the income proved to be about Rs. 7,000 a year, it appears to me that Rs. 25 per month is a reasonable and sufficient sum to allow to the plaintiff. She is entitled to a decree for maintenance at that rate from the date of institution of this suit. She is not entitled to any arrears, because there was no demand by her for maintenance till she brought this suit.

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The 25th June 1866.

*Present:*

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

**Estoppel (False admission of ancestor)—Suit for declaration of title in right of inheritance—Section 22, Act XII. of 1841.**

Case No. 1 of 1866.

*Application for review of judgment passed on the 24th December 1865, in Special Appeal No. 1614 of 1865.*

Shaikh Mahomed Wayez and another (Defendants), *Petitioners,*

*versus*

Musst. Sugeeroonissa (Plaintiff), *Opposite Party.*

*Mr. R. E. Twidale* for Petitioners.

*Mr. Gregory* for Opposite Party.

A false admission made by a Serishtadar to avoid losing his appointment does not estop his heirs from afterwards setting up the truth.

Section 22, Act XII. of 1841, does not apply to a suit for a declaration of the plaintiff's title in right of inheritance as against other members of the family.

THERE can be no doubt that the Mouzah of Muksoodpore was included in the deposition and statement of Gholam Kadir. Our former decision is, therefore, wrong to that extent.

Two points require our consideration.

*First.*—Is the deposition of Gholam Kadir binding upon his heir, the plaintiff, so as to preclude him from setting up the truth in this suit?

*Second.*—Is the suit inadmissible with reference to the provisions of Section 22, Act XII. of 1841?

On the first point, we are of opinion that the plaintiff is not estopped from setting up the truth. Gholam Kadir was formerly a Serishtadar; his holding landed property in the zillah where he held the appointment of Serishtadar was forbidden, and he was thus in a measure forced to choose between losing his appointment and telling a falsehood. To visit any admission made by him under such circumstances upon his heirs would not be just.

On the second point, we are of opinion that this is not a suit to oust the certified purchaser, but a suit for a declaration of the plaintiff's title in right of inheritance as against the other members of the family. The provisions of Section 22, Act XII. of 1841, do not apply to such a claim.

We adhere to our former decision remanding the suit, and reject this application with costs and interest. Copy to be sent to the Zillah Judge.

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The 25th June 1866.

*Present:*

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

**Plaint—Amendment—Date of suit.**

Case No. 482 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Sylhet, dated the 4th December 1865, reversing a decision passed by the Moonsiff of that District, dated the 18th September 1865.*

Husrutoollah (one of the Defendants), *Appellant,*

*versus*

Moulvee Aboo Mahomed Abdool Kader and others (Plaintiffs), *Respondents.*

*Baboo Greesh Chunder Ghose* for Appellant.

*Baboos Beneenath Bose* and *Obhoy Churn Bose* for Respondents.

The date of a suit must be taken to be that of the filing of the plaint originally, and not that on which it was returned amended.

THE only point pressed on us is that the suit in this instance was barred by limitation, as it could not be said to have commenced until the 4th of January 1865, or admittedly more than three years after the order of the Survey Department to remove which the plaintiff sued.

But we cannot take this view of the case. The plaint was actually filed on the 23rd of September 1864, or seven days before the expiry of the three years' limitation. The Court exercising a discretion which it might exercise under Section 29 of Act VIII. of 1859, on the 8th of December returned the plaint for verification by the plaintiff, as it had not been properly verified; and the plaint was returned, amended, on the 4th January 1865.

Following the precedents recorded or alluded to at page 207 of the Weekly Reporter, Volume V., we think that the date of the suit must be taken to be that of the filing of the plaint originally, and, on this view, the plaintiff was in time.

We dismiss the appeal of the defendant, special appellant, with costs.

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The 25th June 1866.

*Present:*

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

**Limitation—Institution of suit—Holidays.**

Case No. 483 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Kamroop, dated the 15th December 1865, affirming a decision passed by the Moon-*

*siff of that District, dated the 26th June 1865.*

Holee Ram Doss (one of the Defendants), *Appellant,*

*versus*

Mihee Ram Gogooee (Plaintiff), *Respondent.*

*Baboo Luleet Chunder Sein* and *Chunder Madhub Ghose* for Appellant.

*Baboo Kishen Kishore Ghose* for Respondent.

Under Act XIV. of 1859, a suit is barred by limitation where the time for its institution expires on a holiday.

We are of opinion that the suit of the special respondent, plaintiff below, is clearly barred under the Statute of Limitations, Clause 5, Section 1, Act XIV. of 1859.

The property in dispute was attached as the property of one Bodoram. The present plaintiff intervened in the summary stage of the case under Section 246 of the Code of Procedure. His claim was, however, overruled. A suit to set aside the order rejecting his claim which was passed on the 3rd of October 1863 ought to have been brought within one year from that date.

The present suit was brought on the 3rd of November 1864. The Principal Sudder Ameen was of opinion that, as the last day was a holiday, the suit was in time, inasmuch as it was filed on the day the Court re-opened for business; but this opinion is opposed to a decision of a Full Bench of this Court, dated 14th June 1865, published in Volume III., Sutherland's Weekly Reporter, Small Cause Court References, pages 5 and 6.

The appeal is decreed with costs and interest, and the decision of the Principal Sudder Ameen reversed. Costs of all the Courts to be borne by the special respondent with interest.

The 25th June 1866.

*Present:*

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

**Alluvial Land.**

Case No. 484 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Serajgunge, in Rajshahye, dated the 30th November 1865, reversing a decision passed by the Moonsiff of that District, dated the 26th January 1865.*

Narainee Burmonee (one of the Defendants), *Appellant,*

*versus*

Tarinee Churn Singh (Plaintiff) and others (Defendants), *Respondents.*

*Baboo Kalee Mohun Dass* for Appellant.

*Baboo Issur Chunder Chuckerbutty* for Respondents.

There is no right of property in a mere site. Proof of mere identity of site is not sufficient to defeat the right of an owner to whose land an accretion or formation may be an increment.

The Principal Sudder Ameen's decision and the principles on which he has proceeded are not very clear or intelligible. But what is clear is, that he has misinterpreted and misapplied the ruling of the Full Bench quoted by him of the 26th of May 1865, Weekly Reporter, page 51, Volume III. He seems to think that, because the lands were not gradually formed but were thrown up at once, both parties ought to be put in possession of the same. But the principle of the decision which he quotes is that there is no right of property in a mere site, or that mere identity of site, if proved, is not sufficient to defeat the right of any owner to whose lands the accretion or formation may be an increment.

In the case before us, the real point at issue was whether the accretions were to Boorampore and Ramchandpore, the plaintiff's lands, or to Dogachee and Kulma, the lands of the defendants. The first Court appears to have drawn the issues properly.

We set aside the decision of the Principal Sudder Ameen, and remand the case to the Judge, who will try the appeal himself on the merits of the case between the parties with regard to the law and precedents of accretion applicable to such cases, and to the rival claims of the litigants.

The 15th May 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

**Joint Julkur—Trespass.**

Case No. 2595 of 1865.

*Special Appeal from a decision passed by Moulvie Mahomed Nazim Khan, Principal Sudder Ameen of Mymensing, dated the 10th June 1865, reversing a decision passed by the Moonsiff of that District, dated the 31st December 1864.*

Gobind Chunder Shaha (Defendant), *Appellant,*

*versus*

Khaja Abdool Gunnie and others (Plaintiffs), *Respondents.*

*Baboos Bungshee Dhur Sein* and *Greeja Sunker Mozoomdar* for Appellant.

*Mr. C. Gregory* and *Baboo Nulleet Chunder Sein* for Respondents.

A co-proprietor cannot be sued for trespass for fishing in a julkur in which he and the other proprietors were entitled to fish, merely because the julkur, by a change in the course of the river, ran over the land which was allotted to the plaintiff under a butwara.

In such a suit the plaintiff cannot obtain a share of the fish on the ground that he had a share in the julkur.

It appears to us that the decree of the Principal Sudder Ameen ought to be reversed, and a decree entered for the defendant. The defendant and the plaintiff and others were joint proprietors of the julkur of a river. They afterwards divided the property under a butwara, but the julkur remained entire. It appears that the river changed its course, and a portion of it came over the land which formerly belonged to the parties jointly. Under those circumstances, the plaintiff was not entitled to sue one of the co-proprietors in an action for a trespass in coming on defendant's land and taking the fish. He was only one of the joint proprietors of the julkur, and if one of the joint proprietors took the fish out of the fishery, the plaintiff might have had an action against him to account for the profits of the fishery; but he could not sue him for coming and fishing in the fishery in which he and the other proprietors were entitled to fish.

It appears to us, therefore, that the Principal Sudder Ameen was wrong. He says that the julkur was formed since the butwara. Still, the fishery existed in that part of the river out of which the fish was taken, although, by a change in the course of the river, it ran over that portion of the land which was allotted to plaintiff under the butwara.

We think also that the Moonsiff's decision was wrong, because he gave to the plaintiff in this case (which was an action for trespass) a share of the fish on the ground that he had a share in the fishery, whereas the plaintiff claimed the fish as taken out of water exclusively belonging to him, and not on the ground that he had a share in the fishery. The defendant did not dispute the plaintiff's right to a share in the fishery, but he defended the suit in which the plaintiff claimed a very different right, *viz.*, the exclusive right to the water.

The decrees of both Courts will be set aside, and the suit of the plaintiff dismissed, and the defendant will be entitled to the costs of this appeal, and also to his costs in both the Lower Courts.

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The 18th June 1866.

*Present:*

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

**Estoppel—General Power of Attorney.**

Case No. 3399 of 1865.

*Special Appeal from a decision passed by the Judge of Rajshahye, dated the 13th September 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 29th December 1864.*

Shoshee Bhooshun Dutt and another (Defendants), *Appellants,*

*versus*

Chunder Coomar Roy (Plaintiff), *Respondent.*

*Mr. A. T. T. Peterson* and *Baboo Greeja Sunkur Mozoomdar* for Appellants.

*Mr. R. V. Doyne* and *Baboo Bungshee Dhur Sein* for Respondent.

The Court cannot import into a power of attorney a limitation which the deed does not contain; but the principal, and those who purchase from him, are bound by the acts of the agent done under such general power.

THE plaintiff in this case, who is the purchaser of the Belnabary Indigo Concern, sues the defendant for cancelment of a perpetual jote jumma granted to him at a fixed rent by one Imlach, the general agent of the then owner of the factory—a grant which was entirely beyond the scope of that agent's authority.

The first Court finds that the deed was executed by the agent with full knowledge of what he was doing, that the act was within the scope of his general agency, and must therefore be upheld. He, therefore, dismissed the plaintiff's suit.

On appeal, the Judge considered that the transaction is equivalent to an alienation by the agent of the villages covered by the lease; that the power of attorney gave the agent no such power; and that, being beyond the scope of his agency, was voidable and liable to be cancelled. He, therefore, reversing the decree of the Principal Sudder Ameen, gave plaintiff a decree for what he asked.

The defendant has now appealed to us specially, urging that the Judge has misinterpreted the power of attorney; that that instrument fully empowers the agent to grant such a lease as this; that, consequently, it should be upheld, and the Judge's decree reversed.

The act which the agent did may not have been advantageous to his principal—that is not a point before us; neither is there any proved fraud in the case; the only question we have to determine, as admitted by the learned Counsel on both sides, is whether, looking at the powers given to the agent in his general power of attorney, this act falls within them or not. Now, the lease is a perpetual lease of two villages with a reserved rent of Rs. 101-7; it is in no sense an alienation, neither does it amount to such. On turning to the power of attorney, we find that the agent was vested with the most extensive power as to settlement with zemindars and ryots, and the principal binds himself therein to admit and approve, as acts done by himself, any settlements which the said Mooktar might effect with ryots, the zemindars, or the Government. These words are neither expressly nor impliedly limited in the instrument, and we are, therefore, unable to import into the deed a limitation which the party executing the deed has failed to enter in it himself. If persons do not limit their confidence, the Court cannot limit it for them when they find that it has been misplaced; but they must, and those who purchase from them must, also suffer the effect of their own ill-judged act. Under this view, we think that the lease granted by Imlach to the defendant was within the scope of Imlach's powers, and cannot be set aside. We, therefore, reverse the decision of the Judge, thus reviving that of the Principal Sudder Ameen. The costs of all Courts will be borne by the plaintiff below.

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The 25th June 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Limitation—Suit by mortgagee for possession of rebel's property sold under Act IX. of 1859.**

Case No. 273 of 1865.

*Application for review of judgment passed on the 25th April 1865, in Special Appeal No. 3053 of 1864.*

Gobind Pandey (Plaintiff), *Appellant,*

*versus*

Heemut Bahadoor and others (Defendants), *Respondents.*

*Mr. R. E. Twidale* and *Baboo Mohendro Lal Shome* for Appellant.

*Mr. G. Gregory* for Respondents.

A suit by a mortgagee for possession, on ground of foreclosure, of a rebel's property sold under Act IX. of 1859, is barred by limitation if not brought within one year from the date of seizure or sale.

Nothing in Section 20 of the Act allows a concurrent period of 12 years to sue in the ordinary Civil Courts for confirmation of civil rights.

THE decision of this case was postponed pending the decision of the Full Bench on the question whether an appeal on the point of limitation might be admitted after the final judgment on the merits.

The Full Bench having now decided that such an appeal can be admitted, the special appellant urges that the suit is barred by the limitation in Section 20, Act IX. of 1859. That Section enacts as follows:—

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"Nothing in this Act shall be held to "affect the rights of parties not charged "with any offence for which upon convic-"tion the property of the offender is for-"feited in respect of any property attached "or seized as forfeited, or liable to be for-"feited to Government; provided that no "*suits brought* by any party *in respect of* "*such property* shall be *entertained* unless it "be instituted within the period of one year "from the *date* of the *attachment* or *seizure* "of the property to which the suit relates."

The case is one where the property in suit is claimed by a party suing under the allegation of having a mortgage-lien on it. The property in question was sold as that of a rebel under the Special Laws, Act XXV. of 1857 and IX. of 1859. It is admitted that no suit was brought within one year to set aside the sale, but it is strongly pressed on us by the opposite party that the property was sold with notice of the mortgage, and that only the rights and interests of the rebel were sold.

Further, that the special appellant could not sue till he obtained a decree after foreclosure.

Lastly, it is said that Section 20, Act IX. of 1859, is to be read as providing that a suit to set aside the sale of a rebel's property made under that law must be brought within one year in the *special* Courts which administered that law, but that there is no legislative enactment therein to prevent suits being brought to confirm civil rights, such as this of mortgage, in the ordinary Civil Courts within the period, *viz.*, 12 years, which is the period of limitation recognized in these Courts.

Our opinion in this case is that it should be governed by our decision in case No. 3516, 25th July 1864, Legal Remembrancer, page 150, and by the Review Order, 6th December 1864, which is of a very similar character. The judicial reasons given there for the judgment will apply to this case, and suffice for our decision now, and for our holding that limitation bars the suit. No decision contrary to the above has been shewn to us.

We may add that the plea of the petitioner as to there being a concurrent period of 12 years to sue in other Courts is not borne out by any expressed or implied provision in Section 20, Act IX. of 1859.

In this view, we dimiss the special appeal with costs.

The 25th June 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Leases by Managers.**

Case No. 94 of 1866.

*Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 15th September 1865, affirming a decision passed by the Deputy Commissioner of that District, dated the 2nd February 1865.*

Maharajah Jugunnath Sahee Deo (Defendant), *Appellant,*

*versus*

Heera Ram Chuckerbutty (Plaintiff), *Respondent.*

*Mr. R. T. Allan* and *Baboos Dwarkanath Mitter* and *Mohesh Chunder Chowdhry* for Appellant.

*Baboos Kalee Mohun Doss* and *Bhowanee Churn Dutt* for Respondent.

Construction of a deed which was held to give the landlord authority to refuse his consent to any lease or transfer by the manager.

A manager has no authority to borrow money on a bond which does not recite for what purpose it is required, and the greater portion of which is said to have been previously borrowed by the principal.

THIS was a suit to recover from the defendant, a Rajah in the Chota Nagpur districts, the amount of profits of a lease of Mouzah Anjoor which had been given to the plaintiff by the Rajah's manager, but of which plaintiff had been dispossessed by the Rajah; also to recover a sum of Rs. 1,000 with interest which the manager had borrowed on account of the Rajah. Both the Lower Courts have decreed the claim; and it is urged on special appeal that the manager held no sufficient authority to give such leases or to borrow the money. It seems to be admitted on both sides that the power vested in the manager is contained in a proceeding of the Assistant Commissioner of the district. The manager was the nephew of the Rajah, and was appointed at the instance of the Rajah. He has since been removed. The authority given to the manager extended to the giving of leases, but the terms are somewhat contradictory. In one sentence it is distinctly stated that no such lease shall be granted except with the

seal and signature of the Rajah as well as the manager; but in a subsequent sentence it is added that leases may be granted on the signature of the manager alone, because it may hinder the transaction of business if the Rajah's signature is always required. Looking to both these Sections, we are of opinion that the manager had not authority on all and every occasion to grant leases totally independent of the consent of the Maharajah; that the general rule laid down was that he should obtain the Rajah's seal and signature to such leases, and that it was only on special occasions and under special circumstances that he had authority to dispense with it. It is clear from the lease itself that all parties to it knew full well that the Rajah's signature was necessary, for there is a vacant space left for that signature. There is no attempt made to prove that the Rajah was asked for his signature, or that the Rajah neglected or delayed to give his consent and signature to the lease; but from the fact that the plaintiff never held possession of the property leased, as proved by his never having collected any of the rents of it, the presumption is that the Rajah from the first withheld his consent to the granting of the lease to the plaintiff. We have no doubt that a proper construction of the power gave the Rajah authority to refuse his consent to any lease or transfer. Wo do not see that the plaintiff has suffered any injury by the transaction. The Rajah's manager wished to give the plaintiff a lease. The Rajah objected and refused it, or at least did not consent to it. It would be unreasonable that the manager's acts should bind the Rajah, and the power which is put forward by him for exercising such independent authority does not confer it.

Then, as to the loan, the manager had authority to give and take money on behalf of the Rajah, but this does not extend to the borrowing of Rs. 1,000 on a bond which does not even recite for what purpose it is required, and the greater portion of which is said to have been borrowed by the Rajah on some former occasion. Whatever effect the power had, it did not confer on the manager authority to give acknowledgment of former debts binding on the Maharajah.

The plaintiff is not, in our opinion, in any way entitled to recover the money sued for from the Rajah; and we, therefore, decree the appeal of the Rajah, and dismiss the plaintiff's suit with all costs as respects him. We think the manager should pay his own costs on this appeal.

The 26th June 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Res-judicata.**

Case No. 40 of 1866.

*Regular Appeal from a decision passed by the Principal Sudder Ameen of Shahabad, dated the 5th December 1865.*

Baboo Sunkur Dyal Singh (Plaintiff), *Appellant,*

*versus*

Baboo Purmessur Dyal Singh (Defendant), *Respondent.*

*Baboos Unnoda Pershad Banerjee* and *Dwarkanath Mitter* for Appellant.

*Mr. R. T. Allan* and *Baboos Onookool Chunder Mookerjee, Mohesh Chunder Chowdhry,* and *Nilmonee Sein* for Respondent.

Suit laid at Rs. 5,076.

Where the claim of a brother's son in 1847 was that he had title, as heir to the moiety of an estate, prior to the other brother's widow, in respect to the whole estate, on the plea that it was joint and undivided, and his claim now is that she has no title prior to him, but accepting the decision of 1847 and regarding the widow's title to be prior to his and as holding a life-interest in the whole estate before him, he now claims as heir next in reversion after the widow, regarding her property as separate with a view to a declaration of his right as such heir to have a certain alienation by the widow (alleged by him to be illegal under Hindoo Law) set aside. HELD that the two cases and causes of action were essentially different.

IT is necessary in this case to notice, in the first instance, the following facts admitted by both parties, *viz.*, that Munoo Singh was the common ancestor; that he had three sons, Sheo Churn Singh, father of plaintiff, and Sheo Golam Singh, father of Sadoo Surun and Ram Surun Singh, and Sahebzada (who died childless, and who is admitted by all parties to have no concern in this litigation); that Sheo Golam Singh had also a daughter named Rajbunsee Koonwar, who had a son Purmessur Dyal, defendant No. 2; that on the death of Sheo Golam Singh, *his widow* Dheraj Koonwar, defendant No. 1, held the property as such widow and as guardian of her sons Sadoo Surun and Ram Surun; that on their decease, she succeeded to it as Sheo Golam's widow, with a widow's life-interest. Further, that she executed a certain ikrarnamah on the 14th October 1864 transferring the property she so held to Purmessur Dyal, the son of her daughter Raj Bunsee; and that a suit was brought by

Duleep Koonwar, as mother and guardian of the plaintiff Sunkur Dyal Singh, son of Sheo Churn Singh, for a moiety of the estate on the allegation of the estate of the two brothers Sheo Golam and Sheo Churn being joint and undivided. That suit was dismissed by the first Court on the 17th March 1847, and by the Zillah Judge on the 5th August of that year—the contention of the widow of Sheo Golam Singh then being that plaintiff could not share in the property, as it was separate and distinct, and not joint and undivided.

The plaintiff now sues, as reversionary heir to the widow of Sheo Golam, for a declaration of his title and interest after her death, and for an order to set aside the ikrarnamah above mentioned.

Plaintiff also sues for immediate possession, as the widow has, by the above ikrarnamah, committed waste. We shall not further notice this part of plaintiff's case, because it has been ruled by a Full Bench decision that the execution of such a document is not the actual waste contemplated as justifying the Court in giving immediate possession to a reversioner.

Plaintiff's claim to have a declaration of his right as reversioner to set aside the ikrarnamah of Dheraj Koonwar, defendant No. 1, made in favor of Purmessur Dyal, defendant No. 2, was met by both defendants pleading, *first*, that the claim was barred by Sections 2 and 3, Act VIII. of 1859, with reference to the plaintiff's suit before alluded to as dismissed in 1847; *secondly*, that plaintiff had no *status* to sue as reversioner while defendant No. 1, Dheraj, was legal heir in possession; *thirdly*, that the general Law of Limitation barred the suit; *fourthly*, that the property in dispute had been declared the *separate* property of Sheo Golam; thus plaintiff as Sheo Churn's heir had no rights in it, and that consequently defendant No. 1 could legally transfer it as she had done to the *management* of defendant No. 2, Purmessur Dyal, her daughter's (Raj Bunsee's) son, and that her daughter Raj Bunsee had given full and free consent to this arrangement.

The Lower Court dismissed the plaintiff's suit as barred by Sections 2 and 3, Act VIII. of 1859, inasmuch as the decisions above quoted of 1847 had ruled the *entire* property to be the separate and distinct property of Sheo Golam; and consequently plaintiff, as Sheo Churn's heir, could have no right to a half or any other share of it on a claim founded, as his was, on the allegation of the same property being joint and undivided.

Plaintiff's suit being accordingly dismissed by the Lower Court, plaintiff appeals, and urges that the Lower Court is wrong in holding this suit barred under the Law cited (Sections 2 and 3, Act VIII. of 1859), inasmuch as in the litigation of 1847 he (plaintiff) came in to contest the right of Dheraj Koonwar, defendant No. 1, to hold the whole property in the way she did, as if it were the *separate* property of Sheo Golam—plaintiff's contention *then* being that he was entitled to a half share of it as *ancestral joint undivided* estate of Sheo Golam and his brother Sheo Churn. But *now* plaintiff does *not* contest the *prior* title of Dheraj Koonwar, but only seeks for his right to be declared as heir entitled to possession *after* Dheraj's death, on the ground that Dheraj could not legally execute the ikrarnamah referred to, and so alienate the property; and that Purmessur Dyal, as sister's son, could not succeed to the estate which Dheraj held as guardian of her sons Sadoo Surun and Ram Surun, to the prejudice of plaintiff as reversioner.

An objection was here made by the respondent that the suit and appeal could not proceed without Raj Bunsee being a party, and all admitted she was not a party.

We are, however, clearly of opinion that this objection is one of no validity. Raj Bunsee clearly assented to the acts of Dheraj, and, so far as they are concerned, it is not necessary any longer for her to be made a party.

The incidental mention in the pleadings (*vide* page 6, line 15 of the printed File) stating that the right and title to the property to be *first* that of Dheraj and *then* the daughter's, will not create the right; nor did the judgment of the 5th August 1847 do so, for it only had to deal with Dheraj's rights, which were the rights attacked by plaintiff then, and not with those of Raj Bunsee.

As to the matter being "*res adjudicata*," and so barred under Sections 2 and 3, Act VIII. of 1859, we are of opinion that, when the claim of plaintiff in 1847 was that she had a title as heir to the *moiety prior* to Dheraj, for the *whole* of the estate in suit, on the plea that it was *joint* and *undivided*, while the claim of plaintiff now is that she has *no* title *prior* to plaintiff, but accepting the decision of 1847 and regarding the widow's title to be *prior to* his, and as holding a life-interest in the whole estate before him, plaint-

iff now claims as *heir next in reversion after Dheraj*, regarding her property as *separate* property, with a view to a declaration of his right as such heir to have a certain alienation by the widow (alleged by plaintiff to be illegal under Hindoo Law) set aside, the two cases and causes of action are essentially and truly different.

Thinking, then, that the Lower Court was wrong in holding that they were the same, and that the plaintiff's suit was barred under Sections 2 and 3, Act VIII. of 1859, we reverse its order.

We may say, indeed, that the plaintiff's suit might be liable to be dismissed, as he had no business so to frame his plaint in the suit as to demand possession on account of waste simply on the ground of the deed of transfer, for the Full Bench has ruled that such a demand will not be allowed. But, though we have the legal power to use our discretion on this matter even to the extent of dismissing the suit, we do not think, under the whole facts of the case, that we should be right to do so.

We decree that the deed of ikrarnamah confers no title on the defendant Purmessur Dyal to retain possession of the disputed property after the death of Dheraj Koonwar. Purmessur Dyal raises no objection to such a decree. Our decision decides no question between Raj Bunsee or any representative of Raj Bunsee and the plaintiff, nor does it decree possession to the plaintiff. All the costs of this suit must be paid by plaintiff.

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The 26th June 1866.

*Present:*

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

**Enhancement (by a person not being an auction-purchaser)—Uniform payment of rent 12 years before Permanent Settlement.**

Case No. 485 of 1866.

*Special Appeal from a decision passed by the Judge of Backergunge, dated the 30th November 1865, reversing a decision passed by the Sudder Ameen of that District, dated the 19th December 1860.*

Shookhoda Debia (Plaintiff), *Appellant,*

*versus*

Bishambhur Shaha (Defendant), *Respondent.*

*Baboos Kishen Succa Mookerjee, Khettur Mohun Mookerjee,* and *Sreenath Doss* for Appellant.

*Baboos Dwarkanath Mitter* and *Onookool Chunder Mookerjee* for Respondent.

**A person not being an auction-purchaser for arrears of revenue cannot, even under the old law, demand proof of uniform payment of rent 12 years before the Permanent Settlement.**

THREE grounds are taken in this special appeal :—

*1st.* That the Judge was wrong in admitting the review of judgment.

*2nd.* That, as the suit was instituted before Act X. of 1859 came into operation, the defendant was bound to show uniform payment of rent for twelve years prior to the Perpetual Settlement.

*3rd.* That the Judge was wrong in stating that the Dakhilas proved the genuineness of the Dowl Bundobust, inasmuch as the special appellant did not question the genuineness of these Dakhilas, whereas they were distinctly traversed in the replication of the special appellant.

On the first point, the order of the Judge admitting the review is final, and no legal defect has been pointed out to us in the fresh decision—for such it is under a late ruling of a Full Bench of this Court.

On the second point, the Dowl Bundobust, which the Judge has found to be genuine, is dated twelve years prior to the Perpetual Settlement. The special appellant, not being an auction-purchaser for arrears of revenue, would not be in a position even under the old law to demand proof of uniform payment of rent twelve years prior to the Perpetual Settlement, even if the Dowl were not, as in this case, of a date twelve years antecedent to that Settlement.

On the third ground, the Judge does not rely upon the denial of the plaintiff, special appellant, of the Dakhilas. His decision is based on two grounds, and the result was that he came to the conclusion that the Dowl Bundobust of 1185, which could not have been produced by the special respondent in the former suit, was a genuine document protecting the tenure of the special respondent from enhancement of rent.

The appeal is dismissed with costs and interest.

The 26th June 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble G. Loch, *Judge.*

**Recovery of possession—Sale in execution.**

Case No. 3510 of 1865.

*Special Appeal from a decision passed by Mr. A. Pigou, Judge of Hooghly, dated 30th June 1865, reversing a decision passed by Syud Sawdut Hossein, Sudder Ameen of that District, dated the 20th January 1865.*

Gunganarain Behutta (Plaintiff), *Appellant,*

*versus*

The Collector of Midnapoor and others (Defendants), *Respondents.*

*Baboo Khetter Mohun Mookerjee* for Appellant.

*Baboo Kishen Kishore Ghose* for Respondents.

If in a sale under execution against *A*, *B's* property is sold, *B* is not bound to reverse the sale before he can recover possession; nor will his asking to reverse the sale preclude him from recovering possession.

If this property was the plaintiff's, it could not be sold under the execution against another person; and, if the plaintiff was turned out of possession on 25th March 1864, he was in time, on the 28th July 1864, to assert his title and to bring his suit to recover back possession. The right and interest of the judgment-debtor alone was sold; and, if the property belonged to the plaintiff, and not to the judgment-debtor, it was not necessary for the plaintiff to reverse the sale before he could recover possession. If it was not necessary for her to reverse the sale before he could recover possession, he is not precluded from recovering in this suit because he has asked to reverse the sale. If it should turn out that the property was not the plaintiff's, but the judgment-debtor's, it passed under the execution. The judgment was wrong in holding that the plaintiff was barred by limitation. The decree of the Lower Appellate Court is reversed with costs of this appeal, and the case remanded to the Judge to try it on the merits.

The 27th June 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Special Appeal—Remand under Section 351, Act VIII. of 1859—Calling for additional evidence under Section 355.**

Case No. 731 of 1866.

*Special Appeal from a decision passed by the Judge of Shahabad, dated the 22nd February 1866, reversing a decision passed by the Moonsiff of that District, dated the 25th January 1865.*

Ram Kant Pandey (Defendant), *Appellant,*

*versus*

Mussamut Guneshee Koonwur and others (Plaintiffs), *Respondents.*

*Baboo Roopnath Banerjee* for Appellant.

*Baboos Mohesh Chunder Chowdhry* and *Upprokash Chunder Mookerjee* for Respondents.

A Special Appeal does lie where a Lower Appellate Court remands a case under Section 351, Act VIII. of 1859, instead of calling for additional evidence under Section 355.

In this case, the proper order for the Judge to have passed would, in our opinion, have been one for keeping the case on the Judge's own file, and requiring the first Court, under Section 355, to take the additional evidence required, and return the case with that evidence to the Judge.

The Judge, by ordering a remand under Section 351, gave a jurisdiction to the first Court which the law does not give.

In a case at page 181, Volume II., Weekly Reporter, March 18th, 1865, Kemp and Glover, JJ., seem to consider that this is a technical objection not affecting the merits, although it is an error of procedure. But there is no ruling that an appeal will not lie.

We think that, as affecting jurisdiction, an appeal will lie; and we, therefore, remand the case to the Judge in order that he may pass legal orders as above indicated.

The 27th June 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Succession (to immoveable property)—Section 7, Regulation V., 1799.**

Case No. 1 of 1866.

*Regular Appeal from a decision passed by Baboo Luckhee Narain Mitter, Additional Principal Sudder Ameen of Dacca, dated the 26th August 1865.*

Shib Ram Lal and others (Plaintiffs), *Appellants,*

*versus*

Raj Coomar Mitter and others (Defendants), *Respondents.*

*Baboos Onookool Chunder Mookerjee* and *Mohinee Mohun Roy* for Appellants.

*Mr. R. T. Allan* and *Baboos Sreenath Doss, Dwarkanath Mitter,* and *Luleet Chunder Sein* for Respondents.

Suit laid at Rs. 9,639-2-7-2.

A claim to immoveable property cannot be barred if not brought within one year of the proclamation issued under Section 7, Regulation V., 1799, which applies only to moveable property.

THE plaintiffs claim to succeed to the estate of Lalla Gobind Buksh on the death of his widow Golab Dayee, which, they state, took place in Falgoon 1258.

The defendants, who are in possession of the estate, contest the plaintiffs' title on many grounds, but the only one which it is necessary to allude to for the determination of this appeal is that the plaintiffs are not, as they allege, the descendants of Ajaib Lal *alias* Golapee Singh, the grandfather of Lalla Gobind Buksh. Upon this issue, the Principal Sudder Ameen of Dacca has held that the plaintiffs have failed to prove their descent from Ajaib Lall, and upon this and other grounds the Principal Sudder Ameen has dismissed the plaintiff's suit.

Upon appeal, the plaintiffs' pleader does not urge that the evidence upon the file of this case is sufficient to prove the plaintiffs' descent from Ajaib Lal, but he urges that the evidence which was taken in another suit which is now before this Court on special appeal, No. 5 of 1866, should be read as evidence in this suit, and that it was expected by the plaintiffs' pleaders in the Lower Court that it should have been so read.

We are of opinion that there is no foundation for any such argument. It is admitted that there is no distinct application on the part of the plaintiffs to have the evidence in the suit alluded to considered as evidence in this suit. But it is said that an application was made and conceded that the two suits should be heard together. As the decision of the two suits rested entirely on the proof which the plaintiffs could produce of their being the grandsons of Ajaib Lal, it was quite right that the two suits should be heard together. But it does not follow that the evidence taken by a Moonsiff in the absence of the greater part of the present defendants would be accepted in the Principal Sudder Ameen's Court as evidence against those defendants. Not only did the plaintiffs not ask that it should be so read—not only did the defendants not admit that it should be received as evidence—not only did the Court not grant any such application as is now contended for—but the record of the trial in the Lower Court shows that, at the request of the plaintiffs, commissions were sent to Zillahs Sarun and Backergunge to enable them to examine witnesses in proof of their claim, and some witnesses were examined in Zillah Sarun, of which district the family of the plaintiffs were residents, who, however, did not prove that claim. Further, the Principal Sudder Ameen over and over again directed the plaintiffs to serve summonses on the witnesses, residents of the Dacca district, whom they had named as able to prove their descent from Ajaib Lal, but the plaintiffs would not act up to the orders of the Court.

The decision of the Additional Principal Sudder Ameen of Dacca, Baboo Luckhee Narain Mitter, dismissing the suit, is therefore confirmed, and this appeal dismissed with costs.

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We remark that this case originated on the 23rd February 1864. and was not decided by the Principal Sudder Ameen until the 26th August 1865. In the meantime, it seems to have been before numerous Principal Sudder Ameens. For nearly a year, the delay in proceeding with the case was caused by different parties coming in from time to time and applying to be made defendants; but the issues in the case were not even fixed until April 1865. There can be no doubt that these issues might have been fixed at a much earlier period. Even the new defendants who came in from time to time raised no new issues. We have to remark also that the issues finally fixed by Baboo Luckhee Narain Mitter contain matters which were not in issue in the statements of the parties, and omit the very important question which was raised by one of the defendants, of the plaintiffs' suit being barred as not having been brought within 12 years of the death of Golab Dayee. We would point out also to the Principal Sudder Ameen that his decision on several of these issues is manifestly erroneous. The plaintiff's suit is not barred, because it is not brought within one year of the proclamation issued by the Judge on the death of Golab Dayee under Section 7, Regulation V. of 1799. That Section of the law applies only to moveable property, and not to landed estate which is the subject of this suit. The Section of the Limitation Law, Clause 5, Section 1, Act XIV. of 1859, which the Principal Sudder Ameen has applied, alludes to summary decisions and orders, and it is evident that there has been no summary decision or order passed against the plaintiffs in any Court. The Principal Sudder Ameen has laid down that there has been a splitting of the claim, because some vendor of a portion of the plaintiffs' estate brought a separate suit to obtain the portion to which he asserted his title. It is difficult to understand how there can be a splitting of the plaintiffs' claim. As the plaintiffs laid no claim to the portion which they had sold to a third party, the plaintiffs could not have sued for that portion.

We think that Baboo Luckhee Narain Mitter, holding the high position of a Principal Sudder Ameen, should not fall into such manifest errors as these. It raises some doubts as to his competence to fulfil the duties of that position.

We request that this case may be placed before the Judge in the English Department.

The 27th June 1866.

*Present:*

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

**Dismissal of suit—Stamp-duty—Limitation—Damages—Breach of Contract.**

Case No. 70 of 1866.

*Regular Appeal from a decision passed by Baboo Gunga Churn Shome, Principal Sudder Ameen of Sarun, dated the 14th December 1865.*

Raj Narain Singh (Plaintiff), *Appellant,*

*versus*

Koonwar Dowlut Singh and others (Defendants), *Respondents.*

*Mr. R. T. Allan* for Appellant.

*Mr. R. E. Twidale* and *Baboos Romanath Bose* and *Obhoy Churn Bose* for Respondents.

Suit laid at Rs. 14,978-13-3-7-12.

The mere omission to stamp a copy of a document, the original of which is the basis of a suit, does not justify the dismissal of the suit.

A suit for damages for breach of contract by the defendant in not giving a valid title to the plaintiff, according to his contract, to the shares which the defendant professed and agreed to sell of the property in question, is governed by the limitation prescribed by Clause 9 or 10, Section 1, Act XIV. of 1859.

In this suit, the plaintiff claims as purchaser under a deed of conditional sale, dated the 20th of September 1862, of certain shares, 2 annas and 8 pies in one case, and other fractional shares in other cases, of certain mouzahs mentioned in the plaint. After the date of the mortgage, Gunga Pershad, a decree-holder, sold the rights and interests of the mortgagors, the sale having taken place on the 2nd of February 1863. Subsequently to this sale, some of the properties in question were sold for arrears of Government revenue, and the surplus proceeds are lodged in the Collectorate. The plaintiff sues to establish his right to these surplus proceeds as against Baboo Koonwar Dowlut Singh, the principal defendant, and other defendants who were purchasers at a sale in execution of a decree against him; and to establish his title to Mouzahs Obhoiman and Dowlai which were not sold; *secondly*, he prays, as against the defendant Koonwar Dowlut Singh, damages upon the ground that that defendant at the time of the conveyance to him (plaintiff) was in possession only of 8 pies and 13 kranties, instead of the 2 annas 8 pies and

other fractional shares which he professed to convey.

The Principal Sudder Ameen rejected the suit for possession and to establish a title to the surplus proceeds upon the ground that the original document upon which the plaintiff bases his claim was not filed, and that the copy filed, or rather produced at the time of the filing of the plaint, was on an 8 annas stamp only, which, under Article 28, Schedule A of Act X. of 1862, is inadmissible.

Now, looking into that Act, we find that the document in question, which was attested as a true copy of a deed made for the use of the plaintiff being a person or party to, and taking a benefit and interest under, the deed, required a stamp of 2 rupees, because the duty chargeable on the original mortgage for 6,500 rupees was 35 rupees. But it is clear that the plaintiff did not propose to use the document as *evidence*. The Principal Sudder Ameen should have allowed the original document to have been sent for; and the original document, and not this copy, would have been evidence in the cause. This mere omission to stamp a document of this kind, which is not the basis of the suit, did *not* justify the Principal Sudder Ameen in dismissing the suit.

*Secondly*, as to the damages claimed against the defendant Koonwar Dowlut Singh for his breach of contract in not giving a valid title to the plaintiff, according to his contract, to the shares which he professed and agreed to sell of the property in question. The Principal Sudder Ameen has dismissed the suit upon the ground that claims for damages of such a nature should be brought within one year under Clause 2, Section 1, Act XIV. of 1859. He says: "That plaintiff has "omitted to mention when he discovered "the fraud, and such omission shows the "informality of the plaintiff also which "cannot be corrected."

The Principal Sudder Ameen was entirely wrong in supposing that such a suit falls under Clause 2 of Section 1. It is a suit for breach of a contract which falls within Clause 9 or 10, and might therefore certainly have been brought within 3 years from the time when the breach of contract took place; and this suit, having been brought on the 25th April 1865, *was* within three years from the date of the conveyance to the plaintiff, and is therefore clearly within time.

The decision of the Principal Sudder Ameen is in the highest degree unsatisfactory. He has resorted to a technical objection in order to get rid of the trouble of trying what possibly might have been a long cause, after the case had been pending many months before him.

We remand the case for trial, and the Principal Sudder Ameen will take it up, and try the question as to damages as if it were one cause; and the question as to plaintiff's right to the two several mouzahs which were not sold, and to the money in deposit in the Collectorate, and the surplus proceeds of sale, as a separate cause.

Each party will bear his own costs of this appeal. Costs of the former trial to abide the result of the suit.

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The 28th June 1866.

*Present:*

The Hon'ble J. P. Norman and G. Campbell, *Judges*.

**Gift (by husband to Wife)—Sale (by wife and husband respectively).**

Case No. 171 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 27th October 1865, affirming a decision passed by the Sudder Ameen of that District, dated the 14th March 1863.*

Khajah Abdool Gunnee (one of the Defendants), *Appellant*,

*versus*

Shaikh Nyamutoollah (Plaintiff) and others (Defendants), *Respondents*.

*Mr. R. E. Twidale* for Appellant.

*Baboo Gopal Lal Mitter* for Respondents.

A wife by virtue of a deed of gift from her husband sold certain property to a *bonâ-fide* purchaser exercising due care and diligence. HELD that a subsequent sale of the same property by the husband was invalid.

IT has been now found as a fact that the plaintiff's purchase was good and *bonâ fide*. The husband by deed of gift put it in the power of the wife to sell; the wife sold to a *bonâ-fide* purchaser exercising all due care and diligence in receiving the title-deeds and registering the sale. Under these circumstances, the special appellant, as subsequent purchaser from the husband, has no title which can stand against that of the plaintiff.

The appeal is dismissed with costs and interest.

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The 28th June 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Sale by Hindoo widow—Evidence of necessity—Consent of then reversioner.**

Case No. 117 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Jessore, dated the 13th November 1865, reversing a decision passed by the Moonsiff of Jenidah, dated the 13th July 1865.*

Kalee Mohun Deb Roy (Plaintiff), *Appellant,*

*versus*

Dhununjoy Shaha and others (Defendants), *Respondents.*

*Baboos Mohinee Mohun Roy* and *Kedarnath Chatterjee* for Appellant.

*Mr. G. C. Paul* and *Baboo Woomesh Chunder Banerjee* for Respondents.

The consent of the then reversioner to a sale by a Hindoo widow, though not binding evidence on the present heir, is strong presumption of the existence of necessity at the time of sale, to be rebutted only by proof of fraud and collusion or of the absence of necessity.

We think that we should not interfere with the decision at which the Principal Sudder Ameen has arrived. The special appellant urges that he has given more weight to certain evidence than he ought, and that in law that evidence did not fully prove the fact which it has been held to establish. The question was as to the legal necessity for an alienation by a Hindoo widow twenty years ago. The consent of the then reversioner to his own prejudice, and his admission on the deed of alienation that it was necessitated for the payment of debts and other expenses, had been considered sufficient evidence that such a necessity existed. No fraud is alleged, and, if the deed was executed *bonâ-fide*, the consent of the reversioner, being one of the requirements mentioned in the Hindoo Law, is, we think, a strong presumption that some such necessity existed. It is not binding evidence upon the present heir, but in the absence of any evidence proving fraud and collusion, or that no necessity did exist, we think that the consent of the reversioner is evidence of great weight.

We therefore dismiss the appeal with costs.

The 28th June 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble G. Loch, *Judge.*

**Evidence—Local Investigation—Report of Ameen.**

Case No. 2533 of 1865.

*Special Appeal from a decision passed by the Judge of Burdwan, dated the 23rd June 1865, reversing a decision passed by the Moonsiff of that District, dated the 23rd September 1864.*

Seetaram Mookerjee (Plaintiff), *Appellant,*

*versus*

Rammarian Mookerjee and others (Defendants), *Respondents.*

*Baboo Bungsheedhur Sein* for Appellant.

*Baboo Juggodanund Mookerjee* for Respondents.

The report of an Ameen upon a local investigation is sufficient evidence to support a decree, if it is believed by the Court, and considered sufficient without further evidence, to corroborate it.

The Judge seems to have been under a wrong impression. He says that, "until the plaintiff has proved a cause of action, a local investigation is unnecessary, and such investigation can never be the sole ground for a decree." By "investigation" we understand the Judge to refer to the report of the Ameen who made the local investigation, and to mean that the report of the Ameen cannot of itself be sufficient to support a decree. If that is his meaning, it appears to us to be a mistake in point of law, for the report of an Ameen upon a local investigation is sufficient evidence to support a decree, if it be believed by the Court. The Judge may act upon the report by itself, if it is sufficient to satisfy him without other evidence to corroborate it. If, taking the report and the whole of the evidence in the cause, the Judge does not believe that the plaintiff was in possession of any portion of the land which forms the "Arrah" within 12 years, *viz.*, before the commencement of the suit, he may find against the plaintiff. If he believe the report by itself, he may act upon it.

The case must be remanded to the Judge to be re-tried with reference to the above remarks.

The 28th June 1866.

*Present:*

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

**Hindoo Law of Inheritance—Evidence—Effect of bona-fide decree on judgment-debtor's heir—Estoppel—Sale by Hindoo widow—Acquiescence of reversioner—Decree for loan to pay Government Revenue.**

Case No. 48 of 1866.

*Regular Appeal from a decision passed by the Principal Sudder Ameen of the 24-Pergunnahs, dated the 31st December 1865.*

Gopaul Chunder Manna (Plaintiff), *Appellant,*

*versus*

Gour Monee Dossee and others (Defendants), *Respondents.*

*Baboos Gopal Lal Mitter* and *Ashootosh Dhur* for Appellant.

*Mr. R. T. Allan* and *Baboos Kishen Kishore Ghose, Dwarkanath Mitter, Unnoda Pershad Banerjee, Hem Chunder Banerjee, Mohesh Chunder Chowdhry, Benee Madhub Banerjee, Beneenath Bose, Chunder Kalee Ghose, Poorun Chunder Mookerjee, Otool Chunder Mookerjee, Bhugobutty Churn Ghose, Sreenath Doss, Kalee Mohun Doss, Nobbo Kishen Mookerjee, Khetturnath Bose, Gopeenath Mookerjee, Anund Chunder Ghosal, Roopnath Banerjee,* and *Opendur Chunder Bose* for Respondents.

Suit laid at Rs. 1,50,000.

The very strongest and most reliable evidence is required in the case of a claim to a share in an estate larger than the Hindoo Law allows.

In the absence of proof of collusion between the purchaser and the decree-holder, the decree is binding against the heir in expectancy of the judgment-debtor.

The fact of a revisioner being an attesting witness to a conveyance by a Hindoo widow is an acquiescence on his part which precludes him from impeaching the sale on the ground of waste.

A decree against a Hindoo widow for a loan to pay Government revenue is binding on the reversioner.

THIS was a suit by a reversioner to set aside certain alienations and other acts of the defendant, Gour Monee, which are alleged to be subversive of his interests as an heir in expectancy.

Gour Monee is the maternal grandmother of the plaintiff, and is in possession of the estate of her husband, Ram Narain Mundul. The said Ram Narain died on the 11th Aghrain 1241, and the plaintiff attained his majority on the 9th Assin 1260 B. S. This suit was instituted on the 31st December 1861. No less than thirty-five parties were made defendants, and the claim of the plaintiff refers to transactions some of them of very ancient date.

The plaintiff classes his claim under five heads:—

*1st.* Alienations made by the widow Gour Monee contrary to the Hindoo Law.

*2nd.* Properties which had been sold in execution of decrees in which the widow was personally liable, and not the estate of Ram Narain.

*3rd.* Proceeds of sales of talooks sold for arrears of Government revenue which have been permitted by the widow to be drawn out of the Collectorate in satisfaction of debts other than those of Ram Narain.

*4th.* Alienations of properties dedicated to idols.

*5th.* Properties still in the possession of Gour Monee.

The Principal Sudder Ameen of the 24-Pergunnahs has disposed of the cases of each defendant separately, and for convenience sake we have adopted the same method of procedure.

No. 1.—The first case is that of Obinash Mookerjee and others. The plaintiff has wholly failed to prove that the land in Mouzah Nowapara, with an area of 41 beegahs 13 cottahs, belonged to the estate of his maternal grandfather Ram Narain. The long occupation of the defendants is admitted, and, in the absence of all proof on the part of the plaintiff, their possession cannot be disturbed. The suit was pending in the Court below for nearly three years, and every facility was given to the plaintiff of proving his claim.

With reference to the plaintiff's allegation that the surplus proceeds of Talook No. 93 were drawn out under warrant of the Sheriff of Calcutta in satisfaction of the decree obtained by Obhoy Churn, the mortgagee, against Lukhee Narain Mundul, the brother and co-sharer of Ram Narain and others, we observe that there is nothing to connect the mortgage-deed executed by Gour Monee, the maternal grandmother of the plaintiff, with the properties mentioned in the warrant of the Sheriff; and there is no evidence adduced to show that the monies which were drawn out by the mortgagee, Obhoy Churn, the father of the defendant, under cover of the Sheriff's warrant, were in satisfaction of a decree under which Gour Monee was only personally liable. Further, the amount alleged to have been drawn out by the defend-

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ants is not stated in the plaint. The claim is altogether vague and indistinct. We dismiss the plaintiff's appeal, in as far as these defendants are concerned, with costs and interest.

No. 2.—Buzloor Roheem, defendant.—No appeal is preferred. The plaintiff obtained a decree against this defendant, which has been upheld by this Court in a separate decision.

No. 3.—The third defendant is Modhoosoodun Mundul. The written statement of the defendant raises a question as to the extent of Ram Narain's share in the estate left by the common ancestor Obhimono Doss. The plaintiff avers that the share of his maternal grandfather Ram Narain was 8 annas, whereas the defendant, who is the son of a step-brother of the common ancestor named above, asserts that the share of Ram Narain was only 4 annas.

We find, on reference to the genealogical table which is on the record, and which is not disputed, that Obhimono had four sons, Joy Narain, Gooroo Pershad, Luckhee Narain, and Ram Narain. Now, according to the ordinary rule of descent under the Hindoo Law, Ram Narain would be entitled to only 4 annas, and not to 8 annas. But the plaintiff alleges that Mothoor Mohun, the son of Joy Narain, the eldest brother of Ram Narain, by will made over the 4 annas share which he inherited from his father to Luckhee Narain and Ram Narain in equal shares—that is to say, 2 annas to each—and that Doya Moyee, the widow of the son of the second brother Gooroo Pershad, relinquished her title in a 4 annas share of the estate to Luckhee Narain and Ram Narain, and contented herself with receiving maintenance, and that thus an 8 annas share in the estate became vested in Ram Narain, *viz.*:—

| | |
|---|---|
| His own share by inheritance, | 4 annas |
| By will of Mothoor Mohun, | 2 annas |
| By relinquishment of Doya Moyee, | 2 annas |
| Total, | 8 annas. |

The will of Mothoor Mohun has not been produced in this case, and, although incidental mention is made of a will in another case to which the defendants were *not parties*, no issue was raised as to the validity of the will, nor was it filed in that suit. Further, we find that Bromo Moyee, the widow of Mothoor Mohun, has drawn out surplus proceeds to the extent of four annas—the share which the her husband inherited—without objection. The very strongest and most reliable evidence is required in cases where a claimant sets up a title to a share in an estate larger than that which, under the ordinary rules of inheritance, would devolve to him. The plaintiff files no proof whatever. The relinquishment by Doya Moyee is entirely without proof, and is quite improbable.

With reference to Talooks 397 and 398, mortgaged by Ram Narain to Modoosoodun Banerjee, said to be benamee for the defendant Modoosoodun Mundul, we observe that this transaction is more than thirty years old. The mortgage-deed has been filed in several other suits, in one Court—that of the Judge of the Twenty-four Pergunnahs—so far back as in 1839. This deed could not, therefore, have been manufactured in anticipation of a suit to be brought years after by a party whose right of inheritance even now rests upon a contingency. The properties mortgaged were sold in satisfaction of a debt of Ram Narain, and were purchased by the defendant. They were never in the possession of Gour Monee; and the plaintiff's allegation that she wasted the property is, therefore, clearly without foundation. Whether the plaintiff's equity of redemption is still alive is a question which does not arise in this case.

The claim to the garden-lands in Moheshurpore is not pressed by the pleaders for the plaintiff, appellant.

With reference to the other lands in the same village occupied by tanks, buildings, and drains, it is very clear that these properties were sold out-and-out by Ram Narain. A copy of the bill of sale is filed; the original is to be found in the record of Appeal No. 2190 of 1863 pending in this Court. The copy was taken from the records of the High Court. And the defendant has been in possession for more than 12 years. There has been no illegal alienation of the property by Gour Monee, but an out-and-out sale by Ram Narain, who was fully entitled to dispose of the property.

In the matter of the Thakoor or idol in the large tank, and the endowed lands in Moheshurpore and Doorgapore of a very small area, it is admitted that this idol and these lands are ijmalee, and the plaintiff is entitled to a declaration of his title to succeed jointly with the other members of the family on the death of Gour Monee; and this we accordingly give him. The appeal of the plaintiff, as against this defendant, is otherwise entirely dismissed with all costs and interest.

No. 4.—Modhoosoodun Banerjee, defendant.—The appeal as against this defendant is not pressed by the pleaders for the plaintiff, appellant. It is dismissed with costs and interest.

No. 5.—Modhoosoodun Deb, defendant.—It is admitted that the plaintiff has proceeded against the wrong party. This defendant is entitled to his costs in all the Courts with interest.

No. 6.—Ram Koomar Holdar, defendant.—This part is not appealed.

No. 7.—Ruttun Misser, defendant.—Not appealed.

No. 8.—Nogendro Chunder Ghose, defendant.—The appeal as against this defendant is not pressed by the pleaders for the plaintiff, appellant. It is dismissed with costs and interest.

No. 9.—Ram Comul Mundul, defendant.—With reference to the claim of the plaintiff to certain lands which he avers to be lakheraj, but which the defendant avers he is in possession of as mâl, we find that there is nothing in the resumption-proceedings filed by the plaintiff to identify the lands mentioned in those proceedings with the lands admittedly in the long occupation of the defendant. The chittahs which the plaintiff files were not relied upon in the resumption-proceedings, and are quite useless for the purpose of identification. The resumption-proceedings give no boundaries or any other information which would assist the plaintiff in identifying the lands.

With reference to the property called Lot Mandor, the possession of Ram Narain at any time within twelve years before his death is not proved. The plaintiff has not even started his case by shewing that the party through whom he claims was at any time in possession of this property. The appeal as against this defendant is, therefore, dismissed with costs and interest.

No. 10.—Romonee Dossee, defendant.

No. 11.—Joy Kisto Sircar, defendant.

It is admitted that the appeals as against these defendants must be governed by our decision in the case of defendant No. 9. These two defendants are, therefore, entitled to their costs in all the Courts with interest.

No. 12.—Bhoopal Chunder Biswas.—No appeal has been made against this defendant.

No. 13.—Ram Comul Mundul, defendant.—The defendant purchased the property claimed in 1840, and has been in possession ever since. There is no collusion proved or shewn between the decree-holder in satisfaction of whose decree the property in dispute was sold, and the defendant, the purchaser of that property. The decree was fairly and properly obtained against Gour Monee, as the widow and executrix of Ram Narain; and, in the absence of any attempt even to show collusion between the purchaser and the decree-holder, it is binding * against the plaintiff, her heir in expectancy.

* *Vide* Privy Council decision reported in Volume II., Weekly Reporter, page 37, Rajah Leelanund.

No. 14.—Huree Mohun Mundul, defendant.—This defendant's purchase of one beegah of land in the village of Shahapore, together with other land, was made after the plaintiff reached his majority. The vendor was Gour Monee, and the plaintiff was an attesting witness to the bill of sale. The petition of the plaintiff alluded to by the Principal Sudder Ameen in his decision, does not, as stated by that officer, admit the genuineness of the defendant's purchase. But the fact of his being an attesting witness to the conveyance shews, in our opinion, an acquiescence on his part in the act of Gour Monee, which cannot be impeached on the ground of waste. The appeal as against this defendant must, therefore, be dismissed with costs and interest.

No. 15.—Doorga Churn Chowdhry, defendant.—It is admitted that our decision in the case of the defendant No. 13 governs this appeal, which is dismissed with costs and interest.

No. 16.—Doorga Monee Dossee, defendant.—Our decision in the case of defendant No. 3 governs this appeal, which is dismissed with costs and interest.

No. 17.—Chunder Koomar Mundul.—This appeal follows the decision in No. 9. It is dismissed with costs and interest.

No. 18.—Chintamonee Dwalee, defendant.—No appeal has been preferred against the decision of the Court below as against the defendant.

No. 19.—Issur Chunder Mundul, defendant.—This appeal opens out the question of the extent of Ram Narain's share, *i. e.*, whether it was 4 annas or 8 annas. This has been decided by us in the appeal against the defendant No. 3, Modhoosoodun Mundul. With reference to the lands which the plaintiff claims as lakheraj and the defendant as mâl, of which he has held long and uninterrupted possession, no proof has been adduced to identify these lands with the lands which were the subject of the suit decided on the 5th July 1848, to which Mr. Garstin

and Luckhee Narain were parties, and in which Gour Monee was a *pro formâ* defendant. The appeal of the plaintiff as against this defendant must be dismissed with costs and interest including those of the zemindar, Baboo Degumber Mitter, who has been unnecessarily dragged into this suit.

No. 20.—Koylash Chunder Mundul and others, defendants.—The pleaders for the plaintiff do not press this appeal, which is dismissed with costs and interest.

No. 21.—Gunga Gobind Mundul.—The pleaders for the plaintiff, appellant, admit that our decision in the appeal of defendant No. 14, Huree Mohun Mundul, apply to the 8 beegahs 1½ cottahs of land in the village of Amgachee. With reference to the claim of the plaintiff for the remaining lands, the pleaders abandon it. Appeal dismissed with costs and interest.

No. 22.—Benee Madhub Butto Punchanun, defendant.—The small area of land involved in this appeal was granted in gift by Ram Narain on the 21st Assar 1241 to his son-in-law Thakoor Doss. He mortgaged the land to Jugurnath Misree, who foreclosed his mortgage, sued the mortgagor and Gour Monee, and, obtaining possession, sold to the defendant before the Court. This is not an alienation by Gour Monee or an act of waste on her part. She was a party to the foreclosure-suit, and never questioned the *bona fides* of the gift by Ram Narain. No collusion is proved or suggested even between Gour Monee and the present defendant. The appeal must be dismissed with costs and interest.

No. 23.—Gunesh Junonee Dossee, defendant.—The pleaders, after hearing our decision in the appeal against defendant No. 22, declined to argue this appeal, which is similar in its merits to that in No. 22. It is dismissed with costs and interest.

No 24.—Madhub Chunder Aduk, defendant.—In this case, it appears very clear that Luckhee Narain the brother, and Gour Monee the widow, of Ram Narain, mortgaged certain properties to Obhoy Churn. Mr. Garstin was by a subsequent decree declared to be a co-sharer of the said Obhoy Churn. The mortgagors failed to pay the monies borrowed. The mortgagees sued and obtained a decree against Luckhee Narain and Gour Monee. The monies were borrowed for a legal necessity, *viz.*, the payment of the Government revenue; and this necessity is recited in the mortgage-bond. The borrower was not bound to see how the money borrowed was appropriated, but we have been shewn that the bank-notes which formed part of the consideration-money found their way into the Government Treasury in payment of revenue due from a talook belonging to the estate of Ram Narain. The decree against Gour Monee, which has not been shewn to be collusive, is, therefore, clearly binding upon the plaintiff, the reversioner, and the appeal as against this defendant must be dismissed with costs and interest.

No. 25.—Dhununjoy Holdar, defendant:—Our decision in the appeal preferred against defendant No. 24 governs this case. Appeal dismissed with costs and interest.

No. 26.—Huro Pershad Chowdhry and others, defendants.—This appeal is withdrawn by consent of both parties, each paying their own costs.

No. 27.—Neel Rutno Shikaree, defendant.—The pleaders for the appellant admit that our decision on the appeal against defendant No. 3 governs this appeal, which is dismissed with costs and interest.

No. 28.—Muddun Mohun Doss, defendant.—This appeal has reference only to the 1 beegah 1⅓ cottahs of land in Chuck Etbaree. The parties admit that the plaintiff is entitled to a declaratory decree to the effect that the alienation is binding upon him during the lifetime of Gour Monee alone, and that, if he survive her, he will be entitled to succeed to the property. Such a declaration we accordingly make.

No. 29.—Raj Kishen, Madhub Chunder Banerjee, and others.—The appeal as against these defendants is not pressed by the pleaders for the appellant. It is dismissed with costs and interest.

No. 30.—Baboo Gopal Lal Thakoor, defendant.—This appeal is not pressed. No act of waste on the part of Gour Monee is shewn. The appeal is dismissed with costs and interest.

No. 31.—Bromo Moyee, defendant.—This appeal opens out the question of the extent of the share of Ram Narain under the will of Mothoor Mohun and the alleged relinquishment by Dya Moyee—points which have been disposed of by our decision in the appeal against defendant No. 3. The appeal is dismissed with costs and interest.

No. 32.—Dya Moye Dossee, defendant.—The same remarks apply. Appeal dismissed with costs and interest.

No. 33.—Hulodhur Roy, defendant.—This appeal is abandoned, and is dismissed with costs and interest.

No. 34.—Prosonno Moyee, defendant.—We concur with the Principal Sudder Ameen

that the plaintiff and his maternal grandmother Gour Monee are colluding to deprive this defendant, the heir of Luckhee Narain, of her title to perform the duties devolving on the shebait of certain endowed Birmotur lands which were decreed to her father-in-law Luckhee Narain. The appeal is dismissed with costs and interest.

The plaintiff, appellant, has asked this Court to remove Gour Monee from the possession which she still enjoys of the remaining properties belonging to the estate of Ram Narain, and to appoint a receiver who will account to Gour Monee for the profits during her life; but as no act of waste such as to threaten the destruction of the *corpus* of the estate has been established or other sufficient cause shewn such as to justify the interference of the Court, we cannot comply with his request.

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The 28th June 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, *Judge.*

**Evidence.**

Case No. 2661 of 1865.

*Special Appeal from a decision passed by Moulvie Anwar Ali, Principal Sudder Ameen of Tipperah, dated the 17th June 1865, reversing a decision passed by Moonshee Abdool Khuluk, Moonsiff of Juggernath Diggee, dated the 30th July 1864.*

Khemun Kuree Chowdranee and others (Plaintiffs), *Appellants*,

*versus*

Beerchunder Joobraj and others (Defendants), *Respondents.*

*Baboos Kali Mohun Doss* and *Sreenath Banerjee* for Appellants.

*Baboos Dwarkanath Mitter* and *Onookool Chunder Mookerjee* for Respondents.

"*Ought not to be accepted*" may have different meanings with reference to documentary evidence and to parol evidence.

We think that this appeal must be dismissed, for, even assuming that the *onus* lay upon the defendant to prove what land fell within the exception, the Principal Sudder Ameen says that "the Ameen has filed his "report, from which it is fully clear and "established that the disputed land apper-"tains to Mouzah Ramroygram in the khood-"kasht of the zemindar and in the posses-"sion of the defendant, appellant." If that report was admissible in evidence, there was evidence on the part of the defendant to show that this land was in his possession and did belong to the khood-kasht of the zemindar. This was the conclusion arrived at by the officer sent to make a local investigation, and his report is evidence.

But then it is said that the Principal Sudder Ameen ought not to have acted upon the report of the Ameen; inasmuch as the Ameen had attached to his report certain documentary evidence which was admissible, whereas many of these papers were rejected by the Principal Sudder Ameen as admissible. The Principal Sudder Ameen has gone through several of the documents, and has given good reasons for not considering them satisfactory. With regard to other documents and the parol evidence, the Principal Sudder Ameen has used an ambiguous word, which means, as I understand, that they "ought not to be accepted." "Ought not to be accepted," with reference to written documents, and to parol evidence, may have different meanings. With regard to documentary evidence, the words may mean that it is not legally admissible—as to parol evidence, that it is not worthy of credit. We think that is the meaning of the Principal Sudder Ameen, and we have not been shown any document to which reference was made by that expression which ought to have been admitted.

If it were necessary, the case might be referred back to the Principal Sudder Ameen to specify more clearly what he means. But nothing has been shown to induce us to believe that there is such an ambiguity in the expression of the Principal Sudder Ameen as to require us to send the case back, and thus to continue the litigation between the parties and to cause further delay and expense without benefit to either of them. Under these circumstances, it appears to us that the judgment of the Principal Sudder Ameen must be affirmed with costs.

The 28th June 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble G. Loch, *Judge*.

**Limitation—Section 14, Regulation III., 1793—Pendency of suit to set aside Revenue-sale.**

Case No. 3378 of 1865.

*Special Appeal from a decision passed by Baboo Gunga Churn Shome, Principal Sudder Ameen of Sarun, dated the 21st August 1865, affirming a decision passed by Moulvie Furreedooddeen, Sudder Ameen of that District, dated the 27th October 1862.*

Munnoo Bebee (Plaintiff), *Appellant*,

*versus*

Nundkishore Lall and others (Defendants), *Respondents*.

*Baboo Anund Gopal Paulit* for Appellant.

*Baboos Greesh Chunder Ghose* and *Debendro Narain Bose* for Respondents.

The pendency of a suit to set aside a revenue-sale is not a legal reason, within the meaning of Section 14, Regulation III., 1793, to support a plea of limitation.

THE right to sue accrued when the purchase was made under the revenue-sale, and the opposite party could not have opposed the claim on the ground that a suit was pending to set aside the sale. The defendant was no party to that proceeding. We do not think that that suit is a legal reason within the meaning of Section 14, Regulation III. of 1793. It certainly did not preclude the plaintiff from obtaining redress if she had a right. The judgment of the Lower Appellate Court is right, and is affirmed with costs.

The 28th June 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble G. Loch, *Judge*.

**Maintenance—Right of suit by wife against husband—Section 316, Code of Criminal Procedure.**

Case No. 3462 of 1865.

*Special Appeal from a decision passed by Moulvie Itruth Hossein, Principal Sudder Ameen of Behar, dated the 12th September 1865, affirming a decision passed by Moonshee Ali Ahmed, Moonsiff of Aurungabad, dated the 24th July 1865.*

Lallah Gopee Nauth (Defendant), *Appellant*,

*versus*

Mussamut Jeetun Kooer (Plaintiff), *Respondent*.

*Baboo Roopnath Banerjee* for Appellant.

*Baboos Unnoda Persad Banerjee* and *Chunder Madhub Ghose* for Respondent.

Section 316, Code of Criminal Procedure, does not bar a suit by a wife against her husband for maintenance.

IT is not contended that, by the Hindoo Law, a wife is not entitled to have maintenance provided for her by her husband if he refuses to maintain her. But it is contended that, by virtue of the operation of Section 316, Act XXV. of 1861, the plaintiff is barred from suing her husband for maintenance. It appears to us that Section 316 does not deprive the wife of any remedy in the Civil Courts which she would otherwise have had. Therefore, it not being contended that the wife had no right to maintenance from her husband, we see no ground for disturbing the judgment of the Lower Appellate Court which has awarded maintenance to her. The decree is affirmed with costs.

The 29th June 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Joint Hindoo Family—Presumption of joint property.**

Case No. 3612 of 1865.

*Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 22nd August 1865, modifying a decision passed by the Sudder Ameen of that District, dated the 29th May 1865.*

Gooroo Pershad Roy and others (Defendants), *Appellants,*

*versus*

Debee Pershad Tewaree (Plaintiff), *Respondent.*

*Baboos Luckhee Churn Bose* and *Mohendro Lal Seal* for Appellants.

*Baboo Umbika Churn Banerjee* for Respondent.

The rule of Hindoo Law in cases of joint-family property (*i. e.*, that it must be presumed to be joint until proved to be the contrary) is applicable to a case where the property has passed by sale into the hands of third parties, and has been redeemed by private purchase by one of the former shareholders.

THE facts in this case, as found by the Lower Court, are that the property of certain judgment-debtors, Kishen Pershad Tewaree and Gooroo Pershad Tewaree, were advertised for sale. Plaintiff put in a claim as being sole proprietor of the attached property, but his application was rejected. The Court executing the decree, holding that the property was joint-family estate, ordered the rights and interests of the debtors to be sold in execution. After the sale, plaintiff purchased back the property from the auction-purchaser, and claims to be the sole proprietor, and brings this action to establish his right. The Judge holds that the rule of Hindoo Law in cases of joint-family property is quite irrelevant in a case where the property has passed, as in this case, by sale into the hands of third parties, and has been redeemed by private purchase by one of the former shareholders. It then becomes, unless shewn to the contrary, his own private property, and he therefore gives a decree for the plaintiff, and affirms the decision of the first Court.

Two objections are taken to this judgment: *1st*, That, though the plaintiff has acquired the property in his own name, yet, by the presumption of Hindoo Law, the members of a joint Hindoo family have an interest in such acquisitions. *2nd*, That, even if plaintiff has purchased the property with his own funds, yet, as the property was formerly ancestral, the other members of the joint family living in commensality have an interest in it.

The pleader for the special appellant gave up the second objection when pressed by the Court to support his allegation by the Hindoo Law. On the first point, we find that the family were originally joint in food, residence, and business; that the property in question was ancestral; that it was sold for the debts of some of the members of that family and re-purchased by the plaintiff, but whether from his own private funds or from other resources belonging to the family has not been found. The Judge calls the plaintiff's purchase a private purchase, but we cannot from these words gather whether the Judge intended to say that plaintiff purchased the property with his own money, or that he used the word "private" in contradistinction to the public sale in execution. As the family have all along been joint, and they are still living in commensality, the presumption of Hindoo Law that the property is joint property does, we think, arise, unless plaintiff can distinctly show that he has purchased it from his own private funds. We remand the case for a clear finding on this point.

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The 29th June 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Lakheraj (Resumption or assessment of)—Limitation.**

Case No. 99 of 1866.

*Special Appeal from a decision passed by the Judge of Midnapore, dated the 9th December 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 15th August 1865.*

Sristeedhur Sawunt and others (Defendants), *Appellants,*

*versus*

Romanath Rokhit (Plaintiff), *Respondent.*

*Mr. F. Barrow* and *Baboo Upprokash Chunder Mookerjee* for Appellants.

*Baboos Dwarkanath Mitter* and *Ashootosh Dhur* for Respondent.

A suit for the resumption or assessment of lakheraj land is barred by limitation under the proviso to Clause 14, Section 1, Act XIV. of 1859, if the defendant shows possession as lakheraj before 1st December 1790, unless the plaintiff can rebut that evidence by proving the land to be mâl by payment of rent or otherwise.

THIS was a suit to assess lands as held on an invalid rent-free tenure. Both the Lower Courts decreed plaintiff's suit. It is pressed upon us now in special appeal—

I. That the burden of proof has been wrongly put upon defendant, special appellant, who alleges the lakheraj title.

II. That special appellant's possession as proof of his title was not sufficiently considered, and that such possession since 1790 bars the plaintiff's suit.

It appears that this case was remanded with an order of the Judge that the burden of proof was to be put on plaintiff. But on the appeal by the plaintiff now before us, the Judge (wrongly, it is pleaded) put the burden of proof on defendant, saying he was clearly in error in his previous order. The Judge cited the decision of the Court, 31st May 1865, A. Forbes, Appellant, in support of his view.

In respect to the appellant before us, the Judge records as follows: "As regards the "lands held by Sristeedhur Sawunt, he files "as his title an alleged sunnud of Mr. A. "Young, the Secretary of the *Bazee* "*Zumeen Duftur*, declaring certain lands "*aima chuck* to be *valid lakheraj*. Now, "respondent has had the opportunity (and "has elected not to take it) of showing that "the lands in dispute are the only lands "covered by the sunnud, and, besides, that "that sunnud is a manifest forgery. It "purports to have been registered by a Col-"lector, Mr. Pearce, in 1795, but that "registration is grossly misspelt, and Mr. "Pearce's name is written "*Puraed;*" and "that registration purports to be confirmed "by "Mr. *A. Eyeng*" for "A. Young" in "1764, or 31 years before it was ever made "at all; and the Collector's No. of Register "and that of the *Bazee Zumeen Duftur*, "which never could correspond, are made "exactly to do so."

Now, as to the forged document, Section 17, Regulation XIX. of 1793, enacts as follows:—

"If it shall appear to any Court of Judi-"cature during the course of a trial that "a grant for land to be held exempt from "the payment of revenue, dated prior to "the 1st December 1790, has been forged, "or that the name of the original grantee "has been erased, and any other name sub-"stituted, or that any name not in the origi-"nal grant has been inserted, or that the "denomination of the tenure in the original "grant has been erased or altered, or that "the date of the grant has been changed, "or that the grant has been antedated, the "grant shall be adjudged null and void, "as far as regards the exemption of the land "from the payment of revenue, and the land "shall be subjected to the payment of re-"venue accordingly."

Act XIV. of 1859 is the later law. But still the proviso, Section 1, Clause 14, of it enacts:—

"To suits by the proprietor of any land or "by any person claiming under him for the "resumption or assessment of any lakheraj or "rent-free land, the period of tweve years "from the time when the title of the person "claiming the right to resume and assess such "lands, or of some person under whom he "claims, first accrued. *Provided that, in* "*estates permanently settled, no such suit,* "*although brought within twelve years from* "*the time when the title of such person first* "*accrued, shall be maintained if it is shewn* "*that the land has been held lakheraj or* "*rent-free from the period of the Permanent* "*Settlement.*"

Now, with whatever reluctance to aid so gross a case of forgery as this on the Civil Side, still we have no doubt that, under the above proviso of Clause 14, Section 1, Act XIV. of 1859, the defendant had only to show possession as lakheraj before 1790 to bar the plaintiff's suit, unless the plaintiff could show, in order to rebut defendant's evidence of possession as lakheraj before 1790, that rents had been collected from the land, or otherwise show it to be mâl.

In this view, we remand this case to be re-tried with reference to the above remarks; that is, if defendant, on whom is *this* burden, can show possession before 1st December 1790, and plaintiff cannot rebut this evidence, plaintiff's case must be dismissed as barred by the absolute limitation provided by the concluding proviso in Clause 1, Section 14, Act XIV. of 1859.

Remand accordingly.

The 30th June 1866.

*Present:*

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

**Examination of witnesses—Day of hearing.**

Case No. 343 of 1866.

*Application for review of judgment passed on the 16th May 1865, in Special Appeal No. 3395 of 1864.*

Ranee Oojulla Koomaree Dhujamonee Debia (Plaintiff), *Petitioner,*

*versus*

Gholam Mostafa Khan *alias* Modhoo Khan and others (Defendants), *Opposite Party.*

*Baboo Kishen Succa Mookerjee* for Petitioner.

*Mr. R. E. Twidale* and *Baboo Onoocool Chunder Mookerjee* for Opposite Party.

Where a day has been fixed for hearing the witnesses, the Court is not competent to decide the case without waiting for that day, in the absence of the witnesses, on the ground that no amount of witnesses would be believed.

THE Court which tried this case acted illegally in disposing of it before the day appointed for hearing the plaintiff's witnesses, on the ground that it was not likely to believe them. There might have been very good ground for refusing to adjourn the case beyond a day once fixed, but after a day had been appointed for hearing the evidence, to decide the case without waiting for that day, in the absence of the witnesses, was illegal to a degree which much surprises us in our Court. The case is remanded to the first Court for re-trial. That the Judicial Commissioner should have set forth the doctrine that it was right to decide without waiting for the witnesses, because no amount of witnesses would be believed, is especially surprising.

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The 30th June 1866.

*Present:*

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

**Appeal—Arbitration.**

Case No. 978 of 1866.

*Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 17th January 1866, affirming a decision passed by the Deputy Commissioner of Maunbhoom, dated the 1st December 1865.*

Hulodur Sungiree (Defendant), *Appellant,*

*versus*

Gunesh Santhal and others (Plaintiffs), *Respondents.*

*Baboo Umbika Churn Banerjee* for Appellant.

*Mr. R. E. Twidale* and *Baboo Uprokash Chunder Mookerjee* for Respondents.

An appeal, on the allegation of want of consent of parties, lies from the order of a Lower Court, under Section 327, Code of Civil Procedure, directing a private award of arbitration to be filed and enforced.

*Jackson, J.*—THIS was a case in which an application was made under Section 327 of the Code of Civil Procedure to file and to enforce a private award. The defendant, being called upon to show cause why the award should not be filed under that Section, came in and alleged that he had not consented to the arbitration. The Court of first instance enquired into that matter, and decided that the parties had consented, and accordingly directed that the award should be filed and enforced. On appeal to the Judicial Commissioner, that officer held that no appeal lay under the Section cited, and he consequently rejected the appeal. From that decision, a special appeal is now preferred. In a case arising under the same Section before Mr. Justice Steer and myself, on the 7th January 1864, it was held that an appeal in such cases would lie, and in that case the appeal was entertained, and the award was actually set aside. In a more recent case before the first Bench of this Court, when the Chief Justice and myself were present, where a private award had been filed by the order of the Principal Sudder Ameen of Moorshedabad, a regular appeal was preferred to this Court, and, on the hearing of that appeal, the Court, being of opinion that no defect of law was apparent on the face of the award, and no improper conduct having been attributed to the arbitrators, and there being no allegation of want of consent of parties, that appeal was dismissed, and the decision below was affirmed.

The right of appeal, therefore, of parties in a case like the present has been affirmed by decisions of this Court. It appears to me, therefore, that the Judicial Commissioner was wrong, and that the case ought

to be remanded to him for investigation on its merits—that is, to enquire whether the appellant had actually consented and submitted to the arbitration.

*Markby, J.*—I understand that it is the established practice of this Court to receive such appeals, and I therefore think that this appeal ought also to be received.

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The 2nd July 1866.

*Present:*

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

**Hindoo Law of Inheritance—Widow—Brother—Limitation—Possession as Trustee.**

Case No. 852 of 1866.

*Special Appeal from a decision passed by the Deputy Commissioner of Kamroop, dated the 28th December 1865, affirming a decision passed by the Moonsiff of that District, dated the 21st August 1865.*

Chunder Kant Surmah and others (Defendants), *Appellants,*

*versus*

Bungshee Deb Surmah (Plaintiff), *Respondent.*

*Baboo Motee Lal Mookerjee* for Appellants.

*Baboo Luleet Chunder Sein* for Respondent.

According to the Daya Bhaga, a Hindoo widow is the heiress of her husband in preference to his brother.

Possession as a trustee for a brother's widow is not adverse possession against her.

THIS was a suit for confirmation of the title of the plaintiff to be administrator of the estate of Ram Kant, deceased, under a deed dated the 15th Bysack 1272 B. S. He is opposed by the widow of the elder brother of the said Ram Kant, who avers that the property was the self-acquired property of her husband, and that she is his legal heiress. There is a further plea that she has adopted a son, but this averment was held by both Courts to be not proved.

The Deputy Commissioner of Kamroop held that, according to Hindoo Law, the special appellant, the widow, would not inherit the estate of her deceased husband, and was only entitled to have maintenance; further, that the special respondent's grantor, or Ram Kant, had been in adverse possession of the property in dispute for more than thirty years. The suit was therefore decreed.

The Deputy Commissioner is clearly wrong in his law. The case is governed by the law as laid down in the Daya Bhaga, and the widow is clearly the heiress of her deceased husband in preference to his brother. The Deputy Commissioner has also omitted to try whether the property was the joint property of the two brothers, Jopra Gossain and Ram Kant, or the self-acquired property of the former. If the property was joint, Ram Kant could only alienate a moiety; if separate, he had no title whatever to it. The fact of Ram Kant being in possession for 30 years has nothing to do with the question of the special appellant's title; for that possession, if the property was joint, was that of a trustee for the widow of his brother, and was not adverse.

The case is, therefore, remanded for re-trial with reference to these remarks. Costs to follow the result.

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The 3rd July 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble H. V. Bayley, *Judge.*

**Appeal (Reversal of decree on plea of limitation and remand for trial on merits)—Local Investigation (by Moonsiff's Sheristadar)—Grounds of appeal.**

Case No. 1930 of 1865.

*Special Appeal from a decision passed by Mr. M. A. G. Shawe, Judge of Sylhet, dated the 21st April 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 23rd December 1864.*

Mahomed Anjob and others (Plaintiffs), *Appellants*,

*versus*

Gouripershaud Shaw and others (Defendants), *Respondents*.

*Mr. R. T. Allan* and *Baboo Anund Chunder Ghosal* for Appellants.

*Baboo Dwarkanath Mitter* for Respondents.

*Quære.*—Whether, when a Lower Appellate Court reverses a decree of a Lower Court on the plea of limitation, and remands the case to be tried upon the merits, such decision is an order prior to decree, from which no appeal will lie.

The Judge reversed the decision of the Principal Sudder Ameen, and ordered a remand and a fresh local investigation by the Moonsiff. The Moonsiff, being unable to go himself, was subsequently authorized by the Judge to appoint a suitable officer, and he, accordingly, appointed his Sheristadar to conduct the investigation. The Principal Sudder Ameen acted upon the report of the Sheristadar, and, on appeal to the Judge, the plaintiff objected to the report on the ground of partiality. HELD that he could not now object to the report, on the ground that the Judge had no authority to remand the case, or that the Moonsiff had no authority to substitute the Sheristadar for himself, or that the report of the Sheristadar was invalid and illegal.

*Peacock, C. J. (Bayley J., concurring).*—THIS was a case which involved a question of boundary brought in the first instance before the Principal Sudder Ameen. An appeal was preferred to the Civil Judge. The case on the first trial was referred for local investigation to an Ameen. The Civil Judge thought that the Ameen's report was unsatisfactory; he reversed the decision of the Principal Sudder Ameen, and remanded the case, directing that a local investigation should be made by the Moonsiff of a particular district, in person. The Moonsiff afterwards sent in a Perwannah, stating that he had a large amount of business on his file, and that he would not be able to make a report within a reasonable time, and he asked permission of the Judge that he might be relieved from conducting the investigation. The Judge directed that, if he should be unable to conduct the investigation himself, he should appoint a suitable officer to do so. The case was consequently referred to the Moonsiff's Sheristadar, who conducted the second local investigation. The result of that investigation was brought before the Principal Sudder Ameen, and he decided against the plaintiff. The plaintiff then preferred an appeal to the Zillah Judge, but he did not then object to the former decision of the Judge remanding the case, or to the fact of the Moonsiff's having appointed the Sheristadar in his place to make the local investigation. The Judge dealt with the evidence in appeal, and affirmed the decision of the Principal Sudder Ameen.

The case is now specially appealed to us, and one of the grounds of appeal is that the order of remand by the Judge on the first appeal was not carried out, the Moonsiff who was directed to make the investigation personally not having done so, and that the Judge had no power, after his decree remanding the case, to authorize the Moonsiff to appoint any other officer; that it was at all events illegal to appoint the Sheristadar to make a local investigation; and that the judgments of both the Lower Courts were illegal, inasmuch as they were passed upon the report of an officer who was legally incompetent to conduct the local investigation. There was also another ground of appeal, that the order of remand by the Judge upon the first appeal was clearly illegal, and that it was not warranted by Section 351, Act VIII. of 1859, inasmuch as the Court of first instance had not disposed of the case upon a preliminary point so as to exclude evidence of any fact material to the investigation of the case, and that the subsequent proceedings must be treated as nullities.

The contention is that the report of the Sheristadar must be treated as a nullity, and that the Lower Courts were wrong in referring to it. But it is contended by the respondent that, even if the Judge was wrong in remanding the case in the first appeal, an appeal ought to have been preferred against the decree by which it was remanded. In answer to that argument, it was contended by the appellant that an appeal would not lie against that order of the Judge under Section 363, Act VIII. of 1859.

Section 363 enacts: "No appeal shall "lie from any order passed in the course "of a suit and relating thereto prior to "decree, but if the decree be appealed against, "any error, defect, or irregularity in any "such order affecting the merits of the case "or the jurisdiction of the Court, may be "set forth as a ground of objection in the "memorandum of appeal."

It appears to me quite clear that, when the Judge on the first appeal reversed the first decision of the Principal Sudder Ameen, and remanded the case to be re-tried, and ordered a new local investigation to be conducted by the Moonsiff, that was a decree of the Judge

which might have been appealed against. It was not an interlocutory order prior to decree, but it was an actual decree of the Judge disposing of the case—so much so, that the case could not come back again to the Judge until the Principal Sudder Ameen had made a second decision. It is clear that the Judge could not upon appeal reverse the decision of the Principal Sudder Ameen by an order prior to decree; it could only be by a decree of the Judge in appeal that the decree of the Principal Sudder Ameen could be reversed.

Section 349 of the Procedure Act says: "The Appellate Court, after hearing the "appeal, shall proceed to give its judgment "in the manner hereinbefore prescribed for "giving judgment in Courts of original "jurisdiction."

Section 350: "The judgment may be for "confirming or reversing or modifying the "decree of the Lower Court," and the Appellate Court has power in certain cases to remand the case.

Now, it is clear that, when the Judge reversed the decision of the Principal Sudder Ameen, and ordered a remand and a fresh local investigation, there was clearly a judgment and decree reversing a decree of the Principal Sudder Ameen, and such judgment and decree cannot in any sense of the words of Section 363, Act VIII. of 1859, be said to be "an order passed in the course of a suit and relating to the suit prior to decree." It appears to me, therefore, that the judgment of the Judge upon the first appeal, if erroneous in law, might have been appealed to this Court. Some cases were referred to in the course of argument, in one of which it was, I think, said that Justices Norman, Kemp, and E. Jackson had held that, where a Civil Judge reverses a decree of a Principal Sudder Ameen upon a plea of limitation, and remands the case to be tried upon the merits, such decision is an order prior to decree. If that statement is correct, I think it is authority to show that the remand in this case was an order prior to decree. But I cannot myself agree in such a construction, and if this case depended solely upon the determination of that question, I think the point ought to be referred to a Full Bench. But I do not think that this case depends upon that question alone. The Principal Sudder Ameen acted upon the report made by the Sheristadar upon the local investigation made after the remand, and upon the other evidence in the case. The plaintiff appealed from that decision of the Principal Sudder Ameen to the Judge, and he did not in any of his grounds of appeal object that the remand by the Judge on the first appeal was illegal, or that the report of the Sheristadar was contrary to law. He objected to the report merely upon the ground that the local enquiry was conducted with partiality by the Sheristadar, but he never took any objection to the report upon the ground now set up, *viz.*, (1) that the Judge had no authority to remand the case, and (2) that the Moonsiff had no authority to substitute the Sheristadar for himself. Are we then to say that the Judge was wrong in not holding that the report of the Sheristadar was a nullity upon the grounds now contended for, when neither of those grounds were ever taken in the grounds of appeal to the Judge, but a different ground of objection, *viz.*, partiality of the Sheristadar was alone taken?

Section 372 of Act VIII. of 1859 enacts that, "unless otherwise provided by any law for "the time being in force, a special appeal "shall lie to the Sudder Court from all "decisions passed in regular appeal by the "Courts subordinate to the Sudder Court, "on the ground of the decision being con-"trary to some law, or usage having the "force of law, or of a substantial error or "defect in law in the procedure or investi-"gation of the case, which may have pro-"duced error or defect in the decision of "the case upon the merits, and on no other "ground." It is not contended in this case that the decision of the Judge was contrary to law; he simply finds that the land was not situated within the plaintiff's boundaries. That is a question of fact, and not a question of law. Then was there an error or defect in law in the procedure or investigation of the case? We cannot say that the Lower Appellate Court was wrong in referring to the report as evidence, when the only objection taken to the report in the grounds of appeal to him was one fact, *viz.*, partiality of the Sheristadar, and not one of law, such as the two objections which are now taken to the report.

I have now only to refer to Section 334 to show that there was no error in law on the part of the Judge, in not reversing the decision of the Principal Sudder Ameen upon the ground, that he had acted upon a report which was invalid and illegal for the objections now made to it. The objection in the grounds of appeal to the Judge was partiality on the part of the Sheristadar. The Judge

was right in not raising other objections, and he was clearly not bound to enter into any other objections than those which were made by the grounds of appeal.

Section 334 says: "The memorandum of "appeal shall set forth concisely, and under "distinct heads, the grounds of objection to "the decision appealed against without any "argument or narrative, and such grounds "shall be numbered consecutively. The "appellant shall not, without leave of the "Court, urge or be heard in support of any "other ground of objection."

If the appellant thought that his grounds of appeal in the memorandum filed with the Judge were not sufficient, he might have applied to the Judge to allow him to be heard upon the objections now urged before this Court; but he not did not do so, nor did he ever make the objections upon which he now relies previously to his appealing to this Court. He cannot ask this Court to reverse the decision of the Judge, because he did not reverse the decision of the Principal Sudder Ameen for grounds which were never mentioned in the appeal to the Judge, nor ever brought to his notice.

The decision of the Lower Court must be affirmed with costs.

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The 3rd July 1866.

*Present:*

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

**Judgment of Lower Appellate Court (reversing that of Lower Court)—Suit for confirmation of possession and declaration of title—Proof of possession—Documentary evidence.**

Case No. 2701 of 1865.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 11th August 1865, reversing a decision passed by the Sudder Ameen of that District, dated the 31st August 1864.*

Shibchunder Bhuttacharjee (Defendant), *Appellant,*

*versus*

Juggut Tara Chowdrain (Plaintiff), *Respondent.*

*Baboos Sreenath Doss and Kishen Dyal Roy* for Appellant.

*Baboo Onookool Chunder Mookerjee* for Respondent.

In a suit for confirmation of possession and declaration of title, a decree cannot be given to the plaintiff without a clear finding that the plaintiff was in possession of the land in dispute.

When a Lower Court dismisses a suit on the ground that the documents on which the plaintiff based his title were not authentic and genuine, it is incumbent on the Lower Appellate Court, before giving the plaintiff a decree, to find whether the documents in question were authentic and genuine.

*Jackson, J. (Markby, J., concurring).*—It appears to me that the decision of the Lower Appellate Court in this case ought to be set aside by reason of a substantial defect in law in the investigation of the case which has produced a defect in the decision of the case upon the merits.

*Firstly*, because the Lower Appellate Court has omitted to find whether or not the plaintiff was in possession of the land in dispute. The suit was one for confirmation of possession and declaration of title. The cause of action must have been something which either disturbed or threatened the possession which the plaintiff said was in him, and the declaration of title would simply be an accompaniment to the confirmation of possession. The plaintiff would have to prove the case which he had set up, and if the Court found, on enquiring into the case, that there was no possession, it could not give a decree confirming possession. Now, the first Court (the Court of the Sudder Ameen) distinctly found that the plaintiff was not and had not been in the possession of the disputed land. For that, among other reasons, it dismissed the suit. The Lower Appellate Court, without recording any finding upon that point, merely finding that title existed, gave the plaintiff a decree.

*Secondly*, one of the main grounds on which the Sudder Ameen dismissed the suit was that he found the documents on which the plaintiff based his title were not authentic and genuine documents. The Principal Sudder Ameen in his decision states: "It appears that the said mourosee on the part of the plaintiff has been clearly proved by the documentary evidence from 5 to 17, and that the evidence of the witnesses cited by the plaintiff has supported the same." But, referring to the original Bengalee decision of the Principal Sudder Ameen, it is quite clear he means that the title of the plaintiff is proved by the documentary evidence, and that

the same matter (that is to say, plaintiff's title) is further proved by the evidence of the witnesses. That, it seems to me, is merely a declaration by the Principal Sudder Ameen that the documents, which the plaintiff has filed in this case, do, if they are proved, and if they are believed to be genuine and authentic, establish a title in him. He seems entirely to give the go-by to that question which had occupied the attention of the Sudder Ameen, namely, whether those documents were really genuine or not.

The judgment of the Appellate Court, under Section 359 of the Code of Civil Procedure, must "contain the point or points for determination, the decision thereupon, and the reasons for the decision." It cannot be doubted that one of the points in this case (and a point of considerable importance) was whether the documents which the plaintiff had filed were what he asserted them to be, or were what the Sudder Ameen had held them to be—spurious and unproven documents.

If it appeared to me that the Principal Sudder Ameen had in any manner, however superficial, or for reasons, however unsatisfactory, decided as a matter of fact that those documents really were what they purported to be, that is to say, that they bore the signatures of, and were executed by, the persons by whom they purported to be executed, and that they were genuine and authentic documents; and if he had then gone on to say that those documents, being genuine, substantiated the plaintiff's title, I should be compelled to say that we had no further authority to question that finding. It would not be for us to prefer the decision of the Court of first instance on the ground that it was more complete, more satisfactory, or more lucid than the decision of the Lower Appellate Court; but we should have to accept its finding on a question of fact. But, as I have said, this matter has been entirely overlooked by the Principal Sudder Ameen. I therefore think that on this point, and also the point first mentioned, the Court below must find anew. I think that the case ought to be remitted to the Principal Sudder Ameen in order that he may find specifically upon these points. He will also bear in mind the necessity of finding, not only whether the documents in question were authentic and genuine, but also, in the case of each document, whether it was properly evidence in the case. Having found upon these two points, he will re-consider the whole case, and pass such decree as justice demands.

The 3rd July 1866.

*Present:*

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

**Witnesses—Refusal of Court to enforce attendance of parties as—Reasons for.**

Case No. 2945 of 1865.

*Special Appeal from a decision passed by the Judge of Midnapoor, dated the 29th June 1865, affirming a decision passed by the Moonsiff of that District, dated the 27th February 1865.*

Siddhessurree Debia (Defendant), *Appellant,*

*versus*

Denobundhoo Koondoo (Plaintiff), *Respondent.*

*Baboo Oprokash Chunder Mookerjee* for Appellant.

*Baboos Nilmadhub Sein* and *Mohesh Chunder Bose* for Respondent.

It is not incumbent on a Court to give detailed legal reasons for its refusal to comply with an application to enforce the attendance of a party to a suit as a witness.

*Jackson, J. (Markby, J., concurring.)*—It appears to me that the ground of special appeal which has been urged by the appellant's vakeel has no force in it. His ground is that the Court of first instance refused to summon, on his application, the plaintiff for the purpose of giving evidence in the case, and that the Lower Appellate Court has affirmed that refusal. He objects that the first Court gave no legal reasons for its refusal. It seems to me that it is not incumbent on a Court to give legal reasons (if by that is meant detailed legal reasons such as to satisfy the mind of the applicant) for its refusal to comply with such an application, because Section 162 of the Code of Civil Procedure expressly says that, "if "any party to a suit shall require to en-"force the attendance of any other party "thereto as a witness, he shall, by himself "or his pleader, make a special application "to the Court for an order requiring the "attendance of the party, *and shall show,* "*to the satisfaction of the Court, sufficient* "*grounds in support of such application;* "*otherwise a summons shall not be issued.*"

Now, when the first Court refused to summon the plaintiff at the defendant's request, we must infer, I think, that sufficient grounds had not been shown to the satisfaction of the Court in support of that application. The Judge, in noticing the circumstance, says, it seems to me reasonably enough, that the plaintiff sued upon a kubala or Bill of Sale, which he alleged had been executed by the other parties; that the plaint in which the kubala was set up had been verified, according to law, and, having so verified, the plaintiff, if it should appear that he had knowingly put forth any statement which was false or which he did not believe to be true, was liable to all the penalties with which perjury is visited. That being the case, it does not appear what good purpose would have been answered by summoning the plaintiff except merely harassment and annoyance. I think, therefore, that the decision of the Lower Appellate Court should be affirmed with costs.

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The 3rd July 1866.

*Present:*

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

**Parties to a suit—Pleading.**

Case No. 3083 of 1865.

*Special Appeal from a decision passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 31st July 1865, reversing a decision of Mr. W. Wright, Principal Sudder Ameen of Pubna, dated the 16th September 1864.*

Kristo Gopal Shaha (Plaintiff), *Appellant,*

*versus*

Kasheenauth Shaha and another (Defendants), *Respondents.*

*Baboo Toolsee Doss Seal* for Appellant.

*Baboos Chunder Madhub Ghose, Greeja Sunker Mojoomdar,* and *Issen Chunder Chuckerbutly* for Respondents.

A person cannot at one time set himself up as a substantial party in a suit, contesting it in both the Lower Courts on the merits, and then turn round and say in special appeal that he has nothing to do with it, and has been unnecessarily brought in.

*Jackson, J. (Markby, J., concurring).*—It appears to me that this appeal cannot be sustained any more than Special Appeal No. 3003. The real issue in the case before the Principal Sudder Ameen was whether a purchase of a certain property made in the name of Goluck Shaha had been made for his benefit or for the benefit of Kashee and Bharut Shaha, the defendants, who held the title-deeds. That issue was raised by Sreekisto, who affirmed that he had purchased by a private conveyance Goluck's rights, but that he found the defendants in possession. Incidentally it came out that Goluck's rights, whatever they then were, had lately been purchased at a sale in execution of a decree by Kristo Gopal, the present special appellant. The Court, therefore, thought it right to suggest to the plaintiff to make Kristo Gopal a co-defendant. Perhaps, in reality, it would have been more convenient and more logical if he had been made a co-plaintiff, because the question being between Goluck on the one side and Bharut and Kashee on the other, there was no question at that time before the Court between the actual plaintiff Sreekisto and Kristo Gopal, although a question might afterwards arise in the event of Sreekisto succeeding in his suit. In any view of the case, it does not appear to me to have been necessary to bring Kristo Gopal into the suit. However, when once brought in, he seems to have taken the most active part in the proceedings. He put in a statement in which he combated with all his power the title of his co-defendants Kashee and Bharut. He maintained that they were persons without means, mere servants, who could not possibly have made this purchase, and in every way controverted their rights. The suit was dismissed by the Court of first instance, but on grounds affecting the alleged purchase by Sreekisto, and consequently highly favorable to the special appellant Kristo Gopal. Sreekisto had appealed from that decision to the Zillah Judge; and Kashee and Bharut, the actual defendants, found or fancied themselves in this position that, if Sreekisto succeeded in procuring the judgment of the first Court to be set aside as far as it related to his purchase, their title would be in jeopardy, and they would be liable to be turned out of possession of the property. They therefore also appealed, making Goluck and Kristo Gopal co-respondents. The reason for that apparently was that, as by the decision of the Lower Court Kristo Gopal was declared to be the representative of Goluck's rights, Kristo Gopal was likely to get the benefit of the decision in favor of Goluck. If Kristo Gopal had objected to be brought into the proceedings, and considered that the appeal was one which the defendants had no right to bring, it was his business then either not to appear

as a respondent or to have objected wholly to taking part in the proceedings, on the ground that the appeal ought not to have been brought, and that the case was not properly before the Court. Instead of that, he appears there, as in the Court of first instance, to have fought the whole case out. He now comes up here, asking that the decision, so far as it affects him, should be set aside, and that he should be allowed his costs.

It appears to me that he is too late. He cannot at one time set himself up as a substantial party in the suit, contesting it on the merits; and then turn round and say that he has nothing to do with it, and has been unnecessarily brought in. The decision of the Lower Appellate Court was quite right, and should be affirmed with costs.

I should observe that the case in 1 Weekly Reporter, p. 51, appears to me to stand on somewhat different grounds from the present case.

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The 3rd July 1866.

*Present:*

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

**Pleaders (Misconduct of)—Disposal of case.**

Case No. 3513 of 1865.

*Special Appeal from a decision passed by the Judge of Sylhet, dated the 9th September 1865, affirming a decision passed by the Moonsiff of Kechoogunge, dated the 26th June 1865.*

Lal Chand Doss and others (Defendants), *Appellants,*

*versus*

Shakeer Mahomed and others (Plaintiffs), *Respondents.*

*Baboo Rajender Nath Bose* for Appellants.

*Baboo Greesh Chunder Ghose* for Respondents.

A Judge may refuse to hear a pleader further on the ground of misconduct. But, instead of adding to his order refusing to hear the pleader, an order dismissing the case with costs, he ought to dispose of the case on the merits.

We are quite clear that the Judge was right in refusing to hear the pleaders further, and that was the sole ground of special appeal taken in the petition. But the special appellant's vakeel now asks the Court to allow him to add another ground of special appeal, and the Court has thought it proper to comply with the request. The ground is that the Court below ought not to have dismissed the special appeal by reason of the misconduct of the pleaders, but should have decided the appeal on its merits.

It appears to us that this ground of special appeal is valid. The pleaders who appeared in the Lower Appellate Court for the appellant no doubt behaved in an improper and irregular manner. The Judge was competent to refuse to hear them further, and might have dealt with them according to law in consequence of that misconduct. But, as he had the appeal before him, and had, no doubt, heard all the arguments that were urged and all the points that arose upon the appeal, he ought to have disposed of the appeal on its merits, and not have added to his order, refusing to hear the pleaders further, an order dismissing the case with costs.

The decision of the Judge is reversed, and the case remanded to him to be decided on its merits, but without costs.

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The 3rd July 1866.

*Present:*

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

**Relinquishment of land (by ryot).**

Case No. 3584 of 1865.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 21st August 1865, reversing a decision passed by the Moonsiff of Bhanga, dated the 24th March 1865.*

Muneeruddeen (Plaintiff), *Appellant,*

*versus*

Mahomed Ali and others (Defendants), *Respondents.*

*Baboo Doorga Doss Dutt* for Appellant.

No one for Respondents.

When a cultivating ryot goes away from the land which he has occupied, and neither cultivates nor pays rent for it, he has wholly relinquished the land. The relinquishment need not be in writing.

It appears to us perfectly clear that the decision of the Lower Appellate Court is wrong. The Moonsiff found as a matter of fact, and his finding appears to be affirmed by the Principal Sudder Ameen, that the defend-

ants, although they had previously held a jote of the lands in dispute, had, some years before the plaintiff entered on occupation of it, run away (as it is called), and had in fact ceased to occupy the lands.

The Principal Sudder Ameen seems to assume that the defendants had some transferable title in the jote which could not be voided unless they gave a resignation or relinquishment of it in writing.

We can see no ground for this opinion. On the contrary, it appears to us to be the law here, as in every other country, that, when a cultivating ryot goes away from the land which he has occupied, and neither cultivates nor pays rent for it, he has wholly relinquished the land.

Under these circumstances, when the land had been re-granted by the landlord to another tenant, it appears to us that the defendants could not be entitled to return and forcibly re-enter on possession. Therefore the decision of the Lower Appellate Court was wrong, and must be set aside, and the decision of the Moonsiff restored, with costs.

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The 3rd July 1866.

*Present:*

The Hon'ble L. S. Jackson and W. Markby,

*Judges.*

**Hindoo Law—(Gift by Leper).**

Case No. 3498 of 1865.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 21st August 1865, affirming a decision passed by the Moonsiff of that District, dated the 19th September 1864.*

Shamachurn Audhiccaree Byragee (Plaintiff), *Appellant,*

*versus*

Roop Doss Byragee and others (Defendants), *Respondents.*

*Babu Rajendro Nath Bose* for Appellant.

*Baboos Kalli Mohun Doss* and *Chunder Madhub Ghose* for Respondents.

Appeal dismissed, the appellant being unable to prove from Hindoo Law that a person becoming a leper was incapable of making a gift of property to which he had previously succeeded.

THE ground of special appeal relied on in this case is that, although Ramsarun, a person under whose gift the defendants held the property in dispute, is found by the Lower Appellate Court to have "succeeded to the property in a state of purity" (that is to say, that his constitution was untainted at that time by the disease of leprosy), yet, as it is alleged that he was subsequently attacked with leprosy, and the Lower Court has held that his gift would not be invalid even if he had the said disease, the decision of the Lower Court is opposed to Hindoo Law.

The vakeel for the special appellant, being called upon to refer to any text or passage in the Hindoo Law-books to support this contention, is unable to do so. He points to a text wherein it is laid down that a person afflicted with an incurable disease is incapable of inheriting. But in this case the donor did inherit, and is found not to have been tainted by the disease of leprosy at the time that he succeeded to the property. It does not follow from the text cited that a person so situated could not make a gift.

The decision of the Lower Appellate Court is affirmed with costs.

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The 3rd July 1866.

*Present:*

The Hon'ble C. B. Trevor and G. Loch,

*Judges.*

**Estoppel—Arbitration.**

Case No. 215 of 1866.

*Special Appeal from a decision passed by the Officiating Judge of Beerbhoom, dated the 29th August 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 26th February 1864.*

Ram Chunder Dey (Defendant), *Appellant,*

*versus*

Kishen Mohun Shaha (Plaintiff), *Respondent.*

*Baboos Chunder Madhub Ghose* and *Nil Madhub Sein* for Appellant.

*Baboo Sreenath Doss* for Respondent.

The allegation of a plaintiff in a former suit which was referred to arbitration, having been over-ruled by the arbitrators, and another state of things found by them to exist, he is not estopped by his former allegation from bringing a further suit founded on the finding of the arbitrators.

THE plaintiff in this case purchased certain property from the defendant. There was some dispute about the purchase, and a suit was the result, which was referred to arbitration, when the arbitrators decided that the defendant had no authority from his father, who was living, to sell the property.

Plaintiff, therefore, now sues defendant to recover the money which he paid to him, and for which he has received no consideration, laying his claim at Rs. 1,600.

Defendant says that he received only Rs. 500, which he subsequently repaid.

The Judge found that consideration passed to defendant from plaintiff as alleged by him, and that he was entitled to recover according to his claim. He, therefore, affirmed the order of the Court below.

Defendant now appeals specially, urging, *1st*, That plaintiff is now estopped from bringing the present suit against him, he having in a former case asserted that he had paid the consideration to defendant's father; and, *2nd*, That the Court has come to no explicit finding on his plea as to the amount of and the repayment by him of the consideration-money, Rs. 500.

The allegation of the plaintiff in a former suit having been overruled by the arbitrators, and another state of things found by them to exist, he is not estopped by his former allegation from bringing a fresh suit founded on the finding of the arbitrators. On the second objection, we think the Judge impliedly rejected plaintiff's plea, and accepted the claim of plaintiff as correct; and, accepting it as such, he considered him entitled to recover in the present action.

We therefore reject this special appeal.

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The 3rd July 1866.

*Present:*

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

**Onus probandi—Suit for declaration of fraudulent—mortgage.**

Case No. 275 of 1866.

*Special Appeal from a decision passed by the Judge of Patna, dated the 24th November 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 28th March 1865.*

Gujadhur Mowar and others (Plaintiffs), *Appellants,*

*versus*

Zinda Mowar and others (Defendants), *Respondents.*

*Baboos Kishen Succa Mookerjee* and *Sreenauth Doss* for Appellants.

*Mr. R. E. Twidale* and *Baboo Hem Chunder Banerjee* for Respondents.

The plaintiffs, on being served with notice of foreclosure by the mortgagees, brought a suit for a declaration that the mortgage was not genuine. HELD that the *onus* did not lie on the plaintiffs to prove the fabrication of the mortgage-deed.

WE are of opinion that this case must go back to the Judge. The defendants, the alleged mortgagees, served notice of foreclosure on the plaintiffs, and the year's grace having expired before the commencement of this suit, the plaintiffs brought a suit praying to obtain a declaration that the mortgage was not genuine. The Principal Sudder Ameen, for reasons fully assigned by him, finding that the execution of the mortgage-deed was not proved, gave the plaintiffs a decree.

On appeal, the Judge finds that the plaintiffs were only entitled to one-third, and not one-half, of the property, as alleged in the plaint, and, apparently relying upon that ground, dismisses the suit without having thoroughly and satisfactorily considered or made up his mind as to whether or not the deed was really executed by the plaintiffs as alleged by defendants.

We think that he was bound to try that issue out. No doubt, as a general rule, a party who comes into Court alleging a fraud must prove it; and, no doubt, to some extent the rule applies in this case. But, on the other hand, the plaintiffs, after notice of foreclosure, were driven to take the steps which they did, and can scarcely be said to have voluntarily undertaken the burden of proving the fabrication of the deed of mortgage.

The suit is accordingly remanded.

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The 4th July 1866.

*Present:*

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

**Limitation—Inheritance—Joint Hindoo Family—Separate property—Onus probandi.**

Case No. 864 of 1866.

*Special Appeal from a decision passed by the Judge of Sarun, dated the 30th December 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 29th November 1864.*

Lalla Beharee Lal and others (Plaintiffs), *Appellants,*

*versus*

Lalla Modho Pershad and others (Defendants), *Respondents.*

*Mr. R. T. Allan* and *Baboos Unnoda Pershad Banerjee* and *Mohesh Chunder Chowdhry* for Appellants.

*Baboos Onookool Chunder Mookerjee, Kalee Mohun Dass,* and *Roopnath Banerjee* for Respondents.

The rights and interests of one of three brothers of a joint Hindoo family having been sold in execution of a decree, a suit brought, not to set aside such sale, but in right of inheritance of the judgment-debtor's brother's share in the family-property, is not barred by limitation under Clause 5, Section 1, Act XIV. of 1859, and Section 246, Act VIII. of 1859.

The mere fact of certain property standing in the name of one member of a joint family is no index to the real owner. Nor is the existence of a separate possession any evidence to separate acquisitions, unless such separate possessor can prove consent of the other sharers to his keeping a separate account.

The *onus probandi* is on the party who pleads separate property.

THE was a suit to recover possession, with mesne-profits, of certain properties in right of inheritance.

An issue in bar was raised as to whether the suit was not beyond time under the provisions of Clause 5, Section 1, Act XIV. of 1859, and Section 246, Act VIII. of 1859.

The issue on the merits was whether the property in dispute was the self-acquired property of the plaintiff Beharee, or the joint property of the three brothers Beharee, Bindoo Lal, and Doonda Lal.

The Principal Sudder Ameen held that the suit was not barred under the Sections quoted above, as it was not a suit to set aside a summary order, but a suit in right of inheritance. On the merits, he was of opinion that the *onus* of proving that the property was the self-acquired property of Beharee alone—the three brothers being admittedly joint in food and estate—was on the party setting up such plea, and that he had failed to discharge himself of it. The suit was therefore decreed.

In appeal, the Judge was of opinion that the suit was barred, inasmuch as it was not brought within one year from the dates of the orders putting the defendant, special respondent, in possession of the disputed properties in execution of a decree against the plaintiff Beharee, in satisfaction of which the disputed properties had been sold and purchased by the defendant.

The Judge also enters into the merits of the case, and remarks that the plaintiff has no case. He observes that, although Beharee lived in the same house as his brethren, it does not follow that all their transactions were in common; that Beharee was a Mooktear in large practice in Chuprah, and it cannot be said that the emoluments he obtained by that possession were acquired in common with his brothers; and, therefore, there is no reason why he should not have purchased land exclusively on his own account. The decision of the Principal Sudder Ameen was reversed.

It is admitted that Lalla Joomul Lal was the common ancestor; he had three sons, Beharee, Bindoo Lal, and Doonda Lal. Kasim Ali obtained a decree against Beharee alone, and in execution of that decree the "Hukook," or the rights and interests of Beharee in the disputed property, passed by sale to the defendant, the special respondent, who is the auction-purchaser. Bindoo Lal, one of the brothers, died subsequently to the sale, and the present suit is brought to recover possession of the share of Bindoo Lal in right of inheritance. The sale in execution of the decree of Kasim Ali passed only the rights and interests of Beharee, one of the members of an admittedly joint Hindoo family; and the rights of the two other brothers, Bindoo Lal and Doonda Lal, were *expressly reserved* by the order passed in the Summary Department. The present suit is not instituted with a view of setting aside the order connected with the sale of the rights and interests of the judgment-debtor Beharee, but on a totally different cause of action, *viz.*, in right of inheritance—the death of Bindoo Lal, one of the members of the family, having opened out the succession to the plaintiffs subsequent to the sale. To such a suit the provisions of Clause 5, Section 1, Act XIV. of 1859, and Section 246 of Act VIII. of 1859 are clearly inapplicable; and the Judge was undoubtedly wrong in holding that the suit was barred.

On the merits, the sole point for consideration was whether the disputed land, which stands in the ostensible name of Beharee alone, was his self-acquired property or the joint estate of the three brothers.

The Judge has thrown the *onus* on the wrong party. It is not denied that the three brothers were joint in food and estate. The defendant must therefore strictly prove that the estate which he purchased was acquired by Beharee alone. The Judge deals in assumptions, to wit, that, because Beharee was a Mooktear, he must have made much money and acquired property separately, forgetting that it is difficult to realize the correct notion of a joint Hindoo family, unless we suppose that its members bring their earnings of all kinds into the *common stock.*

There has been no evidence to a separation in estate, and the mere fact of the property standing in the name of one of the members of the joint family alone is no index whatever to the real owner. Neither is the existence of a separate possession any evidence to separate acquisitions, unless it be shewn that the shareholder, exercising his possession separately, was permitted by the consent of the other sharers to open and keep a separate account of his own, and not to carry his earnings to the common stock.

Thus, in conformity to repeated rulings of our Courts and the late Sudder Court, the case must therefore go back. The Judge will throw the *onus* on the right party, *viz*, the defendant, and put him to the strictest proof of the special plea set up by him, that the property was the separately acquired estate of the judgment-debtor Beharee; failing to do this, the suit of the plaintiff ought to be decreed.

Remand accordingly. Costs to follow the result.

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The 30th September 1863.*

*Present:*

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

**Hindoo Law (Mitakshara)—Joint Hindoo Family—Sale by Father—Immoveable property (Self-acquired and ancestral).**

Case No. 41 of 1863.

*Special Appeal from a decision passed by Mr. E. S. Pearson, Judge of Tirhoot, dated the 9th September 1862, reversing a decision passed by Moulvie Naziroodeen Mahomed, Second Principal Sudder Ameen of that District, dated the 18th June 1862.*

Muddun Gopal Thakoor and others (Plaintiffs), *Appellants,*

*versus*

Ram Buksh Pandey and others (Defendants), *Respondents.*

* This is an old unpublished case, and is now published with reference to the next case, which is the sequel to it.

*Baboo Debendro Narain Bose* for Appellants.

*Mr. S. J. Leslie* and *Baboos Jugodanund Mookerjee* and *Kali Mohun Doss* for Respondents.

According to the Mitakshara, a father is not incompetent to sell immoveable property acquired by himself.

Landed property acquired by a grandfather, and distributed by him amongst his sons, does not by such gift become the self-acquired property of the sons so as to enable them to dispose of it by gift or sale without the consent, and to the prejudice, of the grandsons.

The sale by a father of ancestral immoveable property without the concurrence of his sons is not necessarily void, though it may be avoided, unless the purchaser can show that it was made, during a season of distress, for the sake of the family or for pious purposes. In the absence of evidence to the contrary, it must be assumed that the price received by the father became a part of the assets of the joint family; and, therefore, if the son seeks the aid of the Court to set aside the purchase, he must do equity, and offer to repay the purchase-money, unless he can show that no part of such purchase-money or the produce of it has ever come to his hands.

THIS is a suit to set aside a deed of sale executed by the plaintiff's father to the defendant, as being invalid under the Mitakshara Law, and for the recovery of the lands conveyed thereby.

The plaintiff's grandfather originally acquired the lands in dispute. He had several wives and several sons. By the disputed deed of gift, he gave the property in question to the plaintiff's father, and, in fact, by other deeds of gift, provided for all his sons.

The first Court treated the deeds of gift as being in effect a mere partition of the grandfather's property, and gave the plaintiff a decree.

On appeal, the Judge reversed the decision of the first Court, on the ground that the property having been acquired by the plaintiff's father, Heera Lal, by gift, it must be deemed to have been his self-acquired property, and, therefore, capable of being alienated by him.

The plaintiff appeals to this Court. The first point appears to be whether, even assuming that the property was self-acquired, the plaintiff's father was capable of creating a valid title to it by sale without the consent of his sons. In the Mitakshara on Inheritance, Chapter I., Section 1, there is an argument as to whether property is by birth or not (Sections 21 to 27). The conclusion appears in Section 27, where it is said: "It is a settled point that property "in the paternal or ancestral estate is by "birth." "The father is subject to the

"control of his sons and the rest, in regard "to the immoveable estate, whether acquired "by himself or inherited from his father "or other predecessor; since it is ordained, "'Though immoveables or bipeds have been "acquired by a man himself, a gift or sale "of them should not be made without con-"vening all the sons. They who are born, "and they who are yet unbegotten, and "they who are still in the womb, require "the means of support; no gift or sale "should therefore be made.'"

The following Clause contains an exception shewing that the father "may conclude "a donation, mortgage, or sale of immoveable "property while the sons are minors, during "the season of distress, for the sake of the "family, and especially for pious purposes."

The principal passage above cited is referred to by Mr. Colebrooke in a case which is to be found in Strange's Elements of Hindoo Law, Volume II., page 5, and cited by Macnaghten, Volume I., page 44, with reference to the father's incompetency according to the Law of Benares to dispose of immoveable property, though acquired by himself, without the consent of his sons. It accords with the original texts of Yagnyavalkya, 2 Colebrooke's Digest, Chapter IV., Section 2, Article 1, Paras. 13, 14, 16, Ed. 1798, pages 228, 242. "Of precious me-"tals or stones, of pearls, coral, and other "moveables, the father has power to give "or sell the whole, but neither the father "nor the grandfather shall alienate the "whole of his immoveable property."

"Land or other immoveable property, "and slaves employed in the cultivation of "it, a man shall neither give away nor sell, "even though he acquired them himself, "unless he convene all his sons."

On the other hand, we find, in the Mitakshara on Inheritance, Chapter I., Section 5, Para. 9, the grandson has a right of prohibition if his unseparated father is making a donation or sale of effects inherited from the grandfather; but he has no right of interference if the effects were acquired by the father (Para. 10). Consequently, the difference is this: "Although he has a right by birth in his father's and in his grandfather's property, still, since he is dependent on his father in regard to the paternal estate, and since the father has a predominant interest, as it was acquired by himself, the son must acquiesce in the father's disposal of his own acquired property; but since both have indiscriminately a right in the grandfather's estate, the son has a power of interdiction if the father be dissipating the property."

The apparent conflict between this passage and those before quoted is reconciled, if the right of the sons in the self-acquired property of the father is treated as an imperfect right incapable of being enforced at Law. (*See* Mitakshara on Inheritance, Chapter I., Section 1, Para. 18.) It is not immaterial to observe that the words are "should not" and "shall not," which imply a prohibition, but not an absence of power, to do the prohibited act. A color is further given to this construction by a passage in the Mitakshara on the Administration of Justice, Chapter IV., Section 1, Para. 10; Macnaghten's Hindoo Law, Volume I., page 227, where the author, in stating who are capable of maintaining actions, says: "In case of land "*acquired by the grandfather*, the owner-"ship of father and son is equal, and, there-"fore, if the father make away with the "immoveable property so acquired by the "grandfather, and if the son have recourse "to a Court of Justice, a judicial proceeding "will be entertained between the father and "the son."

The right of suit is not mentioned as extending to the case when the father alienates his own self-acquired immoveable property.

Compare Yagnyavalkya, Colebrooke's Digest, Volume III., Book V., Paras. 31, 33, and 92, pages 40-48 and 128; Vrihaspati, *Ib.*, Volume II., Book II., Chapter IV., Section 1, Para. 5; and Section 2, Article I., Para. 18, pages 213-246, and *see* page 256; *Ib.*, Volume III., Book V., Chapter II., Para. 90, page 117; Vishnu, *Ib.*, Volume III., Book V., Para. 25, page 39; Menu and Vishnu, Para. 91, page 118; Vyasa, *Ib.*, Para. 94, page 119; Jagunnatha, *Ib.*, Volume III., page 88. The Chapter in the Mitakshara, Chapter I., Section 4, and passages in the Digest, as to effects not liable to partition, and the case referred by the Lower Court, Case No. 39, Macnaghten's Hindoo Law, Volume II., page 246, are in accordance with the construction above suggested, though they do not decide the question. (*See* Mitakshara, Chapter IV.. Para. 1.) It may well be that, in property acquired by a man, his sons may have an interest, though mere co-sharers, such as brothers who have not contributed in any manner to the acquisition, may not be entitled to participation.

The result is that we must hold that, according to the law as laid down in the Mitakshara, a father is not incompetent to sell immoveable property acquired by him-

self. It would be very inconvenient if the law were otherwise.

The second question is whether, according to the Mitakshara, landed property self-acquired by a grandfather, and distributed by him amongst his sons, becomes by such gift the self-acquired property of the sons, so as to enable them to dispose of it without the consent, and to the prejudice, of the grandsons. The principle to be deduced from the several texts on this subject (Mitakshara on Inheritance, Chapter I., Section 4), appears to be that, if the gift or acquisition is upon a consideration personal to the donee, as marriage, or the personal regard of a stranger for him, the property given is treated as self-acquired. (*See* Katyayana, Colebrooke's Digest, Volume IV., Chapter V., Para. 347, page 35; and Menu, *Ib.*, 345; Vyasa, *Ib.*, 346.)

But if, in cases other than that first above mentioned, the acquisition has been made, directly or indirectly, by means of, or at the charge or expense of, the ancestral estate, the property so acquired is treated as joint and liable to partition. (*See* Mitakshara, Chapter I., Section 4, Paras. 1-6-8; Katyayana, Colebrooke's Digest, Volume IV., Chapter V., Para. 349, page 42; Nareda, *Ib.*, Volume IV., Para. 357, page 62; and the Commentary of Jagunnatha, citing the opinions of Chandeswara and others, *Ib.*, page 64.) In the Mitakshara, Chapter I., Section 4, Para. 1, page 268, of effects not liable to partition, it is said: "Whatever else is acquired by the co-parcener himself without detriment to his father's estate, or as a present from a friend, or a gift at nuptials, does not appertain to the co-heirs." *See* also the text of Yagnyavalkya to the same effect, Colebrooke's Digest, Volume IV., Para. 352, page 44. In this passage, it would appear that property obtained by gift from a father is not mentioned as not liable to partition.

Nareda, in Colebrooke's Digest, Volume IV., Para. 353, page 45, of wealth not subject to partition, says, "anything that has been received by the favor of a father"—Jagunnatha adds, "or other friend." The absence of these words in the original seems to show that the construction put on the passage by the author of the Mitakshara, Chapter I., Section 1, Para. 19, is correct, and that it means no more than that property so acquired is exempt from partition amongst the brethren. (*See*, further, Mitakshara, Chapter I., Section 4, Para. 28, as explained by Section 6, Paras. 13 and 16; Menu, translated by Sir. W. Jones, Chapter IX., Section 206.)

The text of Vyasa, Colebrooke's Digest, Volume IV., Para. 354, page 46, admits of the same explanation. The ground of that opinion, *viz.*, that the intent of the parties must have been to exclude partition, stated in the Mitakshara, Chapter I., Section 1, Para. 19, does not apply when the question arises between father and son.

We think, then, that, according to the Mitakshara, landed property acquired by a grandfather, and distributed by him amongst his sons, does not by such gift become the self-acquired property of the sons so as to enable them to dispose of it by gift or sale without the consent, and to the prejudice, of the grandsons.

The property cannot be said to have been acquired without detriment to the father's (*i. e.*, ancestral) estate, because it was not only given out of that estate, but in substitution for the undivided share of that estate to which the father, under the passage first cited, appears to have been entitled. It cannot, therefore, be taken to have been given simply by the favor of the father, but upon consideration of the father surrendering some interest or right to share in the grandfather's estate, which he did by the acceptance of this separate parcel.

We think that the father took it with the incidents to which the undivided share for which it was substituted would have been subject. But it does not follow that the sons have a right to ask that the sale shall be cancelled unconditionally. The sale by a father of ancestral immoveable property without the concurrence of his sons is not necessarily void, though it may be avoided unless the purchaser can show that it was made during a season of distress, for the sake of the family or for pious purposes. In the absence of evidence to the contrary, it must be assumed that the price received by the father became a part of the assets of the joint family; therefore, if the son seeks the aid of the Court to set the purchase aside, he must do equity, and offer to repay the purchase-money, unless he can shew that no part of such purchase-money or the produce of it has ever come to his hands. (*See* Story's Equity Jurisprudence, Volume I., Paras. 696-707.) Were this otherwise, the plaintiff might get the estate and keep its price, while the purchaser might have no remedy.

The decision of the Court below must be reversed, and the case remanded to the first

Court, with liberty to the plaintiff to amend his plaint in the mode above suggested, on payment of all the costs already incurred, within one month after the amount thereof has been settled, and notice served on the plaintiff.

But, should the plaintiff omit to signify his intention to exercise the option thus allowed to him within two months, or should he, after having declared such to be his intention, fail to pay the costs already incurred, within one month after having received notice of the amount, this suit must be dismissed on the ground that it is improperly framed.

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The 4th July 1866.

*Present :*

The Hon'ble J. P. Norman and G. Campbell,

*Judges.*

**Hindoo Law (Mitakshara)—Joint Hindoo Family—Suit to set aside sale by Father—Option to repay purchase-money—Allegation of waste by Father.**

Case No. 2689 of 1865.

*Special Appeal from a decision passed by Mr. E. S. Pearson, Judge of Tirhoot, dated the 8th May 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 26th September 1864.*

Muddun Gopal Thakoor and others (Plaintiffs),

*Appellants,*

*versus*

Ram Buksh Pandey and others (Defendants),

*Respondents.*

*Mr. R. V. Doyne* and *Baboo Debendro Narain Bose* for Appellants.

*Baboos Unnoda Pershad Banerjee, Romesh Chunder Mitter,* and *Mohesh Chunder Chowdhry* for Respondents.

Suit by the members of a joint Hindoo family to set aside certain sales by their father as invalid under the Mitakshara Law. Plaintiffs having had leave to amend their plaint by offering to repay the purchase-money unless they could show that no part of such purchase-money, or the produce of it, ever came to their hands, deliberately chose to come into Court upon the allegation that their father had wasted the money in debauchery, and on that footing to get back the estate unconditionally. Having failed to establish that case, the Court declined to give them a decree for the return of the estate on payment of the purchase-money.

THIS is a suit by the plaintiffs, as members of a joint Hindoo family, to set aside as invalid, under the Mitakshara Law, certain sales made by their father, Heera Lal Thakoor.

This case was formerly remanded by the High Court, with the declaration that, in the absence of evidence to the contrary, it must be assumed that the price received by the father became a part of the assets of the joint family, and, therefore, if his sons sought the aid of the Court to set aside the purchase, they must do equity, and offer to repay the purchase-money, unless they could show that no part of such purchase-money or the produce of it ever came to their hands. The Court gave permission to the plaintiffs to amend their plaint upon that principle. They did so ; and they now come to Court upon the allegation that the consideration-money was spent in dancing and debauchery, and that the plaintiffs derived no benefit from the sale, inasmuch as the consideration-money was not applied in extending the property or advancing the welfare of the family.

The first Court, on the evidence of many witnesses, found that it was fully proved that Heera Lal Thakoor was a respectable and conscientious Brahmin of high character and great temperance, and that the purchase-money was expended in paying debts contracted for the *sradh* of his parents and the nuptials of his sisters and daughters, &c.

The Lower Appellate Court, after observing that, as nearly thirty years had elapsed since the date of the last alienation in 1242 B. S., it is hardly to be expected that evidence should be forthcoming to prove that the sales were justified by necessity ; but, as the burden of proof on this point was on the defendants, and the necessity for the sales was not proved, the sale must be treated as voidable. He goes on to say that, the plaintiffs not having offered to refund the purchase-money, it remained to be seen whether any portion of the produce of it had ever come to their hands ; and after a careful consideration of the evidence, he came to the conclusion that it might be fairly inferred that the plaintiffs' father did expend the purchase-money for the purposes expressed in the judgment of the first Court. He says that, if so, plaintiffs have beyond a doubt benefited directly by the sales, and were, therefore, not entitled to get back the estate without refunding the purchase-money ; and, therefore, affirming the judgment of the first Court, he dismissed the suit.

The plaintiffs appealed specially, and objected, *first*, that the *onus* of proving that the purchase-money was not applied by the

father to family-purposes ought not to have been cast on the plaintiffs. On this point, we see no reason to doubt the correctness of the former decision of the Court.

The plaintiffs, claiming as heirs of and co-heirs with their father, come in to complain of a wrong done to them, and the nature and extent of that wrong is peculiarly within their own knowledge. If the father sold the property for its full value, and purchased other property for the family with the proceeds, the plaintiffs would have sustained no real injury whatever; and it would be the highest injustice to compel the defendants to give up their purchased estate unconditionally, and so to allow the plaintiff to deprive a man, who may have acted honestly and in good faith, of both his money and his land, in order to give two estates instead of one to the plaintiffs. It is peculiarly necessary that we should give effect to that consideration in a case like the present, where the sales which plaintiffs seek to set aside took place, some 30 years, and some actually 55 years, before the commencement of the suit. Possibly very different considerations would apply to the case of an estate sold by a mere manager.

*Secondly.*—It was objected that the plaintiffs, on the finding of the Lower Appellate Court, are entitled to a decree for a return of the estate on payment of the purchase-money. We think there is no ground for that contention. The plaintiffs, having leave to amend their plaint, deliberately chose to allege that their father had wasted the money in debauchery, and, on that footing, claimed to get back the estate unconditionally. They failed to establish the case upon which they came into Court; and we do not see the slightest reason, and we have not the least inclination, to assist them in any way.

It may well be that, if the suit had been brought within anything like a reasonable time, the defendant would have been in a position to show that the sales were justified by necessity.

We dismiss the appeal with costs and interest.

The defendant, by way of cross-appeal, brought to our notice that the Judge had not disposed of two defences set up by him—one that the suit was barred by limitation, and the other that, as to the sales in 1217 and 1222 B. S., the plaintiffs were not born at the date of those sales, and that, therefore, the absence of their consent does not render those sales invalid. The Judge treated the case as if it had been remanded only for the trial of the issues which he has disposed of. But the Court gave the plaintiff leave to re-frame his plaint, with the intention that the whole case should be tried as upon a plaint then presented for the first time. However, it will now be unnecessary to enter on the questions on those issues, as on other grounds the suit is dismissed.

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The 4th July 1866.

*Present:*

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

**Limitation—Suit to recover possession—Butwarah.**

Case No. 356 of 1866.

*Special Appeal from a decision passed by Baboo Nurrotun Mullick, Principal Sudder Ameen of Bhaugulpore, dated the 13th December 1865, affirming a decision passed by Moonshee Tumeezooddeen Ahmed, Moonsiff of that District, dated the 28th April 1865.*

Rughoobur Singh and others (Defendants), *Appellants,*

*versus*

Huree Pershad and others (Plaintiffs), *Respondents.*

*Baboo Doorga Doss Dutt* for Appellants.

*Baboos Mohesh Chunder Chowdhry* and *Pearee Lal Roy* for Respondents.

In a suit by the purchaser of one estate to recover certain lands alleged to belong to his estate, which the defendants held as a part of another estate, the plaintiff needlessly prayed that a certain order passed

in the cause of the butwarah of the defendant's estate should be set aside. As the defendant failed to show that the Collector, in laying down the boundaries of the estate then under butwarah, was proceeding under Regulation VII., 1822—HELD that the map made by him in carrying out the butwarah of another estate was not an award binding on the defendant, and that the case, therefore, was not barred by limitation under Clause 6, Section 1, Act XIV. of 1859.

THIS is a suit by the purchaser of one estate to recover certain lands which the defendants hold as a part of another estate, on the allegation that the land in question really belonged to the plaintiff's estate.

Plaintiff also prayed that a certain order passed in the course of a butwarah of the defendant's estate should be set aside. It has been found by the Courts below that the plaintiff had been in possession in accordance with a survey-award, and they decided that he was in possession within 12 years of suit, and decreed in his favor.

The defendant now appeals, urging that the suit is barred by the Special Law of Limitation under Clause 6, Section 1, Act XIV. of 1859. It may be conceded that, if the plaintiff's suit had been brought to set aside an award of the Collector, the Law of Limitation would have been as pleaded by the defendant. But it appears that the plaintiff's prayer to set aside the award of the Collector is only surplusage and unnecessary. His suit was brought to recover possession of the land, and it is rightly contended by the respondent that there is nothing to show that any order was passed as between the plaintiff and defendant to which Clause 6, Section 1 of Act XIV. of 1859, applies. It was for the appellant to show that the Collector, in laying down the boundaries of the estate then under butwarah, was proceeding under Regulation VII. of 1822, and, so acting, had jurisdiction to settle the question of boundary between that and the neighbouring estates. The appellant entirely fails to show that the Collector was acting in any way under the provisions of Regulation VII. of 1822; and therefore a map made by him, in carrying out the butwarah of another estate, was in no way an award binding on the defendant; and the case, therefore, is not governed by the special law of 3 years' limitation.

On the merits, we think that there is a sufficient finding that the land in suit is within the estate of the plaintiff, and that he has been in possession under the Thakbust award within 12 years from the date of suit.

The appeal is therefore dismissed with costs and interest.

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The 4th July 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Alluvial land—Suit for possession—Mesne-profits.**

Case No. 225 of 1866.

*Special Appeal from a decision passed by the Judge of Rungpore, dated the 22nd December 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 21st June 1865.*

Jankee Bullub Sein (Plaintiff), *Appellant,*

*versus*

Mohima Runjun Roy Chowdhry and others (Defendants), *Respondents.*

*Baboo Kishen Dyal Roy* for Appellant.

*Baboo Bhugobutty Churn Ghose* for Respondents.

In a suit for possession of a *chur*, the plaintiff having obtained a decree for possession, he was declared entitled to mesne-profits from date of institution of the suit.

As to mesne-profits before institution of suit, the application by the Judge of the principle laid down in S. D. A. Rep., 1858, p. 513, affirmed.

THE Judge is in error in refusing to give the plaintiff mesne-profits from date of institution of the suit by plaintiff for possession of the *chur*. The plaintiff then put forward his claim, and the defendant opposed it on the strength of his title. As the defendant has failed, he is liable to repay the profits which the suit has declared to belong to the plaintiff, and which the defendant, with the knowledge of plaintiff's claim, refused to allow him to obtain possession of.

As respects mesne-profits before institution of suit, the Judge has applied the principle laid down in the case quoted at page 513 of the Sudder Dewanny Adawlut Reports for 1858; and we see no reason to interfere with that decision.

The case is remanded for re-decision on the first point. Costs to follow final judgment.

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The 5th July 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley, *Judge*.

**Hindoo Law (Mitakshara)—Right of father to dispose of property—Distinction between ancestral and self-acquired property.**

Case No. 2025 of 1865.

*Special Appeal from a decision passed by Mr. F. Tucker, Judge of Shahabad, dated the 20th April 1865, affirming a decision passed by Baboo Burmah Dutt, Moonsiff of Buxar, dated the 27th February 1865.*

Ojoodhya Pershad Sing (Plaintiff), *Appellant*,

*versus*

Ramsurn and others (Defendants), *Respondents*.

*Baboo Kally Kishen Sein* and *Luckhy Churn Bose* for Appellant.

*Baboo Greeja Sunker Mozoomdar* for Respondents.

There is a distinction between ancestral and self-acquired property under the Mitakshara Law, with regard to the right of a father to dispose of it. The fact of being an outcaste would not prevent him from exercising his rights over the property to the same extent as he might otherwise have done.

THE property mortgaged was subject to the Mitakshara Law. It is stated on the part of the plaintiff that the defendant, the son, assented to the mortgages. If so, the ancestral property would be bound by them. It is also stated that one of the houses was self-acquired property, and that the other two alone were ancestral. There is a distinction between ancestral and self-acquired property.

We think that those questions ought to be tried, and that they are material questions for the determination of the suit. We think that the case should be remanded to the Judge in order that he may remit it to the first Court to try the following issues:—

*1st.* Whether the debt was the debt of the grandfather, Ram Roop;

*2ndly.* Whether the defendant Bisseshur assented to the mortgages; and

*3rdly.* Whether two of the houses were the ancestral property belonging to the grandfather, and, if so, what share in them descended to Ramsurn; and whether one of the houses was the self-acquired property of Ramsurn the father.

When those issues have been determined by the first Court, and the result of the determination is reported to the Judge, he will decide the question upon the findings upon those issues.

In the Mitakshara, Chapter I., Section 1, Paragraph 27, it is said, referring to the father, that "he is subject to the control of "his sons and the rest, in regard to the im-"moveable estate, whether acquired by him-"self or inherited from his father or other "predecessor; since it is ordained 'Though "immoveables or bipeds have been acquired "by a man himself, a gift or sale of them "should not be made without convening all "the sons.'"

But that paragraph seems to be modified by Paragraph 33 of the same Section, in which it is said: "In respect of the right "by birth to the estate, paternal or ances-"tral, we shall mention a distinction under "a subsequent text."

In Section 5, Paragraph 7, it is said:—

"The first text, 'when the father makes a "partition,' &c., relates to property acquired "by the father himself. So does that which "ordains a double share, 'Let the father, "making a partition, reserve two shares "for himself.' The dependence of sons, as "affirmed in the following passage, 'while "both parents live, the control remains, "even though they have arrived at old "age,' must relate to effects acquired by the "father or mother. This other passage, "'They have not power over it (the paternal "estate) while their parents live,' must also "be referred to the same subject."

Paragraph 8 says:—

"Thus, while the mother is capable of "bearing more sons, and the father retains "his worldly affections and does not desire "partition, a distribution of the *grand-"father's* estate does nevertheless take place "by the will of the son."

Paragraph 9: "So, likewise, the grand-"father has a right of prohibition, if his "unseparated father is making a donation, "or a sale, of effects inherited from the "grandfather; but he has no right of inter-"ference if the effects were acquired by the "father. On the contrary, he must acqui-"esce, because he is dependent."

And then Paragraph 10 says:—

"Consequently the difference is this: "although he have a right by birth in his "father's and in his grandfather's property, "still, since he is dependent on his father in "regard to the paternal estate, and since "the father has a predominant interest

"as it was acquired by himself, the son must "acquiesce in the father's disposal of his "own acquired property; but since both "have indiscriminately a right in the grand-"father's estate, the son has a power of "interdiction (if the father be dissipating "the property)."

Looking, therefore, at these provisions, it seems that there is a distinction between ancestral and self-acquired property under the Mitakshara Law, with regard to the right of a father to dispose of it. The fact of being an outcaste would not prevent him from exercising his rights over the property to the same extent as he otherwise might have done.

As this case must go down to try whether any part of the property was self-acquired by Ramsurn, it should also at the same time be tried whether Bisseshur assented to the mortgage, and whether the debt was the grandfather's debt. The plaintiff being present in Court has affirmed that the debt was the debt of the grandfather, and that only two of the houses were his property, and the other the self-acquired property of Ramsurn the father. The plaintiff ought strictly to have alleged these facts in his plaint, and to have gone prepared to the trial to prove them. Not having done so, all the expenses of the trials in the Courts below have been thrown away, and the plaintiff ought to pay to the defendant all the costs of such trials in the Lower Courts before the case is sent back for trial upon the issues above directed. Upon his paying the amount of those costs as soon as they have been ascertained by the Lower Appellate Court, the case will be sent back to the first Court, for the trial of the issues above directed. If, when the amount of the costs have been ascertained, it be not paid by the plaintiff within a time to be fixed by the Lower Appellate Court, the decree of the Lower Appellate Court will be affirmed with costs.

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The 5th July 1866.

*Present:*

The Hon'ble G. Campbell and A. G. Macpherson, *Judges.*

**Res judicata—Mesne-profits—Limitation.**

Case No. 388 of 1866.

*Special Appeal from a decision passed by the Judge of Gya, dated the 23rd November 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 28th January 1865.*

Balum Bhutt *alias* Rajah Ram Bhutt (Plaintiff), *Appellant,*

*versus*

Bhoobun Lal and others (Defendants), *Respondents.*

*Baboo Kishen Succa Mookerjee* for Appellant.

*Baboo Dwarkanath Mitter* for Respondents.

A suit for wasilat is not barred under Section 2, Act VIII. of 1859, although in a previous suit the plaintiff prayed for possession and wasilat, and got a decree for possession only, no issue having been raised in that suit as to wasilat, and the plaintiff's right to it not having been tried or determined.

Mesne-profits can only be recovered for 6 years prior to the institution of suit.

In this case, the plaintiff sues for the wasilat of certain lands for the possession of which he had obtained a decree in a former suit. In that former suit, he prayed for wasilat from date of suit, as well as for possession. He obtained a decree for possession only; and he subsequently instituted the suit out of which the present appeal arises, in which he seeks to recover wasilat for the time during which he was out of possession. It is pleaded, in bar of this second suit, that, inasmuch as wasilat was claimed in the former suit, the case falls within Section 2 of Act VIII. of 1859, and that the cause of action is one which has been tried and determined by a competent Court in a former suit between these same parties or persons under whom they claim.

We think, however, that Section 2 of Act VIII. of 1859 does not apply in this case, because, although in the plaint filed in the former suit wasilat was asked for, no issue was then raised upon that point, and the question of whether plaintiff was or was not entitled to it was neither tried nor determined by the Court.

As regards the question of limitation which has been raised, we are of opinion that the plaintiff can only recover the wasilat accrued due within six years prior to the filing of the plaint in the present suit. The case is remanded to the first Court to be re-tried with reference to the above remarks.

The 5th July 1866.

*Present:*

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

**Limitation—Pleading.**

Case No. 858 of 1866.

*Special Appeal from a decision passed by the Judge of Dinagepore, dated the 8th December 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 25th August 1865.*

Mrs. M. Smith (Plaintiff), *Appellant,*

*versus*

Kishen Chunder Roy Chowdhry and others (Defendants), *Respondents.*

*Mr. J. S. Rochfort* and *Nuleet Chunder Sein* for Appellant.

*Baboo Sreenath Doss* for Respondents.

Where a defendant in his examination distinctly pleaded that the plaintiff had no right in the property in dispute and had never been in possession thereof, and the plaintiff did not meet that objection by any reliable evidence and failed to prove possession—HELD that the Judge was quite right in taking the point of limitation.

WE think that, as the Judge has decided this case, not only on the Special, but also on the General, Law of Limitation of twelve years, it is only necessary for us to say whether his decision is right in law as to the latter period.

Now, in reply to the argument that no issue was at first raised on this latter point, it is sufficient to say that the defendant, in his examination, distinctly pleaded that the plaintiff had no right in the property, and had never been in possession thereof at any time. The Judge, on going into the evidence, finds that the plaintiff has not met this objection by any reliable evidence, and that she has entirely failed to prove her possession.

The Judge was quite warranted legally in taking up this point, and there is no error of law in his way of deciding it.

We affirm his decision, and dismiss this appeal with costs.

The 5th July 1866.

*Present:*

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

**Production of documents—Section 138, Code of Civil Procedure — "Nutti Shamil pesh" orders.**

Case No. 818 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Tipperah, dated the 28th December 1865, reversing a decision passed by the Moonsiff of Nassirgunge, dated the 30th June 1865.*

Romun Kishen Dey (Plaintiff), *Appellant,*

*versus*

Shaikh Kadir Buksh and others (Defendants), *Respondents.*

*Baboos Grees Chunder Ghose* and *Luckhee Churn Bose* for Appellant.

No one for Respondents.

A Court ought to send for papers filed in another Court under Section 138, Code of Civil Procedure, instead of recording the objectionable and meaningless order "*Nutti Shamil pesh.*"

WE think this case should go back to the Principal Sudder Ameen for him to send for the *chittahs* filed in another Court—that of the Deputy Collector.

The Moonsiff was asked to send for these *chittahs* which are said to bear the signature or attestation of the defendants. This the Moonsiff might and ought to have done under Section 138 of the Civil Code, instead of which the Moonsiff recorded the objectionable and meaningless order, which we have so often condemned, of "*Nutti Shamil pesh,*" which is only calculated to mislead.

The Principal Sudder Ameen may or may not have had notice of this reasonable request, but we think it right in this case to remand the suit to him in order that he may send for the *chittahs,* and see if they make any difference in his opinion as to the merits of the claim. In other respects, the *onus* has been rightly placed by the Principal Sudder Ameen. But the *chittahs* alluded to might supply that documentary evidence which he says is wanting. Of course, we give no opinion whatever as to the probable value of those *chittahs.* As matters of evidence, the Court below will deal with them, when before it, as it thinks fit.

The 5th July 1866.

*Present:*

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

**Ghatwalee Lands (Resumption of)—Evidence (Copy of copy of sunnud).**

Case No. 296 of 1865.

*Regular Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 13th September 1865.*

Raja Neelanund Singh and others (Plaintiffs), *Appellants,*

*versus*

Nusseeb Singh and others (Defendants), *Respondents.*

*Messrs. R. V. Doyne* and *G. C. Paul* and *Moonshee Ameer Ali* for Appellants.

*Mr. W. A. Montriou* and *Baboos Chunder Madhub Ghose* and *Luckhee Churn Bose* for Respondents.

Suit laid at Rupees 3,500.

Where ghatwals hold land, not under a sunnud conveying a hereditary indefeasible right, but on payment of a quit-rent, with enjoyment of the profits of the land in lieu of wages, such possession, however long, would not entitle them to hold the land at a fixed jumma, or to retain a portion of the land after they have ceased to perform the duties for which the land was assigned to them.

A copy of a copy of a sunnud is not admissible in evidence.

THIS was a suit brought by the plaintiff, the zemindar of Pergunnah Kurukpore, for possession of a tenure hitherto in the occupation of the defendant. The object and scope of the suit will be found detailed in our judgment in Case No. 275 of 1865, decided on the 6th June 1866.

The defendant relies upon long occupation as a ghatwal, and refers us to a decision, dated the 17th April 1797, as in bar of the hearing of the present suit under the provisions of Section 2, Act VIII. of 1859.

The Principal Sudder Ameen dismissed this suit, holding it to be governed by the decision of a Divisional Bench of this Court, dated 29th June 1865.

In support of his defence, the defendant files copy of a copy of a sunnud of the year 1182 Fuslee, without date, alleged to have been granted by Rajah Afzul Ali, the ancestor of the plaintiff. The original is not accounted for. This copy of a copy of a sunnud is clearly not admissible in evidence, but, taking it for what it purports to be, it simply confirms the grantees in their appointments as ghatwals, and exhorts them to be faithful and vigilant in the discharge of their duties, which consisted in watching the passes and preventing crime. There are no words by which an hereditary indefeasible right is conveyed.

The learned Counsel for the defendant relied upon the reasons given by the learned Judges, Trevor and Campbell, in their decision dated the 29th June 1865. But those reasons were, as we understand the case, chiefly based upon the title which those learned Judges held that the grant of Captain Brown conveyed. In the case before us, no such sunnud has been filed, and the copy of a copy of a sunnud which is produced contains no such terms as Istemraree, the insertion of which in the grant by Captain Brown was the main ground for the judgment in question.

The decision of 1797 referred to by the defendant has not been filed.

The position, therefore, of the defendant is this: they may have been in possession for a long period, paying a quit-rent and enjoying the profits of the holding in lieu of wages; but such possession, however long, would not entitle them to hold the lands at a fixed jumma, or to retain possession of them after they have ceased to perform the duties, and, indeed, can no longer perform the duties, for which those lands were assigned to them. They received their lands with a condition of service, and, in lieu of wages, they were permitted to enjoy the profits of the estate. They were liable to dismissal for neglect of duty, and were entirely subordinate to the zemindar, the Government never attempting to interfere in their appointment or dismissal. When their services are no longer required, and cannot (under the present state of things and the new arrangements made by the Government for the police of the district) be rendered, the tenure lapses, the title of ghatwal ceases, and their right to hold possession determines.

In this view, we reverse the decision of the Lower Court, and decree this appeal with costs and interest.

Our order in the matter of wasilat is the same as that passed in Appeal No. 275 of 1865.

The 5th July 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Fraudulent sale—Vendor and vendee—Disaffirmance of contract by vendor.**

Case No. 248 of 1866.

*Special Appeal from a decision passed by Mr. G. Bright, Officiating Judge of East Burdwan, dated the 14th September 1865, affirming a decision passed by Baboo Kedarnath Banerjee, Additional Principal Sudder Ameen of that District, dated the 21st July 1865.*

Dursun Lal Pandey and others (Defendants), *Appellants,*

*versus*

Indur Chunder Baboo and others (Plaintiffs), *Respondents.*

*Baboo Ashootosh Chatterjee* for Appellants.

*Baboos Onookool Chunder Mookerjee* and *Khettur Mohun Mookerjee* for Respondents.

Where goods have been obtained by means of a fraudulent purchase, the vendor has a right to disaffirm the contract, so as to re-vest the property in himself, and this even if the property had passed to the vendee with the consent of the vendor.

Where a vendee purchased cotton with the pre-conceived design of not paying for it, the sale did not pass the property; and although the cotton may have been, with the vendor's consent, allowed to be placed on the vendee's boat, still the vendee must be considered as the agent of the vendor, and his possession as that of the vendor's, and the cotton as still the property of the vendor, as long as the price was not paid.

The plaintiff in this case had obtained a decree against certain retail cotton dealers for a sum of money lent to them, and, in execution of that decree, he attached certain cotton which he now alleges to have been the property of his judgment-debtors, and sues for a declaration of his right to obtain the proceeds of the sale of that cotton. He was opposed by the defendant in this suit, who alleged that the cotton in question was his property, which had been fraudulently taken out of his possession. The defendant's statement is that he is a wholesale cotton dealer, that he had entered into a contract to sell the cotton to the retail dealer, but that it was agreed upon between them that the retail dealer should not remove the cotton until its price was paid, but that in the meanwhile the cotton should be laden on the dealer's boat. The retail dealer, however, fraudulently and secretly carried off the cotton at night without first paying its price, and the defendant pursued him, and succeeded in stopping him and recovering the cotton. The defendant states that the property in the cotton still belongs to him, and that he is entitled to the equivalent value of that cotton which is now in deposit, pending the decision of this case.

There seems to be no dispute as to the facts of this case, but the question is as to the law applicable to it—whether it was, at the time the retail dealer had obtained possession of it with a view to removal, the property of the retail dealer, or still remained the property of the wholesale dealer, the defendant.

The Judge has found that the cotton was delivered to the purchaser, and then left the possession of the vendor; that the vendor's right of stoppage had thereby ceased; that the vendor subsequently sued for the goods or their value, and was satisfied with a decree for their value; and that, under the circumstances, he must be considered as acquiescing in the right of property in the cotton having become vested in the vendees. The Judge adds that the plaintiff in this case might therefore attach the cotton as the property of the vendee, his judgment-debtor, and he accordingly confirmed the decision of the first Court which decreed the plaintiff's suit.

It is objected before us that the Judge has not laid down the law correctly, and that the property in the cotton did not pass to the vendee, and the decree in the suit of the defendant against the vendee has not the effect attributed to it by the Judge.

We think that the Judge was in error. The property in the cotton remained with the defendant, the vendor, notwithstanding that it may to some extent have been placed in the possession of the vendee by being laden on his boat, and notwithstanding that it was further taken possession of by the vendor's carrying it away secretly at night. The whole transaction of the vendee was a gross and deliberate fraud; and where goods have been obtained by means of a fraudulent purchase, the vendor has a right to disaffirm the contract so as to re-vest the property in himself. This is the law even if the property had passed to the vendee with the consent of the vendor. But in this case, the vendee purchased the cotton with the preconceived design of not paying for it, and in such a case the sale does not pass the property. We might even put this case on the higher ground that, upon the contract itself, the property in the cotton was not to pass until the price of the cotton was paid.

Although, then, the cotton may have been, with the vendor's consent, allowed to be placed on the vendee's boat, still the vendee must be considered, until the price was paid as the agent of the vendor, and his possession as that of the vendor's, and the cotton as still the property of the vendor as long as the price was not paid. We think, then, that the Judge was wrong in law in holding that this cotton was legally delivered to the purchaser, and that the property in it had passed.

The Judge is equally in error in the effect which he has given to the decree passed in the suit by the vendor against the vendee. In the first place, those proceedings are no evidence in this suit which is not between the same parties. As against the alleged vendee, the present defendant may have accepted a decree for the value of the cotton; but as against the present plaintiff, he may still assert his right to the property in the original cotton. But the reason for the decree being given for the value of the cotton is very clear, *viz.*, that the cotton itself had been sold, and its value retained in deposit, to await the result of the litigation regarding it.

We reverse the judgment of the Judge on all points, and being of opinion that, on the facts, the property in the cotton did not pass from the present defendant, and that he is entitled to the proceeds of its sale, we dismiss the suit of the plaintiff with all costs.

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The 5th July 1866.

*Present:*

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

**Decision of Court (upon evidence, not upon arrangement of parties)—Evidence—Ancient documents—Possession and enjoyment—Easement—Long and undistrubed user or possession.**

Case No. 181 of 1866.

*Special Appeal from a decision passed by the Judge of Backergunge, dated the 31st October 1865, reversing a decision passed by the Moonsiff of Madareepore, dated the 24th December 1864.*

Gooroo Pershad Roy and others (Plaintiffs), *Appellants,*

*versus*

Bykunto Chunder Roy and others (Defendants), *Respondents.*

*Baboo Kalee Mohun Doss* for Appellants.

*Baboo Upprokash Chunder Mookerjee* for Respondents.

A Court is bound to decide upon the evidence without reference to any previous arrangement between the parties, as to the mode in which the evidence is to be dealt with.

The rule of the English Law of Evidence, which dispenses with formal evidence of the execution of a document more than 30 years old, assuming it to be applicable to the Courts of this country, does not apply to a case in which it is not shown in whose custody the document had been kept; and even then the Court could reject the document if it thought it to be a fabrication.

Evidence of possession and enjoyment is good evidence of title as against the real owner only where it has been undisputed and continuous.

Long and undisturbed user or possession confers title by prescription, because it is presumed to be founded on title.

THIS was a suit brought to recover a plot of land and the use of a road adjoining. It appears that the plaintiffs and defendants belonged to the same family, and that the land claimed was formerly a part of the joint family property. The road in question also ran over what had formerly been part of the same property. At a date not given, but within living memory, the family property was divided under a butwarah, and the real dispute between the present parties is as to their respective rights arising out of that partition.

The suit came on originally before the Moonsiff of Madareepore, who directed a local enquiry by a Civil Court Ameen. Previously to that enquiry, the defendants signed a document, the meaning of which is not quite clear, but which pledges them in some way or other to accept as true the statements of the plaintiffs with regard to the matters in dispute. The plaintiffs were accordingly called by the defendants before the Ameen as witnesses, but, notwithstanding their evidence, his decision was in favor of the defendants, the Ameen being apparently not satisfied with the genuineness of the document last mentioned. Upon the case coming on for hearing before the Moonsiff, he differed with the Ameen, and accepting this document as genuine and binding, he refused to look at any other evidence than that of the plaintiffs, or to consider any of the points of law raised by the defendants, considering that the only question before him was whether the evidence of the plaintiffs proved their claim. Taking this view of the case, he decided the suit in favor of the plaintiffs.

The defendants appealed to the Zillah Court of Backergunge, and the Judge of that Court reversed the decision of the

Moonsiff. He seems also to have considered the disputed document to be a genuine one, but was of opinion that it only related to the proceedings before the Ameen, and even there, to the right of way only; and, that being so, that he was at liberty to go into all the evidence, which he accordingly did. Upon the evidence before him, he decided in favor of the defendants.

The case now comes before us on special appeal, and one point raised is that the Zillah Judge was wrong in confining the operation of the agreement to the local enquiry by the Ameen.

We think, however, that it is altogether unnecessary to examine minutely the terms of that document for the purpose of ascertaining its meaning. Whatever rights may be created under it between the parties by way of contract, it can have no binding effect whatever upon a Court of Law. A Court of Law is bound to decide upon the evidence before it, and upon that only; and it would be a strange violation of the principles of justice to hold that the judgment of the Court could be in any way fettered by a previous arrangement between the parties.

Two other points are raised by the appellants. In the first place, it appears that, upon the Zillah Judge deciding to go into the evidence, the plaintiffs produced a document which they stated to be the butwarah document under which the partition took place. No information was given as to whence it came, or how it got into Court, nor was any proof tendered of its execution; the defendants relying for proof on the bare fact that the deed appeared, on the face of it, to be more than 30 years old. The Zillah Judge having other reasons for doubting the genuineness of the document, rejected it, and his doing so is made a ground of appeal. It is needless to use any argument to show that the Zillah Judge was perfectly right in rejecting the document. The appellants relied upon a supposed rule of the English Law of Evidence. But no such rule does or possibly could exist. There is a rule in the English Law of Evidence by which, when a document is produced from the proper custody and by the proper person, formal evidence of its execution is dispensed with, if the document be more than 30 years old. But the rule goes no farther, and should the genuineness of the document be for any reason doubtful, it is perfectly open to the Court or Jury to reject it, however ancient it may be. Here, assuming the English rule to be applicable to the Courts of this country, the appellants could derive no benefit from it; for, first, not having shewn in whose custody the deed had been kept, the rule was not applicable; and even had this been shewn satisfactorily, the Judge had still power to reject the document, if, as in this case, he thought it to be a fabrication.

The other objection raised by the appellants is that the Zillah Judge refused to receive evidence of possession in support of the plaintiff's title. Now, if by this is meant mere general evidence of possession of the land and enjoyment of the right of way in question, we think the Judge did perfectly right. This was a question of title, and evidence of possession and enjoyment is, as against the real owner, good evidence of title only where it has been undisputed and continuous; otherwise, any trespasser in possession might claim a title. But here the right of the plaintiffs to possession has been constantly in dispute, and so far from the possession having been continuous, a Magistrate had recently decided on enquiry, that the defendants were then in actual possession of the property. This finding of the Magistrate, of course, in no way affects the question of title, but it was perfectly competent to the Zillah Judge to use it as evidence to shew that at that time the plaintiffs were out of possession, and that, therefore, there could be no presumption in this case in their favor arising out of possession. Upon the present argument, however, the Counsel for the plaintiffs has asserted that the nature of the evidence tendered was not mere general evidence of possession, but, as regards the right of way, evidence of user and enjoyment, such as would lay a foundation for a title by prescription to the easement claimed. It is clear, however, that no such evidence could possibly exist in this case. Long and undisturbed user or possession, when the origin of it is unknown, confers a title, because no other inference can be drawn than that the possession is, in some way or other, founded on title, although it is not known whence or how the title was obtained. But here there is no room for such an inference. The origin of the plaintiff's title is modern and is well known; it was in the partition already referred to; and under that alone could the plaintiff claim any rights with respect to the land in dispute. For whatever purpose, therefore, the evidence of possession was

tendered, the Judge was equally right in rejecting it.

All the objections, therefore, taken by the appellants fail, and the appeal will be dismissed with costs.

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The 5th July 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Putnee (Saving sale of)—Payments by dur-putneedar to zemindar.**

Case No. 250 of 1866.

*Special Appeal from a decision passed by the Judge of Purneah, dated the 10th November 1865, reversing a decision passed by the Sudder Ameen of that District, dated the 20th March 1865.*

Mirza Mahomed Hossein Ali (one of the Defendants), *Appellant,*

*versus*

Shaikh Bukaoollah and others (Plaintiffs), *Respondents.*

*Mr. J. S. Rochfort* for Appellant.

*Mr. R. E. Twidale* for Respondents.

A putneedar is not liable to make good the dur-putneedar's payments to the zemindar, insufficient as they were to stop the sale of the putnee. Such payments must be made in Court.

THE plaintiff, a dur-putneedar, sues to recover from the zemindar and putneedar a sum of 500 rupees which he, the plaintiff, paid to the zemindar on account of the putneedar.

The Judge on appeal has decreed the suit against the putneedar, who now appeals specially alleging, *first*, that his putnee had been sold before this money was paid in, and, *secondly*, that the money was not paid in, according to Section 13, Regulation XVIII. of 1819, direct into Court, but to the zemindar. In answer to this, we are told that the putneedar had allowance made to him when taking the surplus proceeds of the putnee for this 500 rupees. This fact is denied, and it does not appear that there is any evidence of it upon the record. On the special appellant's contention, we think that the putneedar is not liable to make good the dur-putneedar's payments to the zemindar, insufficient as they were to stop the sale of the putnee. Such payments must, under the law, be made in Court.

The Judge's orders are reversed, and the plaintiff's suit, as against the putneedar, is dismissed with all costs.

The 6th July 1866.

*Present:*

The Hon'ble C. B. Trevor and G. Loch, *Judges.*

**Mortgage accounts (when necessary).**

Case No. 466 of 1864.

*Regular Appeal from a decision passed by Moulvie Sujawut Hossein Khan, Principal Sudder Ameen of Patna, dated the 17th September 1864.*

Ram Lochun Patuk and others (Defendants), *Appellants,*

*versus*

Baboo Kunhya Lal and others (Plaintiffs), *Respondents.*

*Mr. R. T. Allan* and *Baboo Kishen Succa Mookerjee* for Appellants.

*Baboo Unnoda Pershad Banerjee* and *Hem Chunder Banerjee* for Respondents.

Suit laid at Rupees 8,459-2-8.

In a suit to recover possession of mortgaged property on the allegation that the usufruct had liquidated principal and interest, the production of accounts is necessary.

THIS suit, which was to recover possession of certain mortgaged property, on the allegation that the debt, with interest, had been liquidated from the usufruct, has been twice remanded. On the last occasion, the Court clearly laid down what course the Principal Sudder Ameen was to take in settling the accounts, and that officer has carried out those instructions and given a decree for the plaintiffs to recover possession, and a sum of Rupees 4,026 realized in excess of the debt due by him.

The facts of the case are these: Bunnoo Bibee gave the property in question in mortgage to Kurumoonissa in 1219 (1812) for a loan of Rupees 1,100, and borrowed a further sum in 1237 (1830), making the principal of her debt Rupees 3,750. The rights and interests of the mortgagee were sold in execution of a decree, and purchased in 1847 (1254) by Gonaish, now represented by the appellants, his heirs. The plaintiff purchased the right of the mortgagor in 1257 (1850), and now seeks to recover possession, as the debt has been liquidated.

The order on remand was as follows: "The Principal Sudder Ameen will first "calculate interest on Rupees 1,100 from "1219 to 1257, looking to the particular "dates in those years on which the mortgage "lease was granted, and the additional sum "was borrowed at 12 per cent., and from "1237 up to the date of suit he will cal-"culate interest at the same rate upon Rupees "3,750. He will then demand from the "mortgagee the actual collection papers "showing the gross receipt from the property "mortgaged, and the expenses of collection "from 1847 (1254) up to the institution of "the present suit—that is, during the time he "has been in actual possession—as it is im-"possible to expect the defendant to produce "the collection papers of a period anterior to "his possession. The Principal Sudder "Ameen will accept any trustworthy evi-"dence produced by each party, but espe-"cially by the mortgagee, as to the assets of "the property during any year or years inter-"mediate between 1219 and 1254, and, in "the absence of such evidence, will take the "yearly collection monies and expenses of "management during the years defendants "have been in actual possession, as evidence "towards calculating the yearly collection "from the property from 1219 up to 1254. "After having made these calculations, the "Principal Sudder Ameen will then deduct "the interest due yearly from the collections, "carrying over any sum that may remain "to reduce the principal. Should in this "calculation, the whole principal, with in-"terest, have been paid off either before or "after defendant's purchase and possession, "plaintiff will be entitled to a decree for "possession with mesne-profits amounting to "the sum which the mortgagee has received "in excess of the principal and interest; and "should the principal and interest not have "been entirely paid off, the plaintiff will not, "in the present action, be entitled to posses-"sion, nor will he be, unless the whole sum "is realized from the usufruct of the pro-"perty."

In an earlier part of the same order of remand, the Court observe: "The Principal "Sudder Ameen should have called upon "the defendants, mortgagees, for their col-"lection papers under Section 11, Regula-"tion XV., 1793, and have examined the "mortgagees on solemn declaration as to "their truthfulness and authenticity, and if "he credited them, have passed a decree in "accordance with the result shown by them; "or if he did not credit them, then in accord-"ance with any evidence which plaintiff "might adduce."

In accordance with these instructions, the Principal Sudder Ameen served notices on the defendants, mortgagees, on 20th August and 3rd September 1864, and, on their failing to comply with the orders of the Court, the Principal Sudder Ameen made use of the evidence adduced by the plaintiff, and found that the principal of the debt, with interest, had been realized from the usufruct, and that plaintiff was consequently entitled to recover possession, and a sum of Rupees 4,026 as mesne-profits, from the defendants.

In appeal, it is urged that the Principal Sudder Ameen did not summon the witnesses nor make a local investigation, as asked for by the defendants. In their petition, the defendants refer to one Sreesh Chunder as the present lessee of certain lands, and request that he may be examined; but his lease appears to have commenced since the institution of the present suit. The pleader for the appellant also refers to the evidence of certain witnesses, who state that the rent was about Rupees 400, and not Rupees 680, as found by the Principal Sudder Ameen; but the pleader forgets that Rupees 400 was the amount of rent payable to the landlord, and that the ticcadars realized a larger sum, being their profits from the ryots. The pleader quoted the decision of the Privy Council in the case of A. G. Forbes, Appellant, *vs.* Ameeroonissa Begum, decided on 1st February 1866, as shewing that the accounts now called for by the Court were unnecessary; but that judgment does not lay down any rule at variance with the order for remand in this case. Their Lordships observe: "That the necessity of producing "accounts arises, and need only arise, *first*, "when the mortgagor has deposited the "principal, leaving the question of interest "to be settled on an adjustment of the "accounts; *secondly*, when he has deposited "all that he admits or alleges to be due; "*thirdly*, when he pleads and undertakes to "prove that the whole of the principal and "interest has been liquidated by the usufruct "of the property;" and further on their Lordships remark "that the error of the "Court below was in the dismissal of the "suit on the assumption that the production "of any accounts was necessary in a case "in which there was neither plea nor proof "that the usufruct had liquidated principal "and interest, and no deposit had been made "to cover the balance admitted to be due." In the present case, the plea of complete

liquidation is taken, and it is on that ground that the plaintiff seeks to recover possession. The decision, therefore, of the Privy Council cannot in any wise be said to be opposed to the course adopted by this Court in disposing of this case; and, under all circumstances, we think it unnecessary to disturb the judgment of the Court below, and dismiss the appeal with costs.

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The 6th July 1866.

*Present:*

The Hon'ble C. B. Trevor and G. Loch, *Judges.*

**Rights (Egress of smoke and ingress of air)—Obstruction.**

Case No. 716 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Gya, dated the the 18th December 1865, reversing a decision passed by the Moonsiff of that District, dated the 25th May 1865.*

Beharee Sahoo (Defendant), *Appellant,*

*versus*

Musst. Ajnas Koonwar (Plaintiff), *Respondent.*

*Baboo Kishen Succa Mookerjee* for Appellant.

*Mr. R. T. Allan* for Respondent.

*A* having built on his own ground a wall which blocked up *B's* apertures in his house for the egress of smoke and ingress of air, *A* was required to make corresponding apertures in his wall, and the pulling down of the wall considered not necessary.

THE plaintiff complained that the apertures in his house for the egress of smoke and the ingress of air were blocked up by a wall built by the defendant on his own ground. She prayed that the wall might either be destroyed or removed to the distance of a cubit from his wall. The first Court held that, as defendant was willing to make apertures in his wall corresponding to those in the plaintiff's wall, there would be no necessity for removing the wall, as matters would then remain as they are, the plaintiff having egress for smoke and ingress for air.

The Principal Sudder Ameen in appeal reversed the order, directing the wall to be pulled down, quoting a precedent of this Court of 17th May 1865 (Oodoy Chand Mullick, Appellant), in which this Court held that a wall which obstructed the plaintiff's ancient lights should be pulled down, and that the making of apertures in the defendant's wall would not be sufficient to admit the air and light, as plaintiff was entitled to have it.

We think, in this case, that plaintiff is entitled to have egress for his smoke and ingress for air as heretofore, and we think this will be sufficiently attained by requiring the defendant to make corresponding apertures in his wall; and therefore it will not be necessary to pull down the wall. We accordingly reverse the decision of the Lower Appellate Court with costs, and restore that of the first Court.

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The 6th July 1866.

*Present:*

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

**Appeal—Ex-parte judgment—Adjourned hearing.**

Case No. 722 of 1866.

*Special Appeal from a decision passed by the Second Principal Sudder Ameen of the 24-Pergunnahs, dated the 22nd December 1865, affirming a decision passed by the Moonsiff of that District, dated the 31st July 1865.*

Kalee Churn Dutt (one of the Defendants), *Appellant,*

*versus*

Modhoo Soodun Ghose (Plaintiff), *Respondent.*

*Mr. R. E. Twidale* for Appellant.

*Baboo Anund Chunder Ghosal* for Respondent.

A defendant, who appeared at the first hearing, but on whose absence at the adjourned hearing the case was decreed against him *ex parte*, is not debarred from appeal under Section 119, Code of Civil Procedure.

IN this case, the defendant appeared by his pleader in Court at a first hearing, but

the case was adjourned, and at the adjourned hearing the defendant was absent, and the case was decreed against him *ex parte* under the provisions of Sections 147 and 111 of the Civil Procedure Code. On appeal, the Judge held that the remedy of the defendant was an application to the first Court under Section 119, and refused the appeal. It is true that the defendant might have had a remedy under the provisions of Section 119, which permits an application for re-hearing upon certain grounds in *all* cases decided *ex parte*. But if he cannot or does not care to seek that remedy, we do not think that he is debarred from appeal under the first Clause of Section 119, because he *has* once appeared. He may, if he choose, appeal upon the case as it stands on the *ex parte* hearing; by his neglect to appear at the second hearing, he will only lose the benefit of the evidence and arguments which he might then have used. We remand the case for trial of the appeal as it stands.

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The 7th July 1866.

*Present:*

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

**Service tenures—Custom—Death of grantee without heirs.**

Case No. 791 of 1864.

*Application for review of judgment passed on the 9th September 1864, in Special Appeal No. 557 of 1864.*

Rajah Ramessurnath Sing (Plaintiff), *Appellant,*

*versus*

Huro Lal Singh and others (Defendants), *Respondents.*

*Messrs. R. V. Doyne* and *C. Gregory* for Appellant.

No one for Respondents.

Where the custom of the country was found to be that, on the death of a service tenure-holder without heirs, his jagheer reverted to the grantor, the right of the grantor to the land on the death of the grantee without heirs was recognized.

No one has thought fit to appear in this case against the review, though notice was served very long ago.

We have carefully considered the order of remand, the decision of the Judicial Commissioner after remand, and the arguments of Counsel. We are clear that, in conformity to the second point contained in the remand order of April 24th 1863, the Judicial Commissioner finds that "it is the custom of "the country that, on the death of a service "tenure-holder without heirs, his jagheer "reverts to the grantor."

Now, on this, the legitimate and legal deduction is that the Rajah is entitled to a decree. The failure of service, which the Rajah is said to have not proved, is quite beside the question; neither is there weight or point in the Judicial Commissioner's remarks that the jagheerdar cannot alienate more than his own interests, for he can have no interests which are not bound up with the jagheer and with the service to be performed by him to the grantor.

The decision, quoted by the Lower Court, of 1857 (Sudder Dewanny Adawlut Reports, page 253), as far as it is applicable, is in favor of the Rajah, appellant, for it is there clearly laid down that the land reverts to the Government—that is, to the grantor—on extinction of heirs of the grantee.

We think the Judicial Commissioner has entirely lost sight of the order which legally ought to pass from his own finding of facts; and, reversing our order of the 9th of September 1864, we give the Rajah, special appellant, a decree declaring him entitled to resume the two mouzahs sued for.

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The 10th July 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Evidence—Judgment to state reasons for accepting or rejecting.**

Case No. 646 of 1866.

*Special Appeal from a decision passed by Baboo Luckhee Narain Mitter, Additional Principal Sudder Ameen of Dacca, dated the 13th December 1865, affirming a decision passed by the Moonsiff of Naraingunge, dated the 19th May 1865.*

The 11th July 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

**Rights of co-plaintiffs (to be determined in fresh suit).**

Case No. 2077 of 1865.

*Special Appeal from a decision passed by Mr. W. Ainslie, Judge of Patna, dated the 19th May 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 10th December 1864.*

Luchmun Pershad (Plaintiff), *Appellant*,

*versus*

Dabee Pershad (Plaintiff), *Respondent*.

*Baboos Onookool Chunder Mookerjee* and *Grish Chunder Ghose* for Appellant.

*Baboo Kishen Succa Mookerjee* for Respondent.

In a suit by *A* against *B*, in which *C* intervened and was made a co-plaintiff with *A*—HELD that the Court ought only to have decided the controversy between the co-plaintiffs on the one side and the defendant on the other, and (instead of declaring the respective interests of the plaintiffs in that stage of the case) to have left them, if they disputed as to their shares in the amount of the decree, to make that the subject of a fresh suit between them, the money being brought into Court and impounded on the application of either party.

IN this case, Deendyal and Elahee Khanum obtained a decree against Ameer Ali. The money was levied by sale of property under an execution against the defendant in that suit, and an order was made to pay the amount out of Court to the plaintiffs. But a third party objected to the sale, and then the purchaser gave up his purchase, and was allowed to take the purchase-money out of Court. Upon that, Luchmun Pershad, as representing Deendyal, and as having purchased the share of Elahee Khanum in the decree, brought a suit against the purchaser for the amount of the purchase-money. Dabee Pershad, the respondent in this case, intervened; and upon the faith of a decree between Dabee Pershad and Luchmun Pershad, in which it had been held that Dabee Pershad was one of the heirs of Deendyal, Dabee Pershad was made a plaintiff in that suit. The suit succeeded, and a decree was passed against the defendant. But the Principal Sudder Ameen went on and declared the respective interests of the two co-plaintiffs, namely, the special appellant and respondent before us, and decreed for them in equal moieties; and this part of the decree was upheld in appeal by the Zillah Judge.

It appears to us that the Principal Sudder Ameen was wrong in declaring the respective interests of the plaintiffs in the suit in that stage of the case. If the plaintiffs disputed as to their shares in the amount of the decree which they had obtained, that ought to have been the subject of a fresh suit between them; and the Principal Sudder Ameen might, on the application of either party, have ordered the money to be brought into Court and impounded. But, in the suit before him, the Principal Sudder Ameen could only decide the controversy between the co-plaintiffs on one side, and the defendant on the other.

Then, as the Lower Court was wrong in declaring the respective interests of the plaintiffs in that stage of the suit, so was the Judge wrong in affirming the Lower Court's decision with costs.

We think that so much of the decrees of the Lower Courts as decided the respective interests of the plaintiffs must be set aside; and as both the Lower Courts were wrong in going into that matter, the respondent in this case must pay to the appellant the costs of this appeal and the costs in the Lower Appellate Court.

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The 11th July 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

**Sale (in fraud of creditors before execution).**

Case No. 2916 of 1865.

*Special Appeal from a decision passed by Moulvie Syud Abdoollah, Principal Sudder Ameen of Hooghly, dated the 16th August 1865, reversing a decision passed by Moulvie Suddut Hossein, Sudder Moonsiff of that District, dated the 17th December 1864.*

Radha Mohun Dutt (Plaintiff), *Appellant*,

*versus*

Bissessur Bundodpadhya and others (Defendants), *Respondents*.

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*Baboo Mohendronath Mitter* for Appellant.

*Baboo Bamachurn Banerjee* for Respondents.

Where a mortgagor executes a deed of sale for the purpose of defrauding and defeating his creditors, it is void against any of the creditors who may obtain a decree against him, although the deed may have been executed before execution was taken out on the decree.

*Peacock, C. J.*—I THINK that there is a substantial finding of the Court that this was a fraudulent document. The Lower Court had found the deed to be genuine, not upon proof of any consideration having passed, but merely upon proof by the attesting witnesses of the execution of the deed, and that it was executed before the decree-holder had actually obtained execution.

The Lower Court, under all the circumstances of the case, and taking into consideration the relationship existing between the parties, says: "The kubala seems to me in "every respect to have been drawn out be-"tween the two relatives only with a view "to defraud and defeat the creditors."

If it had been drawn out for the purpose of giving a security to the mortgagee for money advanced to the mortgagor, it would not have been for fraudulent purposes. If the mortgagor executed the deed for the purpose of defeating his creditors, it is void as against any of the creditors who might obtain a decree against him, although it may have been executed before execution was taken out on the decree. The consideration expressed may have been paid in the presence of witnesses, and the money may have been afterwards returned.

I think the Judge shows that this deed ought not to operate as a mortgage from the mortgagor to the mortgagee, as it was merely intended to stand in the way of the mortgagor's creditors whenever they might attempt to seize the property in execution.

It appears to me, therefore, that there is no ground of special appeal, and that the decision of the Lower Appellate Court should be affirmed with costs.

*Jackson, J.*—I entirely agree. I do not find in the decision of the Court of first instance one single word about the passing of the consideration-money. That Court only went upon the ground that the deed had been executed on a certain date prior to the suit of the creditor, and considered itself not entitled to look at anything beyond that. There is no doubt that the Principal Sudder Ameen justly decided that he was bound to take into consideration the circumstances of fraud alleged by the creditor, and he very properly overruled the decision of the Lower Court.

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The 12th July 1866.

*Present:*

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

**Onus probandi—Maintenance—Custom.**

Case No. 806 of 1866.

*Special Appeal from a decision passed by the Deputy Commissioner of Maunbhoom, dated the 22nd December 1865, affirming a decision passed by the Moonsiff of that District, dated the 23rd March 1865.*

Rajah Mokoond Narain Deb (Defendant), *Appellant,*

*versus*

Mooralee Mohun Baboo (Plaintiff), *Respondent.*

*Baboo Mohendro Lal Shome* for Appellant.

*Baboo Ashootosh Dhur* for Respondent.

Suit by a late Rajah's brother for maintenance-allowance, which the present Rajah opposed on the ground that, as the plaintiff was no longer the ruling Rajah's brother, his allowance must be diminished.—HELD that the *onus* was on the defendant to prove a custom entitling him to diminish the allowance heretofore enjoyed in right of plaintiff's position in the family.

PLAINTIFF is a member of the family of a Rajah holding an estate as a Majorat. It is found that, in the time of the late Rajah, his brother, he was entitled to an allowance of 60 rupees for maintenance. The present Rajah, his nephew, resists the claim, on the ground that, as plaintiff is no longer brother of the ruling Rajah, his allowance must be diminished. The Lower Courts rightly hold that, under such circumstances, it is for the defendant to prove a custom entitling him to diminish the allowance heretofore enjoyed in right of plaintiff's position in the family He has not done so. The appeal is dismissed with costs.

The 12th July 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Resumed Lakheraj—Assessment of rent.**

Case No. 679 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 20th November 1865, affirming a decision passed by the Moonsiff of that District, dated the 4th May 1864.*

Hureebuns Burhal and others (Defendants), *Appellants,*

*versus*

Joy Kishen Mookerjee (Plaintiff), *Respondent.*

*Baboo Boykuntnath Paul* for Appellants.

*Baboos Mohendro Lal Shome* and *Pearee Mohun Mookerjee* for Respondent.

The holding of a lakherajdar after a decree for resumption is not that of a trespasser, and he is fully entitled to remain in possession of the land without paying rent until the zemindar assesses rent upon him.

It is sufficient that we should state in this appeal that we coincide in the opinion given by Messrs. Justices Trevor and Campbell in a directly analogous case, Special Appeal No. 1871 of 1865, Brijonath Dutt, Appellant, *versus* Joy Kishen Mookerjee, Respondent, decided 28th November 1865, reported at page 69 of the Weekly Reporter for that month. For respondent, it is said that Justices Norman and Kemp have, on 23rd August 1863, decided that the holding of the lakherajdar after the decree for resumption was the holding of a trespasser, and that the zemindar was able to recover compensation from him. The respondent's vakeel, however, admits that a lakherajdar in such a position cannot legally be considered a trespasser. He is liable to pay such rent as the zemindar assesses upon him, but he is fully entitled also to remain in possession of the land without paying rent until the zemindar does assess rent upon him. We agree with the decision passed in the case first quoted, which was a judicial decision on a point at issue before the Court, whereas that of the Justices in the latter case was an *obiter.*

We reverse the Lower Court's orders, and dismiss this suit with all costs.

The 13th July 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Defamation.**

Case No. 728 of 1866.

*Special Appeal from a decision passed by the Deputy Commissioner of Nowgong, dated the 17th January 1866, affirming a decision passed by the Sudder Ameen of that District, dated the 8th August 1865.*

Mr. Jacob Peter (Defendant), *Appellant,*

*versus*

Mr. P. Dufour (Plaintiff), *Respondent.*

*Baboo Mohinee Mohun Roy* for Appellant.

No one for Respondent.

The law will infer malice where a statement is deliberately false in fact and injurious to the character of another, and the publication is not privileged.

This was a suit by Mr. Dufour, an officer in the Department of Public Works, to recover damages for a libellous publication in a petition of charge presented in the Criminal Court by the special appellant, in which he charged him with fraudulently retaining 15 out of 110 logs of wood sold to the Department of Public Works, the said libel being injurious to his reputation as a public officer.

Both Courts have found that the charge was a false one, and have awarded damages to the amount of 200 rupees.

In special appeal, the pleader urges that, as the charge was made by the special appellant in the conduct of his own affairs, and with a fair and reasonable hope of protecting his own interests, it was a privileged publication; and, further, that there is no proof of malice warranting the award of substantial damages. A decision of the late Sudder Court, dated 22nd April 1841 (Maharanee Kumul Koomaree *vs.* Hedger), is quoted, and the pleader also referred us to Broom's Commentaries.

We are of opinion that this charge, which has been found by those Courts to be a false one, was not made with a fair and reasonable hope of protecting the special appellant's interests. It is clear, from the correspondence which passed between the parties, and which has been admitted in evidence, that, up to the 12th of April 1865, the special respondent was willing to return the logs of wood which had been rejected, and invited the special appellant to take them away. On the 17th April, the special appellant

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makes his charge in the Criminal Court, asserting that special respondent had fraudulently retained 15 logs. This charge was not a *bonâ-fide*, fair. and reasonable charge, and, in the face of the correspondence above alluded to, the special appellant must have known that he had no ground for believing the charge to be true.

The case cited from the Sudder Reports is not in point. In that case, certain hasty and improper remarks were made in the argument as set forth in the pleadings, and the Appellate Court held that they might have been visited with punishment then and there as a contempt of Court. In this instance, we have a deliberate false charge instituted, without any ground for believing it to be true.

The publication was clearly not a privileged one, and the law will infer that a statement which, as in this case, is clearly false in fact and injurious to the character and reputation of the special respondent, is malicious.

The appeal is dismissed without costs, nobody appearing for the special respondent.

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The 16th July 1866.

*Present:*

The Hon'ble E. Jackson, *Judge.*

**Hindoo Law (Succession)—Nephews (of whole and half-blood).**

Case No. 377 of 1865.

*Application for review of judgment passed on the 25th May 1865, in Special Appeal No. 3595 of 1864.*

Gooroo Churn Sircar (Appellant), *Petitioner,*

*versus*

Koylash Chunder Sircar (Respondent), *Opposite Party.*

*Baboos Kalee Mohun Doss, Romesh Chunder Mitter,* and *Nilmonee Sein* for Petitioner.

*Baboos Sreenath Doss* and *Dwarkanath Mitter* for Opposite Party.

**Upholding former decision relating to the succession, according to the Hindoo Law, of nephews of the whole and half-blood.**

THIS application was admitted for argument by Mr. Justice Glover, and I have heard both sides at great length a second time upon the whole question. It remains for me now to decide whether there is, in my opinion, any good and sufficient reason for interfering with our former decision, The special ground on which it is objected to is that it was founded principally on verse 6, Section 8 of the Dya Krama Sangraha. The point was whether a nephew of the whole-blood took precedence of a nephew of the half-blood in a joint undivided Hindoo family as heir to their deceased uncle. The verse in question stated that the nephew of the whole-blood was a prior heir to the nephew of the half-blood whether associated or unassociated. It is now said that the word associated in this verse means "re-united," and that, as the family in this case was not a re-united family, the verse does not apply. Mr. Justice Glover was of opinion that this meaning did attach to the word associated, as proved by a reference to the original Sanscrit word used by the author, and the interpretation of that word as given in other passages of the Dyabhaga and Dya Krama Sangraha, and as given in Shama Churn Sircar's Vyavastha Durpana; and I quite agree with him that associated in this and the former verses of the Chapter quoted does mean re-united.

It is to be observed, however, that our decision did not proceed solely on this single text. The whole of the authorities on the subject were considered, and the conclusion arrived at was that, although there was a text of Yama which laid down that in an undivided immoveable estate a half-brother shared equally with a whole-brother, there was not any text laying down that the same rule should be observed in the case of nephews. It is true that, in most points, the rule of succession by nephews follows that of succession by brothers; but there is no text which lays down that it shall do so under all circumstances. Nephews, it is stated, take by their own right, and not through their fathers—inheriting *per capita*, not *per stirpes*. In the case of brothers, a special exception to the general rule is laid down for the case of undivided immoveable estate, but no such exception to the general rule is to be found in the Hindoo Law in the case of nephews. Ought this Court, then, to introduce the rule? If nephews inherited through their fathers, there might be some good ground for the argument from analogy from the law which regulated the succession of their fathers. But as they do not so inherit, and the special exception which is distinctly laid down in the succession of brothers is not found in the law as to the succession of nephews, my impression remains the same as it was

at the time of our first decision, that that exception should not be introduced into the law regarding nephews. The general law which regulates succession by nephews must be carried out. I therefore dismiss this application with costs.

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The 17th July 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Suit against co-sharers.**

Cases Nos. 639 and 640 of 1866.

*Special Appeals from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 7th December 1865, reversing a decision passed by the Moonsiff of that District, dated the 21st July 1864.*

Chowdhry Kumalooddeen Jha and others (some of the Defendants), *Appellants,*

*versus*

Sreekishen Thakoor and others (Plaintiffs), and others (Defendants), *Respondents.*

*Baboo Kalee Kishen Sein* for Appellants.

*Baboos Kedarnath Chatterjee* and *Anund Gopal Paleet* for Respondents.

Plaintiffs sued all their co-sharers, several of whom absented and allowed judgment to go by default. HELD that the question for the Court to try was whether the plaintiffs had proved their title to the shares they claimed, and not as to the share of one of the defendant co-sharers as between him and the remaining co-sharers, several of whom did not prefer any claim at all.

THE plaintiffs' suits in these cases have been decreed, and they have been declared entitled to certain shares in an estate. The defendant, special appellant, it is admitted, is also a sharer; but whereas he claims 3 annas of the estate, the Lower Appellate Court has declared him entitled to only 2 annas 6 gundahs of it. The plaintiffs, it appears, sued all their co-sharers, several of whom absented themselves and allowed judgment to go by default. The question, then, for the Principal Sudder Ameen to try was whether the plaintiffs had proved their titles to the shares they claimed. If they did, they are entitled to the decree which they have obtained. But the Principal Sudder Ameen cannot go on to consider the question of the defendant's, special appellant's, share as between him and the remaining co-sharers, several of whom did not prefer any claim at all.

The decisions of the Principal Sudder Ameen are modified so far as they affect defendant's, special appellant's, share. Each side to pay his own costs of this appeal.

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The 17th July 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Arbitration.**

Case No. 699 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Rajshahye, dated the 29th November 1865, reversing a decision passed by the Moonsiff of that District, dated the 29th June 1865.*

Mohesh Chunder Moiter and others (Defendants), *Appellants,*

*versus*

Buloram Moiter and others (Plaintiffs), *Respondents.*

*Mr. G. C. Paul* and *Baboo Mohinee Mohun Roy* for Appellants.

*Baboos Nilmonee Sein* and *Kalee Mohun Doss* for Respondents.

An award of arbitration may be valid without being enforced by the Courts, as, for instance, where possession under the award is shown.

THE pleas taken in this special appeal are—

I. That, as to 2½ cottahs, the Lower Appellate Court is wrong in not accepting the award of the arbitrators as evidence, on the ground that it had not been legally enforced by the Courts, inasmuch as a private award, without any intervention of the Courts, might be binding or strong evidence, if shewn to be otherwise valid under the provisions of Clause 3, Section 3, Regulation VI. of 1813.

II. That the order of the Lower Appellate Court to give plaintiff absolutely khas possession of the portion of the house hitherto occupied by defendants is erroneous; because, as it was constructed by defendants, and plaintiff did not object in the interval, either rent or compensation should be given to defendants, on the principle of the case of Jankee Singh, Sudder Dewanny Adawlut Decision of 1856, page 761.

We are of opinion that the Lower Appellate Court has erred in holding that an award of arbitration cannot be binding or

evidence unless it has been enforced by the Courts. If, for instance, possession under the award could be shewn in the present case, it would suffice to make it a valid award without the intervention of the Courts.

The case must be remanded to the Lower Appellate Court, which will find if the possession of defendants under award has been had according to Clause 3, Section 3, Regulation VI. of 1813; and, if so, it will consider the award of such weight as it may deserve. Here, too, we may notice that the answer referred to by the Lower Appellate Court is stated to be merely to the effect that the father held as for the minor son, and not that the father held absolutely. This matter does not seem to have been considered. The Lower Appellate Court will also duly consider the objection taken in the third plea, and re-decide the case on a full review of the evidence and facts proved, and not in the meagre and unsatisfactory way it has now done.

Remand accordingly.

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The 17th July 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Arbitration.**

Case No. 477 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 25th August 1865, affirming a decision passed by the Moonsiff of that District, dated the 23rd December 1862.*

Kazee Syud Naser Ali (one of the Defendants), *Appellant,*

*versus*

Mussamut Tinoo Dossia, Guardian of Woomesh Chunder Paul, Minor (Plaintiff), and others (Defendants), *Respondents.*

*Baboo Bama Churn Banerjee* for Appellant.

*Baboo Toolsee Doss Seal* for Respondents.

An award of arbitration cannot be set aside on the ground that it is erroneous, or that only two out of three arbitrators signed the award when the parties agreed to abide by the decision of the majority.

THE decision of the Principal Sudder Ameen of Burdwan must be set aside. His order setting aside an arbitration-award, on the ground that it is erroneous, is contrary to the law. If parties agree to refer matters to arbitration, they must be bound by the result, although there may be error in it. The respondent states that only two arbitrators signed the award, whereas three were appointed to arbitrate. The parties, however, appear to have agreed to abide by the decision of the majority, and they, when called on by the Court, did not urge any objections to the award.

The Principal Sudder Ameen's orders are reversed, and plaintiff's suit dismissed with costs according to the award.

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The 17th July 1866.

*Present:*

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

**Damages (for Assault).**

Case No. 57 of 1866.

*Regular Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 29th January 1866.*

Mr. J. K. MacIver (Defendant), *Appellant,*

*versus*

Shungeshur Dutt Coonwur (Plaintiff), *Respondent.*

*Messrs. R. V. Doyne* and *J. S. Rochfort* for Appellant.

*Baboos Kalee Prosunno Dutt* and *Dwarkanath Mitter* for Respondent.

In an action for damages for a severe assault, the defendant being unable to prove provocation, the Lower Court's decree against him was in the main upheld. But as, looking to the position of the defendant, the damages awarded were deemed beyond his means, they were reduced on condition of the defendant tendering to the plaintiff a written apology expressing his regret for what had passed.

THIS is an action for damages for an alleged severe assault and injury to the plaintiff, both physically and in his honor and reputation. We think that it is very much to be regretted that such a case should have

come into a Civil Court, when it might have been disposed of in the Criminal Court in which the plaintiff first very properly lodged his complaint. But we cannot say that he received fair and substantial justice in the Criminal Court, in which the Deputy Magistrate, Mr. C. N. Pearson, fined the defendant Rupees 5, or that plaintiff was wrong in applying to the Civil Court for compensation for the injury received.

If the case had been tried before us sitting as a Criminal Court, we should probably have sentenced the defendant to a considerable term of imprisonment, and awarded a fine besides, by way of reasonable compensation. As it is, however, we must take up the case as it comes before us from the Civil Court, though we must say that neither in the Criminal Court, nor in the Civil Court, have the facts been investigated with that degree of care and fullness which the importance of the case deserves.

This, however, we observe, that there being, no doubt, an assault of a severe and serious character, it lay on the defendant to make out that it was committed under provocation or other circumstances which might be urged as a plea for mitigation of damages. And from the defendant's omission to appear in Court and give on oath his version of the story, and his not having produced several witnesses who are shown to have been present on the spot when the assault took place, we must consider that there is so far a failure in his defence. In any view, the conduct of the defendant is such that it is quite proper that it should be marked by substantial damages.

The defendant is an assistant to an indigo-planter. The plaintiff is the son of a Brahmin zemindar in that part of the country, a person of considerable standing, respectability, and property. It appears that he was passing the defendant's factory mounted on horseback; that the defendant sent two servants to call him, who made him dismount from his horse, and carried him before the defendant; that the defendant used some words towards him regarding which some doubt may possibly exist, but (as we find) that then the defendant, without any considerable provocation, assaulted the plaintiff with a stick, and struck him a number of blows.

The case of the plaintiff is that the defendant had no provocation whatever, but, being indignant that the plaintiff should pass without *salaaming* to him, and dismounting from his horse, sent for him, abused him, and beat him.

The defendant does not deny the assault, and pleads that the plaintiff was passing through his compound, by a road by which he had no rights to pass; that he spoke to his (defendant's) coolies and abused them. Of this conduct on plaintiff's part there is very little proof. No doubt, it is difficult to believe that the defendant should be so monstrously absurd, violent, and foolish, as the plaintiff would represent him to be. On the other hand, at best, the defendant's conduct is bad in an extreme degree. It does sometimes happen (rarely, we hope) that isolated Europeans in this country, removed from control and public opinion, behave towards natives with a degree of arrogance which tends to cause much ill-feeling and injury; and, although the defendant has not been made a witness in this case, he has made admissions in the Criminal Court which, to a great extent, tally with the case of the plaintiff. He says: "I had been subject to insult and "annoyance of various kinds from the ser-"vants, ryots, and friends of Mohunth Pro-"sunnoram Dass, with whom I had a case in "Court." But these people seem to have no connection at all with the plaintiff. He also admits that he reproved the plaintiff for riding up on horseback and abusing his coolies, and that, upon plaintiff's doing nothing more than drawing himself up and saying, "I am malik, and the coolies are mine," he struck him with a stick.

Under these circumstances, we shall not think ourselves justified in holding that the Principal Sudder Ameen was, in the main, wrong in decreeing the case against the defendant as he has done, and the appeal must be dismissed. But, looking to the position of the defendant, the damages awarded are probably beyond his means; and, at our suggestion, it has been arranged between the parties that, upon the defendant's tendering to the plaintiff a written apology, expressing his regret for what has passed, the decree of the Lower Court in favor of the plaintiff is not to be executed for more than Rupees 500. On this understanding, the appeal is dismissed with costs and interest upon the amount originally decreed.

If any question should arise regarding the apology now agreed on, we will decide the matter.

The plaintiff's costs in both Courts will be calculated on the Rupees 3,000 decree, the defendant paying his own costs.

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The 17th July 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble F. B. Kemp and L. S. Jackson, *Judges*.

**Special Appeal—Remand—Judgment.**

*Special Appeals from a decision passed by the Principal Sudder Ameen of Behar, dated the 7th June 1865, modifying a decision passed by the Sudder Ameen of that District, dated the 29th November 1864.*

Case No. 2472 of 1865.

Shah Jughun and others (Plaintiffs), *Appellants*,

*versus*

Shaikh Muksood Ali and others (Defendants), *Respondents*.

*Mr. C. Gregory* and *Baboo Kalee Kishen Sein* for Appellants.

No one for Respondents.

Case No. 2566 of 1865.

Shaikh Muksood Ali (one of the Defendants), *Appellant*,

*versus*

Shah Waris Ali and others (Plaintiffs), *Respondents*.

*Moulvie Syud Murhumut Hossein* for Appellant.

*Mr. C. Gregory* and *Baboo Kalee Kishen Sein* for Respondents.

Held by the majority of the Court (Kemp, J., dissenting) that, in special appeal, where there is an error of law in the judgment of the Lower Appellate Court, although the judgment may not be very clear, yet, if the facts have been sufficiently found by the Lower Courts, the High Court is bound to pass the proper judgment in the case, instead of sending the case back to the Lower Appellate Court for a fresh judgment.

*Peacock, C.J.*—* My Hon'ble colleague, Mr. Justice Kemp, thinks that the case ought to be sent back again—that, instead of our passing a decree now, we ought to send the case back again to the Principal Sudder Ameen in order that he may write an intelligible judgment. Under Section 184 of Act VIII. of 1859, it is enacted: "The "judgment shall be written in the vernacular "language of the Judge. Provided that, "if the vernacular language of the Judge "be not English, and the Judge be suffi-"ciently conversant with the English lan-"guage, he be able to write a clear and "intelligible decision in that language, and "prefer to write his judgment in it, the "judgment may be written in English." Further (Section 185): "The judgment shall "contain the point or points for determina-"tion, the decision thereupon, and the "reasons for the decision, and shall be dated "and signed by the Judge in open Court "at the time of pronouncing it. Whenever "the judgment is written in any other "language than that which is in ordinary "use in the Court, the judgment shall be "translated into the language in ordinary "use in the Court, and the translation shall "also be signed by the Judge."

My Hon'ble colleague thinks that the judgment of the Principal Sudder Ameen is not a clear and intelligible decision, and that, therefore, it ought to go back to him to write a clear and intelligible decision before we come to a decision upon the case. But if we can see from the decision how the Judge has determined the questions of fact, and we can see that there is an error in his judgment in point of law, we are not bound to send it back to the Judge to write a clearer or more intelligible judgment. It appears to me that this judgment is sufficiently clear and sufficiently intelligible to enable us to pass a proper judgment upon the case. We shall only be occupying unnecessary time and causing delay to the parties if we send the case back again to the Judge to write his decision. Further, I understand that the Principal Sudder Ameen who passed the decision is not now the Principal Sudder Ameen of the Zillah, and therefore, if the case be sent back again to have a fresh judgment written, the case will have to be re-tried before the present Principal Sudder Ameen. But, be that as it may, it appears to me that there is sufficient in this judgment to enable us to pass a proper decision.

*Jackson, J.*—I concur generally in the judgment which has been delivered by the Chief Justice. I was always of opinion that this Court should pass a proper judgment in cases like the present, when the record enabled us to deal with and to dispose of the case. I did originally propose that this case should be remanded, not because that the judgment was otherwise than clear and intelligible, but because there was some confusion as to the finding both on the facts and on the law. But, after the fuller argument which we have heard to-day, I am now of opinion that the facts have been suffi-

* That portion of the Chief Justice's judgment which deals at length with the facts of the case is omitted.

ciently found by the Lower Courts to enable us to apply the law, and that we are bound to do so. With these observations, I desire to concur fully in the judgment which the Chief Justice has delivered.

*Kemp, J.*—I adhere to my former opinion. I think that the judgment is not clear and intelligible, and that the case ought to be remanded for a fresh judgment.

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The 18th July 1866.

*Present:*

The Hon'ble E. Jackson and G. Campbell, *Judges.*

**Review—Procedure.**

Case No. 654 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Gya, dated the 30th December 1865, affirming a decision passed by the Moonsiff of that District, dated the 1st October 1865.*

Dookhoo Pasee (Defendant), *Appellant,*

*versus*

Shaikh Mahomed Hossein and others (Plaintiffs), *Respondents.*

*Baboo Roopnath Banerjee* for Appellant.

No one for Respondents.

**Procedure in admitting a review of a predecessor's judgment, applied for after 90 days from the date of the decree sought to be reviewed.**

THE Principal Sudder Ameen of Behar, Moulvie Itrut Hossein, is shewn on this special appeal to have admitted a review of his predecessor's judgment without recording any opinion, under Section 377, Act VIII. of 1859, whether there was just and reasonable cause for the delay in the application for review which was presented after 90 days from the date of the decree first passed in the suit; and he is also shewn to have admitted this application for review without calling upon the opposite party to show cause against it. The result is, that there has been no proper decision as to the admission of the review. The Principal Sudder Ameen seems to have admitted the application and reversed his predecessor's judgment, because, in his opinion, the evidence led to a different conclusion. We need hardly remind him that he is not an Appellate Court to revise his predecessor's decisions. It is not solely because he would have recorded a different judgment that he is to review that judgment. If any new evidence is offered—and in this case there seems to have been one new document put in—the applicant is bound under the law to show that it "could not be adduced by him" at the trial, before the review should be admitted to consider this document. It is said before us that this document has no connection with the points at dispute in the case. The Principal Sudder Ameen should look to this.

The case is remanded to the Principal Sudder Ameen, with directions that he will pass a decision, *first,* as to whether the application for review shall be admitted or not, and, if admitted, then go on to decide the case anew. Costs to follow final judgment.

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The 18th July 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Fraud.**

Case No. 694 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Tipperah, dated the 22nd December 1865, reversing a decision passed by the Moonsiff of Begumgunge, dated the 10th June 1865.*

Koylash Chunder Mookerjee (Plaintiff), *Appellant,*

*versus*

Shuroop Chunder Patwaree (Defendant), *Respondent.*

*Baboos Onookool Chunder Mookerjee* and *Upprokash Chunder Mookerjee* for Appellant.

*Baboos Dwarkanath Mitter* and *Chunder Madhub Ghose* for Respondent.

**A person cannot recover a deed of sale in fraud of creditors, even against a party to the fraud, except it may be against the person who executed the deed.**

THE decision of the Lower Appellate Court is impugned on two grounds: *first,* that it is wrong in law; *second,* that it is founded on insufficient evidence on the facts decided.

On the law point, the Principal Sudder Ameen has dismissed plaintiff's suit for possession of land, on the ground that the deed of sale in his favor of these lands was executed in fraud of creditors, and that plaintiff consequently cannot recover under it. We think this view of the law good, as the

defendant is a purchaser from the person who executed the fraudulent deed, and was in no way a party to the fraud. It is attempted to be made out that he was a party to it, as he took an ijarah of the land from the plaintiff; but this is no evidence that he joined in the fraud. Even if he did, the plaintiff could not in law recover under the fraudulent deed even against a party to the fraud, except it may be against the person who executed the deed.

On the question of facts, it is said that the judgment has proceeded solely on certain execution-proceedings; but the respondent's vakeel has shewn us that the Principal Sudder Ameen has gone into the other evidence filed in the case, and has, on very good grounds deduced from the acts and conduct of the parties, found that the sale to plaintiff was in fraud of creditors a mere nominal transaction.

We dismiss the appeal with costs.

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The 19th July 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Easement—Water-course—Riparian proprietorship.**

Case No. 831 of 1866.

*Special Appeal from a decision passed by the Judge of Patna, dated the 29th December 1865, affirming a decision passed by the Sudder Ameen of that District, dated the 27th August 1865.*

Bhoop Narain Singh and another (Defendants), *Appellants,*

*versus*

Kazee Syud Keramut Ali (Plaintiff), *Respondent.*

*Baboos Kishen Succa Mookerjee* and *Mohesh Chunder Chowdhry* for Appellants.

*Messrs. C. Gregory* and *R. E. Twidale* and *Baboo Mohendro Lal Shome* for Respondent.

The right which a riparian proprietor has, under certain restrictions, to the use of the water of a *natural* water-course, has no application to a water-course artificially constructed; and the mere fact of riparian proprietorship gives no rights whatever over such a stream.

In this case the plaintiff sues to establish his exclusive right to the use of a water-course called a "pyne." The water-course in question runs from a river through the defendant's land into a reservoir situate in the plaintiff's land. The defendant claims the ordinary right of a riparian owner to make use of the water of the "pyne." The Judge of the Lower Appellate Court has found that the "pyne" is of artificial construction, and that it was constructed exclusively for the benefit of the plaintiff's estate, and that the plaintiff is, therefore, entitled to the exclusive use of it. This decision is founded on the evidence of certain public maps which were produced and shewn to the Judge at the trial, and which are not now objected to.

It is urged now that the plaintiff, in his plaint, has founded his title on prescription, and that, having done so, he cannot now set up a different claim. But, although he used the words "by former custom" in his plaint, we do not think that he intended to restrict his case to evidence of exclusive user only, but that he intended to establish his exclusive right in any way he could.

This being so, the only question is whether the above finding of the Judge is sustainable in point of law, and we think that it is. The riparian proprietors have a right to the use of the water of a *natural* water-course under certain restrictions. But these rights have no application to a water-course artificially constructed, and the mere fact of riparian proprietorship gives no rights whatever over such a stream.

We therefore think that, the facts having been found by the Judge in the manner stated, the conclusion of law at which he arrived is the correct one.

The appeal will, therefore, be dismissed with costs and interest.

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The 19th July 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Review of judgment (Admission of application after prescribed period)—Jurisdiction.**

Case No. 839 of 1866.

*Special Appeal from a decision passed by the Officiating Additional Principal*

*Sudder Ameen of East Burdwan, dated the 27th January 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 9th August 1865.*

Shaikh Bura Boodho (one of the Defendants), *Appellant,*

*versus*

Koylash Chunder Nundee and others (Plaintiffs), *Respondents.*

*Baboo Bama Churn Banerjee* for Appellant.

*Baboo Onookool Chunder Mookerjee* for Respondents.

**A Lower Appellate Court has no power to interfere with the discretion vested in a Lower Court, by Section 377, Code of Civil Procedure, of admitting a review of judgment after 90 days.**

**Remarks on the admission of reviews after the prescribed period.**

In this case, the Principal Sudder Ameen reversed the decision of the Sudder Ameen admitting a review. It appears that the application for a review was made subsequently to, and probably in consequence of, the decision of the Full Bench of this Court on the 22nd February 1865, and more than 90 days from the date of the original decree. The Sudder Ameen, exercising the discretion entrusted to him by Sections 376 and 377 of Act VIII. of 1859, granted a review; and with the exercise of that discretion, the Principal Sudder Ameen had no power to interfere. This appeal must, therefore, be decreed with costs and interest.

At the same time, we do not by any means wish it to be understood that a decision of this Court in one case is a sufficient ground for admitting a review in another after the ninety days have expired. The Court to whom the application is made is bound to satisfy itself, not only that there is ground for questioning the prior decision, but that there is just and reasonable cause why the application was not made within the limited period; and, if he is not satisfied on this point, he ought to dismiss the application without reference to any other question.

The 19th July 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Zemindary Dak (Maintenance of)—Liability of Zemindar (not of Putneedar).**

Case No. 798 of 1866.

*Special Appeal from a decision passed by Mr. R. Thompson, Judge of Nuddea, dated the 29th December 1865, affirming a decision passed by the Sudder Ameen of that District, dated the 31st July 1865.*

Rakhal Doss Mookerjee (Defendant), *Appellant,*

*versus*

Ranee Shurno Moyee (Plaintiff), *Respondent.*

*Baboo Umbika Churn Banerjee* for Appellant.

*Baboo Bhugobutty Churn Ghose* for Respondent.

**Where the terms of a putnee lease did not make the putneedar liable for the maintenance of the zemindary dâks, it was held that the putneedar was not liable for a tax which was imposed on the zemindar by Act VIII. of 1862 B. C.**

The plaintiff in this suit is the zemindar, and the defendant is the putneedar. The suit is brought to recover Rupees 514 0-5, principal and interest, paid by the zemindar for dâk charges under Act VIII. of 1862, Bengal Council.

The defendant admits his putnee lease, and his liability for all sums for the payment of which he has contracted, but contends that he is not bound by the terms of his lease to pay the sum demanded.

The Judge admits that the case depends upon the right construction of the contract between the zemindar and his lessee. He proceeds to observe "that the kubooleut in this case contains a stipulation that the putneedar shall be bound to act up to, and carry out all orders which may have been or shall in future be passed by the Revenue, Criminal, and Civil authorities; and, as held by the High Court in the case of Bishonath Sircar, Appellant, *vs.* Ranee Sona Monee, page 6, Volume IV., Weekly Reporter, it is no forced construction to include, under the

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above terms, the liability to forward the dâk imposed by the old custom and law."

The Judge gave the plaintiff a decree affirming the decision of the Court of first instance.

In special appeal, it is contended that, according to the terms of the special appellant's kubooleut, he is not liable for the dâk expenses which by law are made payable by the zemindar; that, according to a ruling of this Court, page 17, Small Cause Court References, Sutherland's Weekly Reporter, Volume III., an engagement entered into by a putneedar to carry out all the orders of the Civil, Criminal, and Revenue authorities, does not render him liable to dâk expenses.

There can be no doubt that the liability of paying the expenses incurred in keeping up a postal communication is primarily upon the zemindar. The Government looks to the zemindar, and, in default, the zemindar's estate is liable. Act VIII. of 1862, Bengal Council, does not take away from the zemindars any right of reimbursing themselves from under-holders which they possess under the terms of the lease to the under-holders. In the kubooleut of the special appellant, there is no contract, express or implied, to pay those dâk expenses, and the case clearly turns upon the right construction of the contract between the parties. Section 12, Act VIII. of 1862, Bengal Council, expressly enacts that nothing in the Act shall in any way affect or alter the terms of the contracts or engagements made or to be made by zemindars with parties holding under them.

The words of the lease which are material for the proper determination of this suit are translated from the original literally:—

"I am responsible for all orders that may "be from time to time passed by the Civil, "Criminal, and Revenue authorities of the "district, respecting these villages, and "for the expenses in carrying out these "orders."

The tax under Act VIII. of 1862 was imposed by the Legislature, and not by any local order of the Zillah authorities; and the zemindar is liable. The terms of the lease in this case do not, in our judgment, make the lessee liable, and the words quoted above are certainly not sufficient to impose upon him the burthen of paying a tax, which is leviable from the zemindar. We cannot annex incidents to written contracts in matters with respect to which they are silent. In the case quoted by the Judge, the circumstances were not precisely the same. In that case, the suit was remanded to find whether the putneedar bore the dâk service charges under the old law, and whether, in that case, there appears to have been a general engagement on the part of the putneedar to comply with all "laws" that might be passed. Our decision in the present case is in conformity with the decision in the case of Saroda Soondaree Debia, Plaintiff, *vs.* Wooma Churn Sircar, Defendant, Small Cause Court References, page 20, Volume III., Weekly Reporter, No. 14, for September 1865.

We reverse the decision of the Judge, and decree this appeal with costs and interest payable by the respondent.

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The 20th July 1866.

*Present:*

The Hon'ble W. S. Seton-Karr and L. S. Jackson, *Judges.*

**Hindoo Law of Succession—Will (Power of Hindoo to bequeath)—Female heirs (Exclusion of—under the Mitakshara)—Joint Family.**

Case No. 59 of 1866.

*Regular Appeal from a decision passed by the Principal Sudder Ameen of Backergunge, dated the 19th December 1864.*

Musst. Pitum Koonwar *alias* Munar Bibee (one of the Defendants), *Appellant,*

*versus*

Joy Kishen Doss (Plaintiff) and others (Defendants), *Respondents.*

*Baboos Kalee Mohun Doss* and *Dwarkanath Mitter* for Appellant.

*Baboos Mohinee Mohun Roy* and *Onookool Chunder Mookerjee* for Respondents.

Suit laid at Rupees 14,903-8-6-14.

Any Hindoo within these provinces, whether governed by the Bengal rule of succession or otherwise, possesses a power to bequeath an estate by will co-extensive with his power over the estate in his lifetime.

When it is sought to exclude female heirs from succession to a husband or father under the Mitakshara, on the ground that the estate was joint, it must be shown to have been so at the time of his death, and not merely at the death of a pre-deceasing brother, the father of the claimant.

A Hindoo, subject to the Mitakshara, may die possessed of a share in joint-family property, and also of separately acquired property. The two will not necessarily devolve on the same heir; but they may either descend to different persons, or, if descending to the same persons, may descend in a different way, and with different consequences.

We think it quite clear that the part of the judgment of the Lower Court, dated the 19th December last, which is complained of in this appeal, must be reversed.

Brij Ruttun and Hur Jeebun were two brothers, Hindoos, domiciled at Dacca, but subject to the law of succession laid down in the Mitakshara. Brij Ruttun, who survived his brother, had one daughter, Pitum Koonwar, one of the defendants in the suit, and appellant before us. Hur Jeebun had left two sons, the plaintiff Joy Kishen and another.

Brij Ruttun executed a will in 1262 B. S., and died in 1265.

By that will, which was attested and assented to in express terms by Joy Kishen, and under which Joy Kishen has now sued, Brij Ruttun absolutely bequeathes and disposes of the various estates and items of property mentioned, giving the bulk of it to his nephews, a less portion to his daughter, and a part to religious purposes. The estate, however, is charged with the payment of the testator's debts, and is for that purpose to be placed under the control of the daughter's husband, Motee Chand, also a defendant in the suit.

The plaint alleged misconduct on the part of Motee Chand, and prayed that an account might be taken, and he divested of the control. It also claimed five *churs* which were described as accretions to, or rather re-formations of, the family* zemindary, and therefore belonging one-half to the plaintiff as one of the heirs-at-law both of his father and of his uncle.

* "Our" zemindary is the precise expression.

Defendant, Pitum Koonwar, on the other hand, alleged, as to this part of the case, that Brij Ruttun's estate was separate; that, consequently, even under the Mitakshara, the daughter was heir; and that the plaintiff was entitled to no more than fell to him by the will.

The Principal Sudder Ameen, however, decreed for the plaintiff on this branch of the suit, as well as on the other, and Pitum Koonwar appeals.

We think it right to remark, in the first place, that the plaint discloses two entirely distinct causes of action against different persons, which, in strictness, ought not to have been included in one suit.

As the plaintiff had no cause of action against Pitum in respect of the executive accounts, or against Motee Chand in respect of the *churs* held by Pitum, the 8th Section of Act VIII. of 1859 does not justify the form of the suit. But as this objection was not taken before us, we need not insist upon it further.

But we think the decision of the Principal Sudder Ameen, as far as it gives the *churs* to the plaintiff, to be not sustainable upon any principle.

The grounds of his decision appear to be these: that the evidence, in his opinion, left no doubt but that plaintiff's father and his uncle (Brij Ruttun) lived in commensality and in joint estate down to the death of the *father*, and that, consequently, plaintiff and his brother were entitled each to half of the joint property which after the father's death remained under the management of the uncle; that plaintiff having consented to the will which affected his legal rights, was bound by it as far as concerned the property with which it dealt; but that the lands in question, not being included in the will, and not being proved by defendant to be appendages of the zemindary left to her, must be held to belong to the joint estate, and thus to be the property of plaintiff and his brother, as heirs both of their father and of Brij Ruttun.

This reasoning contains at least two fallacies—*first*, the inference that because the evidence went to show a condition of joint estate down to the death of *Plaintiff's father*, therefore he was entitled to the property left by the surviving *uncle* in preference to that uncle's daughter; *secondly*, the implied ruling that in this case it lay on the defendant to show that the property in dispute came to her under her father's will.

It may be generally laid down that any Hindoo within these provinces, whether governed by the Bengal rule of succession or otherwise, possesses a power to bequeath an estate by will co-extensive with his power over the estate in his lifetime.

And when it is sought to exclude female heirs from succession to a husband or father under the Mitakshara, on the ground that the estate was joint, it must be shown to have been so at the time of his death, and not merely at the death of a pre-deceasing brother who was father of the claimant.

Now, if we apply the evidence in this case which the Principal Sudder Ameen considered conclusive on the point of joint

estate, and which is indeed the only evidence on the point in the record, we find that it brings the matter down, at the latest, to the Bengal year 1250, which is 15 years previous to the death of Brij Ruttun, the testator, while three years before his death we find him disposing of his property by will. We find the plaintiff, his nephew, actually attesting and assenting to that will, and finally suing under its provisions.

This appears to us to be a circumstance which effectually disposes of the earlier evidence, and which clearly proves that Brij Ruttun, three years before his death, with the full concurrence of his nephew, dealt with his estate as separate, in great part self-acquired, and assumed and exercised the power of dealing with it as he thought proper.

In this state of things, if the *churs* to which the appeal before us relates were shown to have devolved upon the defendant from her father, it would still have been open to the plaintiff to show that they had formed part of an original joint estate which to this extent had not been divided. Just as, if the estate had been proved to be generally joint, the defendant might yet have shown that the *churs* were property separately acquired, and not subject either to co-parceny, or to be absolutely taken by the male heir.

In fact, the *churs* in question appear to have been acquired by the defendant, under settlement from the Collector, at a very recent period, since the death of Brij Ruttun. One of them, at least, is shown to have been an accretion to an estate which belongs to the defendant, in a different pergunnah, and, as we understand, on the opposite side of a river from those held by the plaintiff.

It may, however, be assumed that the defendant acquired the *churs* in right of her father.

It has been fully settled by the Privy Council, in what is known as the Shiva Gunga case,* that a Hindoo, subject to the Mitakshara, may die possessed of a share in joint-family property, and also of separately acquired property, and that the two will not necessarily devolve on the same heir, but they may either descend to different persons, or, if descending to the same persons, may descend in a different way and with different consequences.

* IX. Moore, p. 539.

*Vide* judgment in case cited, p. 609.

In the case before us, Brij Ruttun unquestionably had separate property as shown by the will; he may also have had a share in joint family. In such a case, there is no presumption whatever in favor of the agnate heirs, nor any on either side beyond that which arises out of the fact of possession.

It seems to us, therefore, that the defendant could not be called upon to prove either that the *churs* in question came to her under the will, or that they were accretions to property which had to come to her; but that plaintiff had, in the first instance, to prove that they were portions of joint-family property to which the defendant could not succeed; and then it would have been for the defendant to show that, notwithstanding this, she was entitled to retain the property.

No evidence has been submitted to us from which the matter which the plaintiff had to prove could be established, and it follows, therefore, that, as to these *churs*, the plaintiff's suit ought to have been dismissed with costs.

We may add that, if there be, as we think there is, reason to believe that these *churs* really came to the daughter under the arrangements made by the testator, the plaintiff's claim becomes inequitable in a high degree, for we shall then find him taking advantage of the dispositions made by his uncle in respect of property which, in the ordinary course of Mitakshara Law, would have gone to the daughter as heir, and then falling back upon that same Law as entitling him to property which the testator intended for the daughter.

Our decision, however, proceeds on the simple ground that the present was a case in which no presumption existed in favor of the plaintiff, in which he had to prove his title, and in which he has entirely failed to prove any such thing.

We, therefore, reverse the part of the judgment complained, and direct that, in respect of the *churs* in dispute, and also in respect of the dwelling-house mentioned in the plaint, to which the same reasoning applies, judgment be entered in favor of the defendant, Pitum Koonwar, with costs in proportion.

The 21st July 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

**Appeal (by plaintiff)—Cross-objection (by one defendant)—Reversal of decree (against absent defendant).**

Case No. 3279 of 1865.

*Special Appeal from a decision passed by Mr. M. Beaufort, Additional Judge of Dacca, dated the 30th August 1865, reversing a decision passed by Baboo Woopendur Chunder Nyaruttun, Principal Sudder Ameen of that District, dated the 29th February 1864.*

Chunder Kulla Dossee and another (Plaintiffs), *Appellants,*

*versus*

Jotendro Mohun Tagore and others (Defendants), *Respondents.*

*Baboo Bungshee Dhur Sein* for Appellants.

*Baboos Dwarkanath Mitter, Sreenath Doss,* and *Pearee Lal Roy* for Respondents.

Suit against three sets of defendants interested in three different plots of land *A*, *B*, and *C*. The first Court decreed the suit only as regards *A*. On appeal in respect of *A*, the Judge not only reversed the Lower Court's decision as regards *A*, but also as regards *B* and *C* by giving the plaintiff a decree in respect of them. On special appeal as regards *A* the plaintiff was unsuccessful; but the defendants interested in *B*, having been served with a notice to appear, were treated as respondents, and upon their objection under Section 348, Code of Civil Procedure, the Judge's decision was reversed, not only as regards *B*, but also as regards *C*, although the defendants interested in *C* did not appear.

*Peacock, C. J.*—THIS is an appeal from the decision of the Judge. The Judge reversed the decision of the Lower Court as to 186 beegahs. That was done upon the appeal of the defendants who were in possession and claimed title to those 186 beegahs. The only question before the Judge related to those 186 beegahs. But, having reversed the decision as to the 186 beegahs, he went on and said, "As the defendants" (the appellants before the Judge) "do not contest "the right of the plaintiff to the remainder "of his claim beyond the 186 beegahs be-"longing to them, the plaintiff will have a "decree for the remainder, with costs in "proportion."

The other defendants in the suit, who were the owners of Daghs 1 to 6, Kismut Ghattah Koorah, and of Daghs 1 to 3, were made co-respondents in that appeal; but, as the appeal to the Judge related only to the 186 beegahs, having reversed the decision as to them, he ought not to have gone on and dealt with that part of the case, in which the Lower Court had given a decision in favor of other defendants.

It appears to me that the decision of the Lower Appellate Court must be affirmed as to the 186 beegahs with costs, and that it must be reversed as to the aforesaid Daghs 1 to 6 Kismut Ghatta Koorah also with costs, because the defendant interested in those Daghs was summoned by and at the expense of the plaintiff, appellant, and, although not made a respondent in this case, he was summoned, and the appellant paid the costs of his summoning. Therefore, having brought him here, the plaintiff ought to pay his costs.

As to Daghs 1 to 3, the defendant has not appeared. I think that we ought not to affirm the decision of the Judge as to Daghs Nos. 1 to 3, when we see that the Judge ought not to have interfered with the decision of the Lower Court as to those Daghs 1 to 3. The decision of the Judge as to those three Daghs ought to be reversed with costs.

The effect will be that the judgment is affirmed as to all except Daghs 1 to 6 of Kismut Ghatta Koorah, and Daghs 1 to 3, and reversed as to Daghs 1 to 6 of Kismut Ghatta Koorah, with costs to the defendants to whom those Daghs were decreed by the Court of first instance, and to the defendants representing the 186 beegahs, but without costs to the defendant representing Daghs 1 to 3.

*Jackson, J.*—I quite concur in the judgment which has been given, but I desire to explain the grounds on which I find myself at liberty to agree in reversing the judgment in respect to the Daghs called 1 to 3, the parties interested in those Daghs in the original suit not being before us.

Ordinarily speaking, I imagine we are only called upon to affirm or reverse as much of the judgment of a Court below as is brought before us. But Section 337 declares that, "if there be two or more "plaintiffs, or two or more defendants, in a "suit, and the decision of the Lower Court "proceed on any ground common to all, "any one of the plaintiffs or defendants "may appeal against the whole decree, and "the Appellate Court may reverse or modify "the decree in favor of all the plaintiffs or "defendants."

Now, here we have a suit and an appeal in which there were several defendants.

Some of the defendants were interested in respect to 186 beegahs of land; certain other defendants were interested as regards Daghs from 1 to 6, and a third set of defendants in a different set of Daghs numbered from 1 to 3. The Judge having before him an appeal in respect to the 186 beegahs, decided that appeal, and went on to pass further orders in respect to Daghs from 1 to 6, and also Daghs from 1 to 3. The parties interested in Daghs from 1 to 6, having been served with notice to appear in this Court, have been treated as respondents; and they have urged their objection under Section 348, and that objection has been successful. But the ground upon which their objection proceeded, and that on which the decree of the Lower Court was given, was common to the parties interested in Daghs from 1 to 6, and those interested in the other Daghs numbered from 1 to 3. For this reason, I think we are at liberty to reverse so much of the decision of the Lower Court as goes upon that common ground.

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The 21st July 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

**Registration—Evidence.**

Case No. 2956 of 1865.

*Special Appeal from a decision passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 7th August 1865, affirming a decision passed by Baboo Anund Chunder Banerjee, Sudder Ameen of that District, dated the 28th December 1864.*

Kripanath Tullapattur (Plaintiff), *Appellant,*

*versus*

Bhashaye Mollah (Defendant), *Respondent.*

*Baboo Otool Chunder Mookerjee* for Appellant.

*Mr. J. S. Rochfort* and *Baboo Nil Monee Sein* for Respondent.

A certificate of registration is evidence that a bond was registered, but not that it was executed.

A CERTIFICATE of registration is evidence that a bond was registered, but not that it was executed. In this case, the plaintiff had to prove that the bond was executed, and, having failed to do so, the Judge was right in dismissing his claim. The decree of the Judge is, therefore, affirmed with costs.

The 23rd July 1866.

*Present:*

The Hon'ble W. S. Seton-Karr, L. S. Jackson, and A. G. Macpherson, *Judges.*

**Marriage—Restitution of conjugal rights.**

Case No. 3212 of 1865.

*Special Appeal from a decision passed by Mr. W. Ainslie, Judge of Patna, dated the 28th August 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 20th April 1865.*

Chotun Bebee (one of the Defendants), *Appellant,*

*versus*

Ameer Chund (Plaintiff), *Respondent.*

*Mr. R. E. Twidale* for Appellant.

*Baboo Taruck Nath Sein* for Respondent.

A suit will not lie by a husband to recover possession of the person of his wife; but a suit will lie by the husband, in the nature of a suit for the restitution of conjugal rights, for a decree declaratory of those rights, to be enforced, in case of disobedience, by the imprisonment of the wife, or the attachment of her property, or both (*Seton-Karr, J., dubitante*).

*Seton-Karr, J.*—I AM of opinion that a suit of this nature, which may be termed one by a husband against his wife and others for the restitution of conjugal rights, will lie in the Civil Courts, and that it is not barred by the absence of the husband for many years at Hurdwar or other places in Upper India. The cause of action would be the refusal of the wife to cohabit with, or return to, the husband.

But it is argued by the pleader for the appellant that the order of the Courts should have simply been one for damages. The Courts, it is said, are not competent to order the wife to return to her husband, or, at any rate, they cannot adjudge to the husband corporeal possession of his wife, as if she were a chattel, nor enforce their decree in this fashion.

Cases of this kind do not appear to have been very numerous in our Courts. Still, at page 42 of Macpherson's Civil Code for 1860, it is said that .. claim to the *personal custody* of a woman, on the ground that she is the wife of the complainant, is cognizable by the Civil Courts. Cases are quoted in

support of this position, and at page 37 of the decision of the Agra Sudder Court for 1855, the majority of the Court ruled that such a suit would lie, and that a Civil Court could enforce such a claim. At page 166 of Macpherson's Code it is also stated that, in suits by a husband against a wife and others in order to oblige his wife *to return to cohabit with him*, the refusal is held to be the cause of action.

It is said, too, that decrees for the restitution of conjugal rights brought in the Courts in England would be enforced, not by the delivery of the person of the defendant, but by ordering the defendant into custody as for contempt of Court, in case of refusal to cohabit (*see* Shelford on the Law of Marriage and Divorce, page 576). I have great doubts, however, whether we ought to apply these rulings to this kind of cases in India, or whether there is anything to prevent our Courts decreeing to the husband the actual possession of the wife, making her over to him. There does not appear to be any settled law or practice against this course, and the decisions quoted seem to me to favor it. We are bound to administer the law in a manner suited to the people and country, especially if the case be not distinctly provided for. Section 200 of the Civil Code of Procedure seems not to have anticipated such a case. A wife can hardly be termed a specific "moveable" of which "the delivery can be made to the party to whom it shall have been adjudged." Nor, again, do I think that the provision for imprisonment of the party against whom the decree is made, and for attaching his property, ought, or was intended, to apply in such a case. Surely it would be a harder course to imprison a reluctant wife than to deliver her to her husband who wishes to cohabit. And to tell a husband, and a husband of the class before us, that he could "attach his wife's property," in order to get her to live with him, would probably be no remedy at all.

On the whole, I do not feel inclined to interfere with, or add anything to, the decree of the Lower Court, which is not shown to me to be illegal. I would adjudge to the husband the possession of his wife, and would allow the decree to be enforced by his taking possession of her. What course should be followed if the wife break away from her husband, I do not think we are at all called on to state at this stage of the litigation, nor to anticipate any such proceeding.

In this view, I would dismiss the appeal with costs, and make no change in the order of the Courts.

*Macpherson, J.*—The appellant in this case contends, and, in my opinion, rightly contends, that a suit will not lie by a husband to recover possession of the person of his wife. But I have no doubt that a suit will lie by a husband, in the nature of a suit for the restitution of conjugal rights, for a declaration that he is entitled to his marital rights, and for an order that the wife do return to him and live with him. Such an order is an order "for the performance of a particular act" within the meaning of Section 200 of Act VIII. of 1859, and if the wife refuses to obey it, the decree may be enforced, as that Section provides, by the imprisonment of the wife or by attachment of her property, or by both imprisonment and attachment.

It is said, and probably with truth, that orders for the personal delivery of the wife to the husband *have* been made both by this Court and by the late Sudder Court. But I can find no authority for the making of any such decree; for, unless the case falls under Section 200 in the way in which I think it does, it is not provided for by the Code at all. Section 200 certainly does not warrant the making the wife over in person to the husband.

The decree of the Lower Court restraining the defendant who is the mother of the wife, from preventing in any way the return of the latter to her husband, is quite proper. But I think the decree, so far as it concerns the wife, and so far as it goes beyond a simple order, that the wife shall return to her husband and live with him, should be modified. The plaintiff must be left to such remedy as he may have under Section 200 of Act VIII. of 1859, if the wife should refuse to obey the order.

*Seton-Karr, J.*—I am not positive that, after all, Section 200 may not warrant the delivery of the wife to the husband, or may not empower the husband to take possession of the wife, by the words "for the performance of a particular act." But the case is one of nicety and difficulty, and I should wish it to go to a third Judge to say, whether the order of the Lower Court should be interfered with, and, if so, in what way. The order of the first Court, with which the Judge does not interfere, is, that the plaintiff is to take his wife out of his mother-in-law's house, and the latter is not to interfere.

*Jackson, J.*—This is a case referred for the opinion of a third Judge under the procedure previous to the Charter of 29th December last.

The suit was brought by a husband against his wife and others, the parties being Hindoos, to obtain his conjugal rights. The plaintiff obtained the decrees of both Courts below, and the learned Judges, in hearing the special appeal, have confirmed the decrees in substance; but they differ on the point of law, what precisely should be the relief granted to the husband—Mr. Justice Seton-Karr being of opinion that bodily possession of the wife may and ought to be delivered to the husband; Mr. Justice Macpherson holding that the decree ought to be merely declaratory, to be enforced in case of disobedience by attachment. I am of the same opinion as Mr. Justice Macpherson.

A wife cannot be looked upon as property, moveable or immoveable, which passively undergoes transfer from one person to another. If she could be so dealt with, it would have to be determined whether she was moveable or immoveable, and some curious questions of limitation might arise; and, if the wife were property, she could not, obviously, be a party to the suit, as she is in this case, and always must be in suits of this nature. And, further, in seems to me repugnant to the principles of civilized society, whether European or British Indian, that an adult human being, wife or otherwise, should be delivered over as a horse or other brute animal might be.

In truth, it seems to me that the function of the Court in a suit of this nature must be simply to determine, as between the husband and the wife, whether he is or is not entitled to his marital rights. If the decree of the Court be in his favor, the wife, as a party to that suit, is bound to yield obedience to the decree, and, if she refuses to do so, may be dealt with according to law. And in like manner, any other persons whose conduct may have entitled the husband to include them as defendants in the suit will be bound to comply with the decree, and may possibly be liable to pay damages to the aggrieved husband.

There are three cases bearing on the point, cited in the argument before me. Two were from the North-West Provinces.

In the first of these cases, although the suit is designated in one part of the report as a suit "to recover possession of the person of his wife," the question really tried by the Court was "whether, under the Hindoo Law, the appellant should be compelled to cohabit with her husband, who has taken another wife." On this point, which is not before me, the majority of the Court decided in the affirmative (Mr. Coverley Jackson dissenting).

The second case, from the reports of 1865, was also a suit "for the recovery of conjugal rights," and the Sudder Ameen decreed "that the wife be delivered to the husband, "with the nose-ring which he presented "to her." This decree was reversed by the Zillah Judge, but restored on special appeal by the Judges of the Sudder Court. If this is to be considered as a ruling by the Sudder Court at Agra, that a wife may be delivered bodily, with her nose-ring, to her husband, I should respectfully decline to follow it. But, in truth, in this, as in the preceding case, there was no argument at all on that point, the only question discussed being whether a *second* marriage, in breach of the first nuptial contract with the plaintiff, could be any impediment to his asserting his conjugal rights. The Sudder Court finally held that the second marriage was invalid, and the plaintiff entitled to his decree.

The third case cited was from the decisions of our own Court (3 Weekly Reporter, p. 193). In that case, which appears to be a decision of Steer and Phear, JJ., there were two husbands, each setting up a valid marriage. That of the plaintiff was affirmed. Towards the end of the judgment, I find it stated that one objection made to the suit was, that it would not lie, "because there is no provision "of law how a decree for possession of a "wife is to be enforced." The answer to this was easy; the Court, however, say, "but it is as easy to deliver over a wife to "her husband as any other property to "which he is entitled."

This, I think, is a mere observation of the Judges, and not a deliberate ruling that a wife is to be so delivered. Indeed, one of the learned Judges who tried that case—Mr. Justice Phear—informs me that the remark found its way into the judgment, as far as he is concerned, from pure inadvertence.

I concur, therefore, with Mr. Justice Macpherson in ordering that the decree of the Court below be so far modified as to make it a declaration that the husband is entitled to conjugal rights, and that the wife, defendant, be ordered to return to his protection.

The 23rd July 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Limitation—Mesne-profits.**

Case No. 254 of 1865.

*Application for review of judgment passed on the 22nd February 1864, in Regular Appeal No. 316 of 1863.*

Mr. James Gray and others (Defendants), *Appellants,*

*versus*

Anund Mohun Moiter (Plaintiff), *Respondent.*

*Baboo Juggodanund Mookerjee* for Appellants.

*Baboos Kishen Kishore Ghose* and *Mohinee Mohun Roy* for Respondent.

A suit for mesne-profits brought after two years from the passing of Act XIV. of 1859, pursuant to a decree for recovery of possession within the said two years, is governed by the provisions of that Act, and must be limited to the mesne-profits due for a period of six years before its institution.

THE review in this case was admitted to try whether the suit was barred by the provisions of Act XIV. of 1859. Plaintiff was dispossessed in May 1849, and instituted a suit to recover possession on 19th August 1851, and obtained a decree for possession on 3rd April 1861, and was put into possession in June 1861, and brought the present suit for mesne-profits on 9th May 1862, after Act XIV. of 1859 came into operation. Section 18 of that Act distinctly enacts that all suits to which the provisions of the Act are applicable, that shall be instituted after the expiration of the said period (two years from the passing of the Act), shall be governed by this Act and no other Law of Limitation, any Statute, Act, or Regulation now in force notwithstanding. The provisions of the Act are clearly applicable to the suit, and as this Court has held that a suit for mesne-profits must be brought within six years from the date on which the claim to them accrued, the present suit must be limited to the mesne-profits due for a period of six years before its institution, deducting therefrom the time during which plaintiff has held possession, *viz.*, from June 1861 to the date of suit.

The opposite party wished to introduce other matters before the Court, such as the right of the applicants to be heard in review, the amount of the mesne-profits, &c.; but as the review has been admitted to decide only one single point, *viz.*, whether the new Law of Limitation, Act XIV. of 1859, was applicable to the case, we decline to go into these.

The Court, therefore, alter the former judgment holding that the provisions of Act XIV. of 1859 are applicable to this suit, and they give plaintiff a decree for mesne-profits at the rate stated in her plaint, from 9th May 1856, *minus* the period she has been in possession, *viz.*, from June 1861 to the institution of the suit. Costs will be given according to the amount decreed and dismissed.

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The 23rd July 1866.

*Present:*

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

**Pleader's Fees—Section 7, Act I. of 1846.**

Case No. 256 of 1866.

*Special Appeal from a decision passed by Mr. J. R. Muspratt, Judge of Purneah, dated the 10th November 1865, reversing a decision passed by the Sudder Ameen of that District, dated the 24th March 1865.*

Musst. Ameeroonnissa and others (Defendants), *Appellants,*

*versus*

Mr. C. Chapman (Plaintiff), *Respondent.*

*Mr. R. E. Twidale* for Appellants.

*Baboo Khettur Mohun Mookerjee* for Respondent.

Section 7, Act I. of 1846, applies only to cases as between party and party, and not to claims by pleaders against their clients.

Where a pleader was employed by several defendants in the same interest, it was held that he was not entitled to a full separate fee from each of them, and still less so upon the full valuation of the entire suit; and that, in the absence of any express agreement, he was only entitled to a reasonable sum as remuneration for his work and labor.

THE plaintiff sued for the recovery of Rupees 1,000, less Rupees 140, of which he admitted the receipt, due to him as a pleader in respect of a judgment obtained in favor of the defendant, his client, on the 18th of February 1862. The suit was dismissed by the Sudder Ameen on the

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ground that the plaintiff had received as much money as he was entitled to demand.

On appeal, the Judge gave the plaintiff a decree for the full amount of the fees claimed by him. He observes that "the suit was decided by Mr. Birch, the Officiating Judge, who rejected the plaint at the hearing under Section 29, Act VIII. of 1859 (*see* Weekly Reporter, Full Bench Decisions, page 41). Counsel and vakeels were heard on both sides, and two days were occupied in the hearing of arguments before the decision." He says: "That the suit was not dismissed on default, and that the whole of the requisite pleadings had been filed. It was not the fault of the vakeel that the Judge did not proceed to a final decision." The Judge says that he is therefore entitled to full fees according to the provisions of Regulation XXVII. of 1814. The Judge notices that Rash Beharee Roy, the vakeel originally appointed, died, and that Mr. Chapman was appointed in his stead; but he made no enquiry as to what part of the business was done by Rash Beharee in his lifetime, and treated Mr. Chapman as if he had done the whole of the work. He notices that the judgment of Mr. Birch was set aside by the High Court on appeal, and that the case was remanded. He did not enquire what became of the case on the remand, nor does he notice the important fact that Mr. Chapman did no work whatever for the defendant after the remand, but gives him a decree for the full amount of all the money which he supposes the defendant would have been entitled to recover from her adversary if the case had been ultimately conducted to a successful termination.

Both the Lower Courts treat the case as if the question of the amount of the plaintiff's remuneration depended on and was fixed by Section 25 of Regulation XXVII. of 1814. But by Section 6 of Act I. of 1846 it is enacted that Section 25, Regulation XXVII. of 1814, shall cease to be enforced except for the purpose specified in Section 7 of that Act. By Section 7 it is enacted "that parties employing authorized pleaders in the Court shall be at liberty to settle with them, by private agreement, the remuneration to be paid for their professional services, and that it shall not be necessary to specify such agreement in the vakalutnamah; provided that, when costs are awarded to a *party* in any regular suit, original or appeal, decided *on the merits against another party*, the amount to be paid on account of fees of pleaders shall be calculated according to the rules (in Section 25, Regulation XXVII. of 1814); and that, when costs are awarded in other cases, the amount to be paid on account of such fees shall be one-fourth of what it would have been in a regular suit decided on its merits."

It is quite clear that Mr. Birch's judgment was no decision on the merits, and there was nothing in it which, under Section 7, Act I. of 1846, would have entitled the defendant, as against her adversary, to the full amount of costs on the scale fixed by Section 25 of Regulation XXVII. of 1814. She would only have got one-fourth of such amount. But the decision, such as it was, was set aside.

The Section expressly applies only to cases as between party and party. It does not directly touch claims by pleaders against their own clients.

There being no express agreement, the plaintiff is only entitled to a reasonable sum as remuneration for his work and labor as a pleader. There is, as we understand, no evidence on the record to show that he has not been sufficiently paid. It appears that he was employed by Rajah Inayet Hossein and several other persons, of whom the defendant was one, that he received the defendant's vakalutnamah, that he was paid the sum of Rupees 700 at the time when he accepted the vakalutnamahs, and has since received a further sum of Rupees 900 from the Rajah. There is nothing to show that the defendant had an interest distinct and separate from that of the Rajah; or, if so, what was the extent of that interest. The plaintiff appeared for the Rajah, the defendant, and other persons in the same interest, who made payments to him, as they say, ijmalee. We see no reason to think that he ought to be allowed a full separate fee from each of the persons whom he so represented. Still less ground can there be for contending that he is entitled to a full fee from each of these parties upon the full valuation of the entire suit. Of course, under Act I. of 1846, he was entitled to make his own bargain; but, as he failed to do so, we are wholly unable to say that he has not been fully paid for anything that he did, by the sum of Rupees 1,600, which it is certain that he has already received. If the defendant is a mere nominal party, we see no reason to think that plaintiff has not been sufficiently paid for that portion of the work which he did for her by the Rupees 140 which he has already received. Indeed, in the absence of any agreement or under-

standing to the contrary, we should be inclined to assume that it was a payment in full. In our opinion, the plaintiff has wholly failed to show that he is entitled to anything more than he has already received.

We reverse the decision of the Lower Appellate Court with costs, and direct that the suit be dismissed with costs, unless the respondent desires a remand for further enquiry with reference to the above observations. He must distinctly understand that we give him no sort of encouragement. If the respondent does not ask for a remand within 21 days, the suit will stand dismissed.

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The 24th July 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Review of Judgment—Appeal.**

Case No. 711 of 1866.

*Special Appeal from a decision passed by the Judge of Backergunge, dated the 9th December 1865, reversing a decision passed by the Judge of the Small Cause Court, exercising the powers of a Principal Sudder Ameen of that District, dated the 26th January 1865.*

Syud Asudoodden Hyder and others (Plaintiffs), *Appellants,*

*versus*

Khajah Abdool Kureem and others (Defendants), *Respondents.*

*Baboos Romesh Chunder Mitter* and *Otool Chunder Mookerjee* for Appellants.

*Baboo Chunder Madhub Ghose* for Respondents.

A review of judgment may be proceeded with after an appeal has been filed against it.

THE only question in this appeal is whether the Principal Sudder Ameen had power to proceed in a review *after* a petition of appeal had been filed against the same decree. It has been decided by a Full Bench of this Court that a review may be proceeded with in such a case (5 Weekly Reporter, Civil Rulings, page 59). The appeal will therefore be decreed, and the decision of the Zillah Judge reversed with costs and interest.

The 24th July 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Ejectment (of alleged lakherajdar)—Onus probandi—Limitation.**

Case No. 495 of 1866.

*Special Appeal from a decision passed by the Judge of Backergunge, dated the 7th December 1865, reversing a decision passed by the Moonsiff of that District, dated the 23rd December 1864.*

Gobind Chunder Shaha and others (Plaintiffs), *Appellants,*

*versus*

Kishen Chunder Shaha and others (Defendants), *Respondents.*

*Mr. W. A. Montriou* and *Baboo Gopal Lal Mitter* for Appellants.

*Baboo Dwarkanath Mitter* for Respondents.

Where a plaintiff sues to eject an alleged lakherajdar on the allegation that he had been dispossessed by the defendant under a false title of lakherajdar, he is bound to prove his allegation, and that his cause of action accrued within 12 years of the institution of the suit.

THIS was a suit to eject an alleged lakherajdar, and has been dismissed, as the plaintiff has been unable to prove that he has at any time exercised rights of ownership over the land. It has been held that limitation bars the hearing of the plaintiff's suit on the merits.

We have heard Mr. Montriou at some length on this point. The learned Counsel argued that, under the special circumstances of this case, the plaintiff having sued the defendant, not as a lakherajdar, but as a trespasser, and the defendant not having denied that the lakheraj estate was situate within the four corners of plaintiff's estate, the usual rule as to the *onus* of proof on issues of limitation was changed, and that, in this case, the *onus* should be placed on defendant at least to prove something before the plaintiff was called on to prove anything.

We see no circumstances special to this case to induce us to relax the usual rules on the issue of limitation. As the defendant is in possession, and admittedly in possession, he is entitled to raise against the plaintiff the issue that he has so long delayed to prefer his suit that it cannot now be enquired into, and the plaintiff must prove his cause of action, and prove that it originated within the time allowed by the Law of

Limitation. In this case the plaintiff states that the disputed land appertains to his villages, and was his own property, but that he has been dispossessed of it by defendant who sets up a false title of lakheraj. The defendant, on the other hand, states that he holds a lakheraj from before the Decennial Settlement. If the plaintiff can prove his facts, the case on the merits can be heard; if not, the plaintiff is out of Court. The plaintiff must, under Section 14, Act XIV. of 1859, not only show this, but also show that his cause of action against the lakherajdar accrued within 12 years of the institution of the suit. It is quite evident that the plaintiff made no attempt to prove this, and, so failing, the Lower Court was right to dismiss his suit as barred by limitation.

We dismiss the appeal with costs.

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The 24th July 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Mahomedan Law—Dower—Limitation.**

Case No. 688 of 1866.

*Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 9th December 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 31st July 1865.*

Shahazada Mahomed Faez (Defendant), *Appellant,*

*versus*

Shahazadee Oomdah Begum and others (Plaintiffs), *Respondents.*

*Mr. R. E. Twidale* for Appellant.

*Baboos Gopal Lal Mitter, Nil Madhub Sein,* and *Mohesh Chunder Bose,* and *Moulvie Syud Murhumut Hossein* for Respondents.

What Law of Limitation is applicable to a suit by the heirs of a Mahomedan wife for her dower.

We think the Judge was right in the law which he laid down in this case. A Mussulman wife's dower, even though it is in the hands of her husband, is considered to be her estate, held by him in trust for his wife, and, on her death, becomes divisible among her heirs. The Limitation Law applicable to a suit by those heirs is not that relating to suits on contracts, but that relating to suits to recover inheritance. The suit is not founded on the contract, but on the withholding of the widow's estate from the heirs.

Appeal dismissed with costs.

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The 24th July 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Parol Evidence (to vary deed).**

Case No. 672 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Sylhet, dated the 13th January 1866, reversing a decision passed by the Moonsiff of Nubeegunge, dated the 16th September 1865.*

Mahomed Azeem (Plaintiff), *Appellant,*

*versus*

Raesooddeen and others (Defendants), *Respondents.*

*Baboo Grish Chunder Ghose* for Appellant.

*Baboo Gopal Lal Mitter* for Respondents.

Parol evidence is not admissible to vary a deed of sale so as to make it a mortgage deed, whether as against a party to the deed, or as against an innocent purchaser from the person in whose favor the deed was executed.

We think that the decision in this case cannot stand. The Principal Sudder Ameen has admitted parol evidence to vary the direct words of a deed of sale, and to make it a mortgage deed, and this not only as against a party to the deed, but as against an innocent purchaser from the person in whose favor the deed was executed. The decision is both unjust and illegal. It is reversed, and the plaintiff's suit decreed with all costs.

The 26th July 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Sale of land in execution of decree—Arrears of of former years.**

Case No. 898 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Purneah, dated the 30th December 1865, reversing a decision passed by the Sudder Ameen of that District, dated the 27th April 1864.*

Mussamut Luteefun and another (Defendants), *Appellants,*

*versus*

Shaikh Mean Jan (Plaintiff), *Respondent.*

*Baboo Kalee Kishen Sein* for Appellants.

*Baboo Grish Chunder Ghose* for Respondent.

A tenure purchased in execution of a decree for current rent, cannot be re-sold for the arrears of former years, which must be recovered from the former proprietor.

THE Principal Sudder Ameen is clearly wrong in his law. The tenure purchased by Waris Ali in execution of a decree for the current rent due therefrom, cannot be again re-sold for the arrears of rent which had accrued on account of arrears of former years. Those arrears became the personal debt of the former proprietor, and must be recovered from him. The tenure itself is hypothecated for the rent of the current year, and can only be sold for arrears of the current year.

The appeal is decreed, and the decision of the Principal Sudder Ameen reversed with costs and interest. Under this order, the original suit of the plaintiff must be dismissed with costs and interest.

The 26th July 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Evidence (how to be recorded).**

Case No. 692 of 1866.

*Special Appeal from a decision passed by Mr. F. C. Fowle, Judge of Rungpore, dated the 23rd December 1865, affirming a decision passed by Mr. DaCosta, Principal Sudder Ameen of that District, dated the 13th June 1865.*

Shah Suheeooddeen and others (Defendants), *Appellants,*

*versus*

Luchmeeput Doogur (Plaintiff), *Respondent.*

*Baboo Mohinee Mohun Roy* for Appellants.

*Baboos Romanath Bose* and *Bungshee Buddun Mitter* for Respondent.

Manner in which Judges should record the evidence of witnesses.

THIS suit has been preferred for possession of a julkur situated in the river Kurtwa, and both Courts have decided it in favor of the plaintiff, more specially on the ground that the survey maps prove that the channel of that river appertains to the plaintiff's estate. It is shewn to us on special appeal that the same map which states that the channel of that river generally belongs to the plaintiff's estate, also states that a portion of it is in the possession of the defendants as a portion of their estate. This entry in the map seems to have been overlooked by both Courts, and we are consequently obliged to remand the case in order that it may be considered.

We concur in the remarks added to the judgment of the Judge respecting the mode in which the Principal Sudder Ameen, Mr. DaCosta, records the substance of the evidence of witnesses examined by him. The statement in which he records the substance of the evidence does not in fact contain the substance of that evidence; it contains solely the answer of each witness to one or two questions in a meagre tabulated form. It is incumbent on the Principal Sudder Ameen, even if he does not take down the whole of the evidence in his own

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handwriting, which, we think, every English Judge should, to record every material answer made by the witness in the examination-in-chief, the cross-examination, and in reply to questions put by the Court. The substance of these answers should not be taken down in the columns of a statement, but should be written down, as witnesses' evidence is ordinarily written, in consecutive sentences. The Principal Sudder Ameen should also distinguish between the evidence given in answer to the questions of the vakeel who conducts the examination-in-chief, and that given in answer to the cross-examination. The substance of the evidence, as now recorded by the Principal Sudder Ameen, is ridiculous and of no use whatever in ascertaining what the witness did really depose to.

As Mr. DaCosta has left the district of Rungpore, we direct that a copy of these remarks may be sent to him through the Judge of the district in which he is now employed, with directions that he will take down the substance of the evidence of witnesses examined by him in future in a proper and reasonable manner. The costs of this appeal will follow the final judgment in the case.

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The 26th July 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Limitation—Mesne Profits—Liability of several defendants (Proportionate assessment of).**

*Regular Appeals from a decision passed by the Officiating Principal Sudder Ameen of Rungpore, dated the 15th February 1866.*

Case No. 155 of 1866.

Fuzul Mahomed Mundul and Kesub Bebee (Defendants), *Appellants,*

*versus*

Raj Coomaree Debee (Plaintiff), *Respondent.*

*Baboos Dwarkanath Mitter* and *Kishen Dyal Roy* for Appellants.

*Baboos Kishen Kishore Ghose, Greeja Sunkur Mojoomdar, Onookool Chunder Mookerjee,* and *Obhoy Churn Bose* for Respondent.

Case No. 159 of 1866.

The Nawab Nazim of Bengal (Defendant), *Appellant,*

*versus*

Raj Coomaree Debee (Plaintiff), *Respondent.*

*Baboos Kishen Kishore Ghose, Onookool Chunder Mookerjee,* and *Obhoy Churn Bose* for Appellant.

*Baboo Greeja Sunker Mojoomdar* for Respondent.

Six years is the period of limitation prescribed by Act XIV. of 1859 for suits for mesne-profits. The cause of action for such profits is the date upon which they annually become due; and no deduction can be made on account of the pendency of the suit for possession.

The liability of the several defendants in this case was assessed in proportion to the amount of profits which each had derived from his wrongful possession.

*Kemp, J.*—THESE are two appeals by co-defendants from one and the same decision. By consent of the parties, they were heard together, and one decision will govern the two appeals.

The main contention before us is—*first,* whether or not any portion, and, if so, what portion, of the claim is barred under the new Limitation Act, XIV. of 1859; *second,* the respective liabilities of the two appellants for mesne-profits, and the extent of that liability; and, *third,* the amount of the liability.

The plaintiff sues to recover mesne-profits amounting to Rupees 9,627-6-10, principal and interest, on the allegation that the defendants had dispossessed her husband from three jotes and under-tenures from the end of 1261 B. S. The mesne-profits claimed for eight years, or from 1262 to 1269, and the present suit was instituted on the 3rd of Bhadro 1272 B. S. The plaintiff's suit for possession was finally decreed on the 15th September 1862.

The defendant Kesub Bebee answered to this effect: *First,* that a portion of the plaintiff's claim was barred by the Statute of Limitation. *Second,* that she is not liable, but the proprietor of the estate, the Nawab Nazim, whose agent had leased the lands out to her for a period of seven years under a pottah, dated 4th Jeyt 1262 B. S. *Third,* that the amount claimed is excessive.

The defendant, Fuzul Mahomed, who is the husband of Kesub Bebee, averred that he had never been in possession of the three tenures alluded to, and that he had been unnecessarily made a party to the suit.

The Nawab Nazim answered that he had never given permission to his agent to lease out the three tenures to the defendant Kesub Bebee; that, as it had been established in the suit, brought by the plaintiff for possession that he had not ousted the plaintiff, he was not liable for the mesne-profits.

The Officiating Principal Sudder Ameen laid down four issues for trial:—

*First.*—Does limitation apply to any portion of the claim?

*Second.*—Can the three defendants be made liable for the plaintiff's claim?

*Third.*—Has the plaintiff correctly estimated the amount of the mesne-profits?

*Fourth.*—Is the plaintiff legally entitled to interest?

On the first point, the Principal Sudder Ameen held that no portion of the claim was barred under the Statute of Limitation. He quotes a ruling of a Divisional Bench of this Court, dated the 22nd February 1864.

On the second point, the Principal Sudder Ameen observes that all the three defendants were made liable for the costs of the plaintiff in the ejectment-suit, and that it was in consequence of their acts that the plaintiff was dispossessed. He therefore held them to be all liable.

On the third point, the Principal Sudder Ameen was of opinion that the plaintiff had not over-estimated the amount of the mesne-profits, for, whether the amount be tested by the papers filed by the defendants, or by the result of the Ameen's local investigation, it was equally clear that the amount claimed by the plaintiff was not excessive.

On the fourth point, the Principal Sudder Ameen was of opinion that the plaintiff was not entitled to interest owing to the delay in instituting the present suit.

The defendants were declared to be jointly liable in the sum of Rupees 5,288-6-8, with costs in proportion, bearing interest at 12 per cent.—plaintiff to pay the excess costs of the defendants.

I am of opinion that the judgment of the Court below on the issue in bar is clearly wrong. Six years is the period of limitation prescribed by Act XIV. of 1859 for suits for mesne-profits, and no deduction can be made on account of the pendency of the suit for possession. The decision quoted by the Principal Sudder Ameen has since been set aside on an application for review of judgment. As the plaint in this case was filed after Act XIV. of 1859 came into operation, the claim for mesne-profits can only be decreed within six years preceding the plaint, and the cause of action for such profits is the date upon which they became annually due. (*See* pages 13 and 38, Volume III., Weekly Reporter, Civil Rulings.) In this view, all that the plaintiff is entitled to recover is mesne-profits for 3 years and 8 months.

As to the question of the respective liabilities of the defendants, and whether, in the event of the Court finding that they are all wrong-doers, we can apportion the extent of their liabilities, we find that the circumstances of this case justify our doing so. In the original suit for possession, it was not decided who was the party who actually dispossessed the plaintiff. The Nawab Nazim was made a party to that suit, it is true; but he was not arrayed as the principal defendant; the other defendants before us were so. They set up a lease from the agent of the Nawab Nazim under a deed of permission from him, but they failed to prove that deed. They alone appealed, and not the Nawab Nazim; and again, failing to prove that they held under a lease granted by permission of the Nawab Nazim, they failed in their appeal.

The Nawab Nazim has simply enjoyed the difference between the former jumma payable to him by the plaintiff and the enhanced jumma received by him from the defendants, or the difference between Rs. 97-13 and Rs. 138-8—equal to Rs. 40-11; and for this latter sum he is liable for three years and eight months, with costs in proportion bearing interest.

The other defendants have been clearly in wrongful possession, and must account to the plaintiff for all that they have collected, or ought to have collected, after deducting the jumma which would have been payable by the plaintiff to the Nawab Nazim had he remained in possession, or Rupees 97-13. I find that the Ameen reports that Rupees 5,585 were the gross collections from 1262 to 1269 made by these two defendants from the tenantry. This estimate is somewhat less than that assumed by the plaintiff, but it is, in our opinion, one that may be safely relied upon, particularly with reference to the papers of collection filed by the defendants for other years.

These two defendants will therefore be liable for mesne-profits at the rate of Rupees 698-2 per annum, from which must be

deducted Rupees 97-13, the sudder jumma payable to the zemindar, the Nawab Nazim, leaving a sum of Rupees 600-5 for which they are liable for a period of three years and eight months, with costs in proportion bearing interest; excess costs to be paid by the plaintiff, with interest.

The costs of this appeal will be borne by the plaintiff and defendants respectively in proportion to the sums which have been awarded for or against them.

*Markby, J.*—The only doubt I have had in this case is how far we are competent in an action for mesne-profits to assess the proportion in which the defendants should be made liable. It appears to me that the record of the former action is conclusive upon us that the defendants ousted the plaintiff, and held the land to which he was entitled. I understand, however, that this is a course which has been taken on several occasions by this Court, and that the liability of the defendants has been assessed in proportion to the amount of profits which each has derived from his wrongful possession; and, in deference to these decisions, I concur with the judgment of my brother Kemp on this point. Upon all the other points in the case, I entirely concur in his judgment.

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The 27th July 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

**Hindoo Law (Mitakshara)—Right of son (to be heard in suit or appeal).**

Case No. 1216 of 1866.

*Special Appeal from a decision passed by the Judge of Gya, dated the 26th March 1866, modifying a decision passed by the Principal Sudder Ameen of that District, dated the 11th November 1865.*

Brojo Bhookun Lal Awustee (one of the Defendants), *Appellant,*

*versus*

Mean Jahan Koonwar (Plaintiff), and the Collector of Gya (Defendant), *Respondents.*

*Mr. R. V. Doyne* and *Baboos Onookool Chunder Mookerjee* and *Kishen Succa Mookerjee* for Appellant.

*Mr. R. T. Allan* and *Baboos Kishen Kishore Ghose, Jugodanund Mookerjee,* and *Dwarkanath Mitter* for Respondents.

The son of a lunatic living under the Mitakshara Law is not bound, by a compromise entered into between the plaintiff and the Court of Wards as representing the lunatic, from being heard, for the protection of his own interests, in a suit or appeal in which he has been regularly made a defendant or respondent.

We think that the appellant, who is the lunatic's son, had a perfect right to be heard in the appeal in which he had been regularly made a respondent, and that the compromise regularly entered into between the plaintiff and the Court of Wards, as representing the lunatic, the father of the appellant, was no bar to his being so heard. The Judge is wrong in saying that this appellant, Bhookun Lal, was only made a *pro formâ* respondent. He had been made a regular defendant, and his written statement was most hostile to the plaintiff. Moreover, as living under the Mitakshara Law, he had a certain right in the property claimed by the plaintiff, and, on the appeal of the plaintiff, he had a right to be heard for the protection of his own interests.

In this view, we remand the case to the Judge in order that it may be heard as far as it affects this appellant. Should the plaintiff be unwilling to carry on the appeal at all after the compromise, the Judge will then dismiss the plaintiff's appeal as far as it relates to this special appellant, who will not thus be bound or affected by anything in a compromise to which he was not a party.

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The 27th July 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

**Hindoo Law—Maintenance of wife.**

Case No. 1238 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 17th February 1866, reversing a decision passed by the Moonsiff of Sonamookhy, dated the 2nd September 1865.*

Kullyanessuree Debee (Plaintiff), *Appellant*,

*versus*

Dwarkanath Surmah Chatterjee (Defendant), *Respondent*.

*Baboo Shib Chunder Mojoomdar* for Appellant.

*Baboo Romanath Bose* for Respondent.

Under the Hindoo Law, a wife who, without her husband's sanction, leaves him to live with her own family, has no right to ask maintenance from her husband.

THERE are no grounds for this special appeal. The suit is by a wife against her husband for maintenance. The Judge finds that the plaintiff eloped from her husband's house without his consent, and has continued to reside apart from him. A wife who, without her husband's sanction, leaves him to live with her own family, has no right to ask maintenance from her husband; and the question whether the plaintiff was guilty of unchastity or not is wholly immaterial.

This point has been long ago decided in a case from Zillah Chittagong given in Macnaghten's Hindoo Law, Volume II., page 109.

The appeal is accordingly dismissed with costs and interest.

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The 27th July 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges*.

**Stamp-Duty.**

Case No. 1282 of 1866.

*Special Appeal from a decision passed by the Additional Judge of Hooghly, dated the 5th February 1866, modifying a decision passed by the Principal Sudder Ameen of that District, dated the 9th May 1865.*

Peziroodeen Mahomed and another (two of the Defendants), *Appellants*,

*versus*

Hureehur Mookerjee (Plaintiff), *Respondent*.

*Baboo Tarucknath Sein* for Appellants.

*Baboos Bama Churn Banerjee* and *Umbika Churn Banerjee* for Respondent.

The only ground of special appeal being that the special respondent had appealed in the Lower Appellate Court upon an insufficient stamp, it was held that such an objection (being one that did not go into the merits) ought to have been taken in that Court, and the special appeal was dismissed upon condition of payment of the deficient stamp-duty.

THE only substantial point taken by the appellant in the present case is, that the respondent, the appellant in the Lower Appellate Court, appealed upon an insufficient stamp. This objection should have been taken in the Lower Appellate Court. It is not one that goes into the merits of the suit in any way. Had it been taken before him, the Judge would, in all probability, have allowed the plaintiff, appellant below, to deposit the additional stamp. That being so, we direct that the present appeal be dismissed with costs, upon condition that the now respondent file within 10 days an additional stamp sufficient to cover that which ought to have been paid in his petition of appeal to the Lower Court. Should he fail to deposit the additional stamp, the present appeal will be decreed with costs so far as regards the wasilat awarded to the respondent in the Court below, and dismissed as to the residue with costs in proportion.

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The 30th July 1866.

*Present:*

The Hon'ble C. B. Trevor and H. V. Bayley *Judges*.

**Pre-emption—Mortgage.**

Case No. 601 of 1866.

*Special Appeal from a decision passed by Mr. R. J. Richardson, Judge of Behar, dated the 5th December 1865, affirming a decision passed by Baboo Gunga Churn Shome, Principal Sudder Ameen of that District, dated the 28th December 1864.*

Moonshee Syed Ameer Ali (Plaintiff), *Appellant*,

*versus*

Bhabo Soonduree Debia and others (Defendants), *Respondents*.

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*Messrs. R. V. Doyne* and *R. E. Twidale* for Appellant.

*Baboos Dwarkanath Mitter* and *Unnoda Pershad Banerjee* for Respondent.

A party alleging a right of pre-emption in respect of property, which is the subject of a conditional sale, is bound to make his claim immediately on the expiry of the year of grace mentioned in the notice of foreclosure.

PLAINTIFF, as a co-parcener by purchase, sued for possession of certain lands on an alleged right of pre-emption, and to set aside a deed of conditional sale, dated 3rd Bhadro 1252 B. S. The claim was for a 7½-annas share of the above property. The conditional deed of sale stipulated that the sum advanced by the mortgagee should be repaid by the mortgagor in Sawun 1254 B. S. The money not being paid as stipulated, the mortgagee gave notice of foreclosure under the provisions of Regulation XVII. of 1806, and obtained the usual decree in the Zillah Court on the 29th November 1859, which was upheld by the High Court in appeal on the 21st March 1863. The plaintiff's case was that he was unable to demand recognition of the right of pre-emption till the final orders of the High Court had upheld the Zillah Court's decree, and that then he made the formal demands particularised by the Mahomedan Law of Pre-emption.

The answer of defendants to this claim of plaintiff was—

I. That the demand for the exercise of the right of pre-emption should have been made as soon as notice of foreclosure had been given, under the provisions of Regulation XVII. of 1806, and that, this not having been done, the Mahomedan Law of Pre-emption, which requires an immediate demand, rendered plaintiff's claim inadmissible.

II. That the preliminary formalities, necessary under the same law, had never been carried out by plaintiff.

The first Court held that the plaintiff had delayed his demand for the exercise of his right of pre-emption beyond the period contemplated by the law (Regulation XVII. of 1806); and that, according to plaintiff's own statement, he (plaintiff) was well aware that foreclosure had previously taken place. The first Court also held that plaintiff had not carried out the preliminary formalities prescribed by Mahomedan Law, as essential to render legal and valid a claim based on a right of pre-emption. The first Court accordingly dismissed plaintiff's suit.

Plaintiff appealed, urging that the notice of foreclosure given under Regulation XVII. of 1806 would not bind him as to the time at which to make his demand on a right of pre-emption, inasmuch as it was only after a regular decree, and possession under that decree, that the transaction could be deemed closed so as to make the sale *absolute*, or to admit of plaintiff's regarding the transfer as sufficiently complete for him to make his claim of a right of pre-emption. And the appellant also urged that he had duly carried out the necessary preliminary formalities.

The Lower Appellate Court held that the plaintiff could not occupy all the legal position of a pre-emptor, not having purchased after the notice of foreclosure issued; and that such notice, of which plaintiff was fully aware, and not the subsequent proceedings carrying out the details of the foreclosure effected by such notice, must be taken as the date when plaintiff was bound to make his demand on his alleged right of pre-emption. The Lower Appellate Court also found as a fact that plaintiff had *not* carried out the necessary preliminary formalities prescribed by the Mahomedan Law.

The Lower Appellate Court having in this view dismissed plaintiff's appeal, plaintiff appeals specially; and the learned Counsel, Mr. Doyne, urges, in plaintiff's behalf, the same plea on which plaintiff appealed to the Lower Appellate Court, *viz.*, that the sale must not be regarded as absolute merely upon the notice of foreclosure, but that plaintiff could not be required to put forward his claim to pre-emption till after the decree of the High Court above referred to had finally and conclusively declared that the sale was absolute. It was pressed on us by Mr. Doyne, in support of this view, that, after the notice had been given, it was still open to the mortgagor to question the mortgagee's accounts before the decree; and that, if it were proved that in fact the mortgagee had been paid within the stipulated period, the notice of foreclosure would be of no avail, and the sale could never become absolute.

Strictly speaking, perhaps it would not be necessary in this case to go into this point, because it has been found as a fact on the evidence by both Courts, that plaintiff never carried out those preliminary formalities which are prescribed by the Mahomedan Law as indispensible to sustain any claim on an alleged right of pre-emption.

But as no objection of this kind has been taken, and the special appeal has been

argued by the learned Counsel on the other points, we proceed to give our judgment upon it.

We are clearly of opinion that the party alleging a right by pre-emption is bound to set forth his claim after expiry of the year of grace mentioned in the notice of foreclosure issued. That notice declares that, after the expiry of the year of grace, the conditions on which the transaction was to be regarded as one of the mortgage not having been fulfilled, the conditional character of the deed of sale then ceases, and it becomes, from failure of fulfilment of the conditions, an absolute deed of sale, transferring entirely the mortgagor's proprietary rights, preserved till then, to the mortgagee. It is true that it is open to the mortgagor to show that the mortgage has been satisfied, and that, consequently, the notice is erroneous, and in *that event* the notice may become inoperative; but this does not alter the original and essential character of the notice by which, unless the exceptional point above adverted to be pleaded and proved, the property ordinarily and *ipso facto* passes, as by an absolute sale, from one party to the other. And, further, in this case it is clear that plaintiff was aware of the notice of foreclosure, and thus, upon that notice, without waiting for possible exceptional and extraordinary contingencies, he was bound to take action promptly—such prompt action being the very essence of the Mahomedan Law of Pre-emption. Nor (supposing, for argument's sake, that the expiry of the year of grace from notice of foreclosure did not fix the proper time for the demand to be made) do we concur in the special appellant's plea that plaintiff could await the final result of the decision of the High Court of Appeal before action. In the first place, such delay is quite opposed to that prompt action clearly contemplated by Mahomedan Law; and in the next, it is always a presumption of law that the decision of the Court below is right till reversed; and therefore, even on plaintiff's own statement, he should have taken action and made his demand at least on the Zillah Court's decree. We may, in conclusion, add that, in all these cases of a special law, operating against ordinary general rules of civil rights, and especially in the case of a law like the Mahomedan Law of Pre-emption, we think it is so strict in its own requisitions that it is necessary to adhere strictly to the law.

In this view, we dismiss this special appeal with costs.

The 30th July 1866.

*Present:*

The Hon'ble L. S. Jackson and G. Campbell, *Judges.*

**Special Appeal—Finding of fact—Decree against Mahomedan husband—Property in wife's name.**

Case No. 336 of 1866.

*Special Appeal from a decision passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 16th November 1865, reversing a decision passed by Baboo Anund Chunder Banerjee, Principal Sudder Ameen of that District, dated the 22nd May 1865.*

Ranee Shurno Moyee (Plaintiff), *Appellant,*

*versus*

Luchmee Put Chutter Sing and others (Defendants), *Respondents.*

*Baboos Sreenath Doss* and *Bhuggobutty Churn Ghose* for Appellant.

*Mr. R. T. Allan* and *Baboos Bungshee Buddun Mitter, Nilmony Sein,* and *Taraprosonno Mookerjee* for Respondents.

Suit by a creditor holding a decree against a Mahomedan husband, regarding property standing in the name of his wife.

HELD *by Jackson, J.,* that a distinct finding of fact had been arrived at by the Lower Appellate Court (which could not be disturbed in special appeal) that the property was acquired by the wife.

HELD *contra by Campbell, J.,* that the finding of the Judge was not sufficient, inasmuch as he had found that part of the purchase-money was paid by the husband, but had not found whether the remainder of the money was also paid by the husband.

*Jackson J.*—I HAVE intimated, in the course of the argument, the difficulty which I should feel in reversing or setting aside the judgment of the Lower Appellate Court. I cannot say in this case, any more than I could say in a similar case which was before us to-day, that the judgment or decision of the Zillah Judge was altogether satisfactory. Still it appears to me indisputable that the Zillah Judge has, whether his reasons be conclusive or not, come to a positive finding upon the single issue of fact which is before us in the present case. That issue is whether the particular mehal now in dispute was acquired, as it purports to have been acquired, by Kaimunnissa Bebee, or by the husband who is one of the judgment-debtors.

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It is not, as it seems to me, a separate issue in the cause whether the purchase-money by which the property was acquired was the property of the husband or of the wife. But the source whence that money was derived is one test, and a very important test, as to the character of the purchase. It has been laid down by the Privy Council in a case where a Hindoo family was concerned that this fact (namely, the source whence the money was derived) is a material test; and no doubt, in a joint Hindoo family, where the parties live in commensality and joint estate, the source whence the money is derived is of paramount importance with a view to determining the right to the property.

It appears to me that the state of a Mahomedan husband and wife is essentially different from that of a Hindoo family. A Mahomedan husband and his wife may have, and often do have, independent estates. To say, in such a case, that, because the property stands in the name of the wife, and because the husband is indebted, we are to presume collusion, or to presume benamee purchase, and to throw it upon the wife to prove substantively the purchase with her own funds would be, in my opinion, going to an extent to which our Courts have never gone, and cannot properly go. No doubt, in such a case, if evidence were adduced which went to show that the purchase-money had been actually the money of the husband, as the judges of fact, we should require something to be shown, and clearly shown, on the other side; and, if it were not shown, we should have little difficulty in coming to the conclusion that the property had been acquired by the husband.

Now, in the case before us, the special appellant's pleader has not contended that the state of proof in this case was such that the Judge was absolutely bound in law to find on behalf of the plaintiff. Although he has stated his objection over and over again, it has never taken that shape. His objection was that the Judge had not sufficiently investigated the case.

I believe that the Judge has as much investigated the case, and considered the circumstances and conclusions upon them, as he would do if we were to remand the case fifty times over. I am satisfied that the Judge has considered the case; and it seems to me perfectly clear that he has recorded an opinion which he must have meant to be unmistakeable.

That being so, and his opinion on the fact being final, I say (and I say it with some regret) that this Court on special appeal is not competent to disturb it.

I carefully refrain from saying what we should do with this case if we were trying the case in regular appeal or in the exercise of original jurisdiction. It would be superfluous and irregular to say so, because we have not looked, and cannot look, into the evidence. It appears that the Court of first instance relied on the evidence of the zemindar who granted the putnee, to show that the tenure had been paid for by the husband out of his own private funds. If we were to look into the evidence, we might possibly find that the zemindar had nothing on which to found this statement but his own conjecture. It is perfectly manifest that the lady, in whose name the property stands, being a Mahomedan and Purdanusheen, could not have gone personally to the zemindar to take a putnee.

Now, I do not see how it was possible for the zemindar to say that the money which the husband took was his own money, and not the money of his wife. It was alleged on the side of the plaintiff, and it may or may not be true, that, at the time when the money was paid, the husband was in insolvent circumstances. If he was so, it would be more probable that the money for this purchase had come from the wife than from the husband. However that may be—whatever our conclusion might have been if we had been trying the case as judges of fact—I cannot too strongly insist on the position that a distinct finding of fact has been arrived at by the Court below, and that we are not competent to disturb that finding.

*Campbell, J.*—In my opinion, there is no sufficient finding of the Judge in this case. The finding is such that, if upheld in special appeal as sufficiently disposing of the case, a most dangerous precedent will be created.

The plaintiff is a creditor holding a decree against the husband, and the question in the suit, therefore, before us, is whether the property in dispute is really the property of the husband, or the property of the wife. Upon that question, I have no doubt that the issue might be, probably would be, properly stated to be, simply, is the property that of the husband or that of the wife? But I cannot find that there is any clear decision of any kind upon this point.

The Judge does not say, "In my opinion, the property is the property of the wife." He does not even say, "In my opinion, it is

not the property of the husband." He simply says—at least I take his judgment, which is not even so far clear, to mean this—"It is not proved that the property is the property of the husband," which seems a kind of verdict of "not proven."

Now, the point of law on which I think the Judge is wrong is this: he lays down, as it were, this position of law: "It is not enough that it should be proved that the money was paid by the husband, and that the husband, for the series of years since the purchase, has had the management and control of the property," because he seems to say "that state of things is consistent with the possible hypothesis that the property may nevertheless have really belonged to the wife." It seems to me that the position of the Judge is so far wrong that, if it be shown in evidence that the husband paid the money for this property, and has since had the management and control of the property, then the *onus* is shifted, and it will be for those claiming under the wife to show that, in reality, the wife had funds of her own, and that the property was the wife's.

It is only so far that I differ from my learned colleague.

I have said that probably the correct issue in this case may be whether the property was that of the husband or that of the wife. Towards finding that issue, I think that the ruling of the Privy Council establishes that essential question which really represents the issue—"What is the source whence the money is derived?" There is, no doubt, a certain distinction between a Hindoo and a Mahomedan family. As respects a Hindoo family, I should be inclined to hold, under the ruling of the Privy Council, in the case of a son or a wife, that the mere holding in the name of such a member of the joint family establishes no presumption of separate ownership, and that, in such a case, it would be for the member claiming separate property to prove it. In the case of a Mahomedan family, no such broad presumption of law can be set up. On the other hand, the custom of the country, to which the Privy Council in their decision alluded, is a custom in Bengal which is almost universal, to hold property benamee in the names of female relations and others. It is a custom as prevalent among Mahomedans as it is among Hindoos; and so far, in reference to the custom of the country, that decision of the Privy Council wholly applies. Therefore, I would say that, although in the case of a Mahomedan wife there is, in the first instance, from the fact of her holding the property in her own name, a very slight presumption that the property belongs to her, still, if it be proved that the money was paid by the husband, and that the property was under the control of the husband, then, as I have already stated, the *onus* would be shifted, and it would be for those claiming under the wife to prove that the property was the wife's.

In this case, I have stated the matter a little more broadly than appears in the Judge's judgment, because his actual words are that it is not sufficient to prove that a *part* of the money was paid by the husband. Now, I find that the Court of first instance, after going into the evidence, found in the most distinct way that part of the money had been paid by the husband, that the remainder had been remitted by him, and that the property remained in the management and control of the husband. I think that the Judge was bound to come to a distinct decision on that finding of the Lower Court; and, as he has not negatived this part of the decision, and has accepted the finding as regards a portion of the money, his decision, at any rate, is, in my view, insufficient in law. It seems to me that he has fallen into the error of considering this case as if it were a criminal case, as if the defendant had been indicted in a Criminal Court; and some of his expressions would seem even to imply that he thinks it necessary, not only that it should be proved that the property was fraudulently held benamee by the wife, but that the transaction was a fraud on the particular creditor who now sues.

That seems to me to be a mistake. It appears to me that, in a civil suit, the Judge was bound to weigh the evidence equally and impartially, and to see on which side the scale preponderated. If there is strong evidence on one side, he should not lightly reject it, unless there is stronger on the other, especially after the first Court has given credence to it. He should weigh the evidence on this side and that—not require one side to prove a case to demonstration. These latter observations, however, are beyond the main point of law on which I have the misfortune to differ from my learned brother. In my opinion, so far as the Judge has found that part of the money was paid by the husband, the *onus* of proving that the

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property was nevertheless her own, rests on the wife; and so far as he has not found whether the Lower Court was right in considering that the remainder of the money was also paid by the husband, he should find that fact.

*Jackson, J.*—The judgment of the Court then, under Clause 36 of the Letters Patent, will be that the special appeal is dismissed with costs.

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The 31st July 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

**Ghatwalee Lands—Zemindar (Power of—to grant Jaghires, rent-free tenures, &c.).**

Cases Nos. 286 and 290 of 1866.

*Special Appeals from a decision passed by Lt.-Colonel J. S. Davies, Judicial Commissioner of Chota Nagpore, dated the 6th November 1865, affirming a decision passed by Lt. R. C. Money, Deputy Commissioner of Maunbhoom Division, dated the 27th January 1865.*

Rajah Nilmoney Singh Deo (Plaintiff), *Appellant,*

*versus*

The Government and others (Defendants), *Respondents.*

*Messrs. A. T. T. Peterson, W. E. Peacock,* and *R. T. Allan* for Appellant.

*Baboos Kishen Kishore Ghose* and *Juggodanund Mookerjee* for Respondents.

Suit to recover possession of certain lands upon the ground that they were subject to a tenure for private service to be rendered to the zemindar, which tenure had been forfeited by defendant not having rendered such service. Plaintiff having failed to prove that the services were private, and that the tenure was forfeited on account of defendant's refusal to perform them, the decree of the Lower Appellate Court in favor of defendant was affirmed in special appeal.

A zemindar had no power before the Permanent Settlement to grant a rent-free tenure or a tenure at a less rent than the share of the produce payable to Government for revenue; nor had he power to grant jaghires.

THE plaintiff in this case sues to recover possession of certain lands upon the ground that they were subject to a tenure for private service to be rendered to the zemindar of Pachete, and that that tenure has been forfeited in consequence of the defendant not having rendered the service.

The case is not one for the resumption and assessment of invalid lakheraj, for it is admitted that the lands in question are part of the mâl or revenue-paying lands of the zemindary, and that rent in respect of them has been paid to the zemindar.

It appears to us to be perfectly clear, upon the facts found by the Lower Courts, that the plaintiff has not made out any case, and that he has not shown that the defendant holds under a tenure upon which private services were reserved. It is unnecessary for us to determine that there was any evidence sufficient to warrant a finding that the lands were held upon a ghatwalee tenure. The decree dismissing the suit with costs cannot be reversed upon special appeal, unless the plaintiff can show that there was evidence upon which the Judge was bound to act, showing that the services reserved were private, as alleged in the plaint, and not public, or that there was other error in point of law affecting the merits. It is clear that the opinion of Colonel Ousely respecting the jaghires, even if it were admissible in evidence, was not binding upon the Judges in this case, and that they were not necessarily bound to act upon it. As regards the jaghires, it was merely *obiter*, the real question before Colonel Ousely having reference to the Digwar lands, and not to the jaghires.

Admitting the opinion of Colonel Ousely to be admissible in evidence, it must be taken with reference to all that is stated in the roobakaree. From the recitals, it appears that the tenure existed long before the Permanent Settlement; that in the time of Mr. Higginson, who was the Government Collector or Supervisor, two-thirds of the value were paid to him, and one-third retained by the holder of the tenure. Now, if the Government received only two-thirds of the annual value of the lands as rent or revenue, and allowed the tenant to retain one-third on account of services, the services must have been public, and not private. The Government would not have allowed any portion of their revenue in consideration of private services to be rendered to the zemindar.

The document also shows that the tenure existed before the lands were settled with the zemindar. The lands are described as jaghires. If so, they must have been created by the British Government or by the Native Government before the grant of the

Dewanny. A zemindar had no power before the Permanent Settlement to grant a rent-free tenure or a tenure at a less rent than the share of the produce payable to Government for revenue, and it is clear that zemindars had no power to grant jaghires.

We cannot upon special appeal decide the case upon the evidence. It is sufficient for us to say that there is no error in law which would justify us in reversing the decision of the Lower Courts, and holding that the services reserved were private, and not public. If the plaintiff failed in proving that the services were private, and that the tenure was forfeited on account of the defendant's refusal to perform them, the decree of the Lower Appellate Court was correct, and must be affirmed. The decree is therefore affirmed with costs.

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The 31st July 1866.

*Present:*

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

**Zur-i-peshgeedars (Rights of—as against purchasers from grantor of zur-i-peshgee lease).**

Case No. 615 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 11th December 1865, affirming a decision of the Sudder Ameen of that District, dated the 26th January 1865.*

Chuttur Singh and others (Plaintiffs), *Appellants,*

*versus*

Gobind Doss and others (Defendants), *Respondents.*

*Baboo Roopnath Banerjee* for Appellants.

*Baboo Kalee Kishen Sein* for Respondents.

A zur-i-peshgeedar is entitled, as against purchasers from the grantor of his zur-i-peshgee lease, to hold possession of any village covered by his lease until his lien on it is satisfied.

PLAINTIFF in this case is the owner, after foreclosure of a mortgage, dated 15th May 1855, of a mouzah named Sindorah, which, together with two other villages, Chuck Majoliapore and Jalalpore, had, on a date previous to his mortgage, *viz.*, 4th May 1855, being granted to the defendants by their mortgagor, in a zur-i-peshgee lease for a loan of Rupees 2,000. The other two villages let to defendants have been purchased by one Ramnath who is not a party to this suit.

After foreclosure, plaintiff brought a suit for possession of the village, but the Court determined he could not get possession until he had satisfied defendant's lien on the village. Plaintiff, therefore, brings the present suit, having deposited so much of the 2,000 rupees due by his mortgagor as was secured by the lien on the village of Sindorah.

The Lower Courts have dismissed plaintiff's claim, considering that the defendant's security cannot be divided, but that he is entitled to retain possession of the village sued for until his whole claim is paid off.

Against this order, the plaintiff has appealed, but, we think, without reason. The defendant had three villages given to him as security for Rupees 2,000. He may, for reasons not before the Court, have relinquished possession of two, but he is still entitled, as against a purchaser from the grantor of his zur-i-peshgee lease, to retain possession of it until the whole sum borrowed is paid off. If plaintiff, the purchaser of one village, has any claim against the purchaser of the other for a contribution, he may sue him for the same. But a right of the two purchasers *inter se* cannot defeat the right of the zur-i-peshgeedar to hold possession of any village covered by his lease until his lien on it be satisfied. We reject the special appeal with costs.

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The 31st July 1866.

*Present:*

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

**Zemindar (Right of—to grant tenancies to two different persons).**

Case No. 618 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Jessore, dated the 26th January 1866, reversing a decision passed by the Moonsiff of that District, dated the 17th December 1864.*

Mohun Chunder Dutt (Plaintiff), *Appellant,*

*versus*

Fukeer Chund Deb and others (Defendants), *Respondents.*

*Mr. J. S. Rochfort* for Appellant.

No one for Respondents.

A zemindar is quite competent to grant a tenancy to one person over the head of another, provided he does not thereby interfere with the previously acquired legal rights of that other.

PLAINTIFF, it seems, in a previous suit, sued the defendant for a kubooleut, and his

suit was dismissed, and he was referred to the Civil Court to try his right. He has therefore now come into the Civil Court, making the tenant and the zemindar defendants. He urges that the zemindar has granted to him a mourosee holding, enabling him to exercise the rights of enhancement which the zemindar had himself. The defendant replies that he has also a mourosee jote, and that it is not competent to the zemindar to grant another tenancy of the same nature over his head. The zemindar asserted his right to grant the plaintiff a mourosee jote.

The first Court gave plaintiff a decree. The second Court dismissed plaintiff's claim, being of opinion that it was not competent to the zemindar to create the plaintiff's tenure above the defendant's, both being of the same nature.

Against this decision, plaintiff has appealed, and we are of opinion that there is no ground for the judgment pronounced by the Principal Sudder Ameen. Whether the nature of the tenures are identical or not, and, admitting that they were identical, for argument's sake, the zemindar was quite competent to grant the plaintiff his tenancy, provided he does not interfere with the previously acquired legal rights of the defendant. This has not been done in the present instance; so we declare the plaintiff's right to a mourosee jote between the defendant and the zemindar to be established. The plaintiff must go before the Revenue Court for a decree for rents, with which, as well as with the extent and nature of the right of the defendant, this decree has no concern. The special appeal is decreed with costs.

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The 31st July 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Alluvial Land—Suit by Government as riparian zemindar.**

Cases Nos. 95 and 96 of 1865.

*Regular Appeals from a decision passed by the Principal Sudder Ameen of Patna, dated the 31st December 1864.*

Mussamut Tabira and others (Defendants) *Appellants,*

*versus*

The Government (Plaintiff), *Respondent.*

*Messrs. R. E. Twidale* and *C. Gregory* and *Moulvie Murhumut Hossein* for Appellant.

*Baboos Kishen Kishore Ghose* and *Juggodanund Mookerjee* for Respondent.

When the Government sues for alluvial land as an ordinary riparian zemindar, it is bound to prove, under the latter part of Clause 3, Section 3, Regulation XI., 1825, that the stream between the chur and the mainland is fordable at some time of the year, and that it was fordable when the alluvium formed.

THIS suit relates to certain alluvial formations which have formed in front of the Cantonments of Dinapore. They were the subject of Appeal No. 101 of 1865, brought by the proprietor of Jahangirpara Mungurpal, which has been dismissed. The present litigation arose from the following circumstances. Certain alluvial lands were the subject of litigation between the proprietors of Chuck Dhuleep on the one side, and of Shahzadpore, Dinapore, on the other. This litigation ended favorably for the latter in 1824. Since that period, the alluvial lands have been washed away, and again re-formed about 8 or 9 years ago. From the evidence of the witnesses brought forward by the Government, who is plaintiff in this case, it appears that these chur-lands were taken possession of by the proprietors of Chuck Dhuleep; that the next year, the Collector of Patna interfered and took possession on the part of Government, as sovereign, and settled the lands with one Mahomed Ali. Three parties laid claim to the land—the proprietors of Chuck Dhuleep, the proprietors of Shahzadpore, and the proprietors of Mungurpal—and the three appealed to the Commissioner from the order of the Collector in regard to the settlement made by him with Mahomed Ali. The Commissioner set aside the settlement, and directed the parties to prove their possession under Act IV. of 1840. The Magistrate declared in favor of Government, but on appeal, the Judge, on 14th September 1861, reversed the order upholding the possession of the proprietors of Shahzadpore. The Government has instituted the present suit to set aside that judgment and to get possession of the chur lands in front of their purchased landed property in Dinapore,

Daoodpore, Bahadoorpore, and Fureedunpore.

The proprietors of Shahzadpore, who are the parties in possession, allege that the lands in question are merely a re-formation of certain lands which existed in 1802, which were then in their possession, and which formed the subject of litigation in 1824 with the proprietors of Chuck Dhuleep; that Government, till the present time, never laid claim to them, and are not entitled to anything beyond the area which they purchased for the cantonments and other public purposes.

The proprietors of Mungurpal filed an answer in this suit, and at the same time instituted a separate action for possession. That suit has been disposed of in our decision of Appeal No. 101 of 1865.

The proprietors of Chuck Dhuleeep, not being in possession, were not made parties to the suit, but, having intervened, were allowed to appear and answer as defendants. These defendants claim the alluvial lands as being a re-formation of their estate Chuck Dhuleep on its original site. They urge that their estate existed on both sides of the Ganges; that they sold a portion of their estate on the south of the Ganges to the Government; that in 1810, when the Government had taken possession of these alluvial lands adjoining and opposite the Dinapore Cantonment, they were released to the zemindar under the order of the Board of Revenue, since which period the Government has never laid claim to the lands.

The Principal Sudder Ameen has given the plaintiff, Government, a decree under the provisions of Clauses 1, 2, and 3, Section 3, Regulation XI. of 1825; and from his decision two appeals have been preferred—one by the proprietors of Shahzadpore in No. 95, and the other by the proprietors of Chuck Dhuleep in No. 96 of 1865.

The land in dispute is not, properly speaking, an increment to the Government land on the original bank of the Ganges, but is separated from them by a stream which now appears to be a branch of the Soane, but was formerly the bed of the Ganges. When the Principal Sudder Ameen visited the spot in 1863, he found the water in this stream before Dinapore to be deep, though farther to the westward it was fordable; but he ascertained from the Cantonment Joint Magistrate that during the dry weather the stream was fordable in front of Dinapore.

We have taken up Appeal No. 96 first, at the request of the appellants. Two arguments are urged against the Government title to the land: *first*, that, before the Government can get a decree, it is bound to prove that these lands were gained by gradual accretion, and this the Government have entirely failed to do, for they rely on the evidence of three witnesses who give contradictory statements as to the right and possession of Government. In this case, Government does not come forward as a sovereign power, and take possession of the newly-formed lands as of an island surrounded by an unfordable stream, but as an ordinary riparian zemindar, and, as such, is bound to prove either gradual accretion, or that the stream between the old bank and the new-formed lands was fordable when the latter came into existence. The fact of the channel being now fordable would give the plaintiff no title to the land, but the map of the Ameen as well as the proceeding of the Principal Sudder Ameen in 1863 shew that the stream is still deep before Dinapore; and whatever the Principal Sudder Ameen learnt from the Cantonment Joint Magistrate in conversation, as to the depth of the stream in the hot weather, is not evidence in the case. Further, it is urged that, even if the land were an accretion, the Government would not be entitled to any portion of it, for it was in existence before the Government made its purchase in 1859, and these newly-formed lands formed no part of the purchase. It is, further, pointed out to us that the Ameen, in the presence of the parties, has marked down in yellow a place in his map, of which it is stated that part was purchased by Government and included in the Hospital compound, while the portion between it and the river is in the possession of the proprietors of Chuck Dhuleep, who in 1860 were acknowledged by Government to be the proprietors of these chur-lands; for in that year, the Commissariat Officer, Captain Chalmers, wrote to the Collector of Patna, on 19th July 1860, for information regarding the strip of land in the bed of the river, whether it was the property of Government or of private individuals, as he was anxious to secure fodder for the Government elephants; and on the 23rd idem he was informed by the Collector that the land alluded to belonged to Zillah Sarun, and that the Dearah was Chuck Dhuleep,

Pergunnah Kusmat, the property of Sheo Golam Sahoo. On 17th August, the Collector called upon the proprietor of Chuck Dhuleep to give an "ikrar" in conformity with his promise to allow the Government to cut the jungle on the chur for fodder for elephants, and a document was given on 18th August 1860, to the effect that the Government servants were at liberty to cut fodder free of charge for one year, though in past years the zemindar had always received payment for the grass; and it was added that Government was not to interfere with the rest of the cultivation, but the lands so cultivated were to remain as heretofore in the possession of the ryots. Here, then, it is urged, was a clear admission of the zemindar's right and of a permissive possession, of which the Government was now trying to take advantage as a right. The existence of some of the original lands of Chuck Dhuleep on the south bank of the Ganges was proved, notwithstanding the decision of 1824, by the deed of sale, dated 23rd September 1859, which was executed by the proprietor in favor of Government for 1 beegah, 5 cottahs, and 7 dhoors of land, to the north of which, and lying between it and the river, was another strip of land still in the possession of the zemindar of that estate; and Government had done nothing to displace this evidence.

The appellant in Case No. 95, in addition to the general argument pleaded by the pleader in Case No. 96, pressed upon the attention of the Court the decree obtained by him against the proprietor of Chuck Dhuleep in 1824, reported in Volume III., Select Reports, page 316, which, though relating only to 58 beegahs, the quantity then in dispute, clearly shewed that he was in possession of the chur.

In reply, the pleader, on the part of Government, filed a map of these lands prepared by the same Ameen in another case, to show that the map before the Court was not correct, and the Ameen's proceedings open to objections. He then referred to certain proceedings held on the spot, and a map prepared by the Principal Sudder Ameen, dated the 28th December 1864, to which the representatives of all parties assented. He also referred to the decision of 1824, as shewing that no part of the estate of Chuck Dhuleep could be on the south bank of the Ganges, as that judgment clearly set forth that it was situated in Zillah Sarun, on the north side of the Ganges. He was, however, unable to account for the fact of the purchase in 1859, or to prove that the land between the hospital and bank of the river were in the possession of Government; nor was he able to set aside the title set up by the proprietor of that estate to chur-lands arising from the admissions and acts of the Government officers.

This case cannot be treated as coming under Clause 1, Section 3, Regulation XI. of 1825, for the lands in litigation are evidently not a gradual accretion to the original lands of plaintiff's village of Dinapore, but have formed opposite to it in the shape of an island, there being a running stream between it and the main-land. If the island at the time of its formation were surrounded with water unfordable at any time of the year, the Government, as sovereign, would have had undoubted right, under Clause 3 of the above law and Act IX. of 1847, Section 7, to take possession. Government, however, does not come into Court in this capacity or with this allegation. Government is inclined to treat the new formation as an accretion to a Government-purchased property, which it is not, and comes into Court as a private zemindar. The law applicable to such a case is the latter part of Clause 3 of Section 3, Regulation XI. of 1825. If the stream between the chur and the main-land be fordable at any season of the year, it must be considered an accession to the land of the person or persons, whose estate or estates may be most contiguous to it. The Government, therefore, before it can establish its right to any portion of the chur-lands, must prove that the stream is fordable at some time of the year, and that it was fordable when the alluvium formed. The investigation of the Principal Sudder Ameen is not in support of the plaintiff's case, for he says that the water was deep when he visited the locality; and what the Cantonment Joint Magistrate told him in conversation is no evidence, and, even if it were, it would prove only the present state of the channel, and not what it was when the island was formed; and the map of the Ameen shews that there is deep water. We do not think that the decision of 1824, however conclusive it may be between the parties concerned in that case, can be made use of by Government against the proprietor of Chuck Dhuleep, who has been acknowledged by subsequent acts of the Government officers, to hold lands on the south bank of the Ganges, and to have been in possession of some portion at least of the alluvial lands now claimed by the plaintiff. The Government has come

into Court without a title of evidence. The three witnesses examined on the part of Government contradict each other, and have not been questioned as to the state of the intermediate stream. The claim on the part of Government has been placed before the Court most inefficiently, and is supported by no reliable evidence; and, if the Government interests suffer in this case, the loss must be attributed to the proper cause, *viz.*, the slovenly manner in which the case was brought before the first Court by the Government officers who had charge of the case. As we think that the Government has failed to establish its right to these alluvial lands, we reverse the order of the Principal Sudder Ameen, and dismiss the plaintiff's suit with all costs.

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The 31st July 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Summons on witness—Service of.**

Cases Nos. 922 and 975 of 1866.

*Special Appeals from a decision passed by the Judge of Hooghly, dated the 20th December 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 20th February 1864.*

Prem Chand Roy (Plaintiff), *Appellant,*

*versus*

Beecharam Mookerjee and others (Defendants), *Respondents.*

*Baboos Nil Madhub Sein* and *Romesh Chunder Mitter* for Appellant.

*Baboo Umbica Churn Banerjee* for Respondents.

Where a summons on a witness is returned, with the endorsement that the witness could not be found, on the very day fixed for the hearing of the case, the party, on whose application the summons was issued, cannot be expected on that day to be prepared to show that the witness was material or had absconded.

A summons on a witness ought not to be affixed upon his residence; the proper course is that prescribed in Section 156, Code of Civil Procedure.

THE pleaders in both cases admit that these two special appeals will be governed by one and the same decision here.

The pleader for special appellant places before us these two pleas:—

I.—The Lower Appellate Court was wrong in not taking the evidence of one Jogendronath Mookerjee, who appeared and tendered himself as witness.

II.—That the Lower Appellate Court having fixed the 28th December for the final hearing, and the return that the witnesses ordered to be then present not having been received till then, the Lower Appellate Court was wrong in holding that special appellant was not prepared to prove that the witnesses were material to issue of proclamation in due form.

On the *first* point, we observe that the summons to Jogendronath was to appear for the hearing of the 2nd December. He did not appear till this case had been heard, as far as it could be on that day, and then, two days after, petitioned to be examined. Upon that same day, the 2nd December, however, an order for a warrant against Jogendronath was issued by the Judge, but the special appellant took no steps to pay the necessary charges, and so to get it issued. We think, then, that the *first* plea is not tenable.

But, on the *second* plea, we think there must be a remand, for the return that the witnesses could not be found was only received on the 28th, the day fixed for the hearing, and the special appellant on that day petitioned for proclamation to issue. No specific orders seem then to have been passed on the application; but in his judgment the Judge records that the special appellant should have on that date been prepared to show that the witnesses were material or had absconded.

We think, under the above stated facts and dates, special appellant could not have done so, as he did not know till that very date whether the witnesses would or would not appear, owing to the return not having come to hand till then. And here we may observe, as to that return, that it is quite illegal in case of a summons to affix it on the residence of the witnesses. The proper course is that prescribed in Section 156, Act VIII. of 1859.

Remand accordingly.

The 31st July 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Mortgage Accounts.**

Case No. 863 of 1866.

*Special Appeal from a decision passed by Mr. E. G. Birch, Judge of Shahabad, dated the 23rd December 1865, reversing a decision passed by Moulvie Eradut Ali Khan, Principal Sudder Ameen of that District, dated the 10th September 1864.*

Sirdar Golab Singh, Agent and Manager on behalf of Sirdar Dyal Singh, Minor (one of the Defendants), *Appellant,*

*versus*

Ram Buddun Sing (Plaintiff) and others (Defendants), *Respondents.*

*Baboos Kishen Kishore Ghose* and *Greeja Sunkur Mojoomdar* for Appellant.

*Baboos Unnoda Pershad Banerjee, Dwarkanath Mitter,* and *Mohesh Chunder Chowdhry* for Respondents.

A mortgagee in possession is bound to give an account of all payments made towards the liquidation of his mortgage. On his refusal or neglect to furnish such account, every presumption will be made against him.

Total payment sufficient to cover all due on three mortgages, is payment sufficient to cover what may be due on each or any of them.

*Bayley, J.*—In this case, plaintiff sued for possession of 3-5ths of Mehal Roghoobur Geer Kondee under a right of redemption based on the allegation that the mortgage had been satisfied.

Defendant denied that the mortgage debt had been liquidated.

The first Court, in the first instance, held that the mortgage debt had not been satisfied, and dismissed plaintiff's suit.

The Lower Appellate Court reversed that decision.

On special appeal, the case was remanded by this Court with the instruction that it should be clearly found what was the debt, principal, and interest, which had to be paid on account of the mortgage of the mehal in respect to which this suit was brought, *viz.*, 3-5ths of Mehal Roghoobur Geer Kondee; and what were the gross receipts collected and realized to credit by the usufructuary mortgagee, under whatever character or name that party might be. It was also a direction to the Lower Court to consider the Ameen's report.

The Lower Appellate Court has, upon this remand, found that the mortgage debt has been satisfied, and has decreed the plaintiff's suit accordingly.

Defendant appeals specially, and urges the following grounds, which I have taken down *verbatim* as the pleader stated them before us.

1.—That the Lower Appellate Court has overlooked much evidence, shewing that the mortgagee has not realized the mortgage debt.

2.—That the security bond, executed when the plaintiffs took the lease of the mehal, contains an admission which shews the mortgage debt to be still unsatisfied.

3.—That the Judge refused to hear the objections of special appellants to the Ameen's report.

4.—That the first Court gave reasons in detail for rejecting the Ameen's report, which the Lower Appellate Court did not specifically meet and answer.

5.—That the Lower Appellate Court should have more fully enquired into and ascertained the exact amount received by the mortgagees.

6.—That the Lower Appellate Court has not found what were the amounts collected by the mortgagors during the time they were in possession under their lease, that period being admitted by them to be for the two years 1268 and 1269, and alleged by the defendants to be 1267, 1268, and 1269, and found by the Court below to be 1268 and 1269 and half of 1267.

The *first* plea requires no specific remark, as the judgment on the other pleas will cover it.

On the *second* plea, I would observe that, after a careful perusal of the whole of the security bond, I can find in it no such admission as the special appellant wishes us to adopt. It merely contains a recital of the terms of the lease under which the mortgagors admit they held possession in 1268 and 1269.

In respect to the *third* and *fourth* pleas, I think special appellant has no right to urge that his objections to the Ameen's report were not heard or more fully gone into, when he (as is found by the decision) admits being mortgagee in possession from 1261 to 1267, and notwithstanding positively refuses to file the usual or proper accounts required by law, but merely gives in a paper containing in writing an assertion of what he declares to be due on the mortgage. I quite concur in the Judge's remark that "the

mortgagee having produced no accounts, every presumption is to be raised against him," especially where the law (Regulation XVII. of 1806) is both so strict and clear that the mortgagee *must produce proper and full* accounts.

Further, I think the reasons which the Judge gives for accepting the plaintiff's account based on the Ameen's report to be sound and cogent. The one is shewn to be tested by, and correct according to, the other, with a slight exception which is against plaintiff.

The main contention, however, of this special appeal has been on the *fifth* and *sixth* pleas, *viz.*, as to the ascertainment of what was the mortgage debt, and how it has been paid off.

As before remarked, the mortgagees were found to be in possession from 1261 to 1267. The mortgagors, on the other hand, admit that they had a lease and possession from 1268 to 1269. In regard to the first period, I observe again that defendants file no accounts. In regard to the second period, *defendant* himself filed a decree for arrears of rent. In the defendant's plaint in that suit, it is clearly stated that of 29,805 rupees then due on account of the lease of the three mortgaged mehals (including that which is the subject of this suit), Rs. 15,355 had been realized, and Rs. 14,450 were due of the total Rs. 29,805.

The Court which tried that suit found that, instead of Rs. 14,450 said by defendant to be due, Rs. 13,842 only were due, and gave a decree accordingly.

Now, it cannot be denied that, on this statement of the mortgagee, defendant, if the money of that decree had been realized, nothing whatever would have been due on any of the three mortgaged mehals of which the mehals in suit was one. But two contentions are raised on this point:—

1.—That it is for plaintiff to prove specifically that he paid off the mortgage of *this very* mehal.

2.—That the decree is not shewn to have been realized, and therefore the amount of the decree must be considered to be due.

The *first* of these objections I look upon as utterly untenable. If a man mortgages three properties for Rs. 10,000, and it is shewn that the Rs. 10,000 have been paid with interest, it cannot be said that anything is due *for any one* of those three properties. In this view, I would at once overrule such an objection as this.

On the *second* of these objections, I hold that a decree which professes to transfer a certain sum from the judgment-debtor to the judgment-creditor, does do so, unless the judgment-creditor can shew that he could not realize, from want of assets in the debtor, or for other reasons. In this case, defendant does not attempt to shew this. The pleader merely presses on us that he could not execute till he heard the result of the special appeal against that decree, made here by the plaintiff. It is clear that the law does not prevent a decree-holder executing a decree during an appeal, although it may be with or without security, at the discretion of the Courts. Nor does it appear that there was any order or injunction of any Court staying the execution of the decree, while it is quite clear that the decree was of September 1862; and this present suit was not brought till 10th February 1863.

As to the mortgagor's possession in 1268 and 1269, it would not be necessary to go into the detail of his usufruct during those years, for if my view be correct that the defendant not having shewn that the decree for Rs. 13,842 was not or could not be executed, that sum *plus* the Rs. 15,355 admitted to have been received by defendant, indicates that the total for the three mortgages (including this) stated to be due, *viz.*, Rs. 29,805 has been paid. But as a general rule, I think that, where a mortgagee enters, as defendant has here done, into a new contract with his mortgagor by which the mortgagee accepts a sum certain, as annual jumma, as that which is to be considered the annual amount payable as usufruct in liquidation of a mortgage, the mortgagor so put in possession taking the risk of short collections, failure of crops, expenses of collection, and so forth, such a mortgagor does not occupy the ordinary position of a mortgagee bound to account for all his gross collections, inasmuch as the jumma annually stipulated to be paid to the mortgagee is, in such a case, accepted by the latter as the *total usufruct* to be accounted for.

Such being my view of this case, I would dismiss this special appeal with costs.

*Jackson, J.*—I also am of opinion that this appeal should be dismissed. The Judge has found the payments from 1261 to 1267; and as to the payments for 1268 and 1269, the plaintiff asserts that he has paid the whole sum due. It amounts to something less than Rs. 11,000. The defendant admits that he has received a sum of Rs. 15,000

from the plaintiff, but he claims to credit some portion of this to *other* mortgages which he holds from the plaintiff. He does not state what portion he has credited to each mortgage. He, as mortgagee, is bound under the law to give an account of all payments made towards the liquidation of his mortgage, and, on his refusal or neglect to furnish such account, every presumption will be made against him. As to the Rs. 15,000 which the plaintiffs have paid, and of which they assert that Rs. 11,000 was paid for this mortgage, the presumption is, in the absence of all assertion or evidence to the contrary, that it was so paid.

The defendants having then received the money they lent on mortgage, the plaintiff is entitled to redeem, and the Judge was right to decree the suit.

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The 1st August 1866.

*Present :*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

**Ghatwalee Tenure (not liable for debts of former deceased holder).**

Case No. 115 of 1866.

*Regular Appeal from a decision passed by the Judge of Beerbhoom, dated the 19th December 1865.*

Binode Ram Sein (Defendant), *Appellant*,

*versus*

The Deputy Commissioner of the Sonthal Pergunnahs on the part of the Court of Wards (Plaintiff), *Respondent*.

*Baboos Sreenauth Doss* and *Tarrucknath Sein* for Appellant.

*Baboos Kishen Kishore Ghose* and *Juggodanund Mookerjee* for Respondent.

The rents of a ghatwalee tenure are not liable for the debts of the former deceased holder of the tenure.

We think that the Judge was right in the decision at which he arrived. This Court is not bound to enforce the payment of a debt due from the deceased out of monies in the hands of the Court of Wards, which would not have been liable to pay that debt but for the Commissioner having expressed his willingness to pay. If the Commissioner expressed his willingness to pay out of the proceeds of the ward's estate a debt for which that estate was not liable, this Court would not carry out the consent of the Commissioner.

Then the question arises—Were the rents, which accrued out of the ghatwalee estate after the death of the deceased, liable in the hands of his successor to pay the debts of the deceased? We think it perfectly clear that this was a tenure which was held for the purpose of public services, and that those who perform the services are entitled to remuneration, and that, consequently, the rents are not liable for the debts of the previous holder of the tenure.

The appeal is dismissed with costs.

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The 1st August 1866.

*Present :*

The Hon'ble F. B. Kemp and W. Markby, *Judges*.

**Mesne-profits—Limitation—Pleading.**

Case No. 1042 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 20th January 1866, affirming a decision passed by the Sudder Ameen of that District, dated the 26th July 1865.*

Mr. J. P. Wise (one of the Defendants), *Appellant*,

*versus*

Poornima Chowdhrain and others (Plaintiffs), *Respondents*.

*Baboo Mohinee Mohun Roy* for Appellant.

*Baboos Anund Chunder Ghosal* and *Upprokash Chunder Mookerjee* for Respondents.

The plea that wasilat cannot be recovered for more than 6 years, though not taken below, may be entertained at any stage of the case.

We think that the Principal Sudder Ameen has substantially found that the defendant levied tolls upon the parties using the ferry set up by him, and that this proceeding had the effect of stopping the plaintiff's ferry. We cannot interfere with this finding in special appeal.

But the claim for wasilat cannot be admitted for a period more than 6 years (Clause 16, Section 1, Act XIV. of 1859). This plea was not taken below, but it is one patent on the face of the plaint, and is a substantial error in law which ought to be corrected at any stage of the case.

The decision of the Principal Sudder Ameen is therefore amended. The plaintiff will recover wasilat for six years. As the special appellant has failed in the main ground of his special appeal, and he did not take the plea of limitation below, he must pay the costs of this appeal. Costs below to be in proportion to the amended decree.

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The 1st August 1866.

*Present :*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Mesne-profits—Separate causes of action—Local Investigation.**

Case No. 1047 of 1866.

*Special Appeal from a decision passed by Mr. J. E. S. Lillie, Judge of East Burdwan, dated the 17th November 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 19th April 1865.*

Bamun Doss Mookerjee (Defendant), *Appellant,*

*versus*

Brojo Kishore Mitter Mojoomdar and others (Plaintiffs), *Respondents.*

*Mr. C. Gregory* for Appellant.

*Baboos Khetter Mohun Mookerjee* and *Taruknath Sein* for Respondents.

A separate cause of action arises as to each of several sums received as mesne-profits in respect of the same property.

A party, who refuses to appear before an Ameen at the time he holds his local investigation, is not at liberty afterwards to take any objection to the Ameen's report.

In this case, the plaintiff sues to recover mesne-profits of certain land for the years 1845-1858. The Court below has decreed in his favor for the last twelve of those years only.

Against this decree, the defendant has appealed, his first objection being that the plaintiff had in 1858 brought a suit for possession and mesne-profits in respect of the same land, claiming mesne-profits from the date of suit only; and that he cannot now bring a fresh action in respect of other mesne-profits which accrued from the same property. In support of this objection, he relies on the Circular Orders of the Sudder Court of the 11th January 1859.

The Circular Orders in question are directed against the practice of dividing one cause of action into several parts, and bringing several actions in respect of them; but, whatever may have been the view formerly, it has been decided by a Full Bench of this Court (2nd April 1864) that a separate cause of action arises in respect of each several sum received as profits: the Circular Orders in question, therefore, are not applicable.

The second objection taken by the appellant is, that the Judge of the Lower Appellate Court was wrong in not allowing him to take any objection to the Ameen's report, although he had refused to appear before the Ameen when he held his local investigation. But in so deciding, the Judge of the Lower Appellate Court acted entirely in accordance with the decision of this Court of the 21st July 1862.

The third objection is that the appellant, as to one mouzah, is only bound to pay the sum which he has actually received from his tenant. But this objection was taken for the first time in the Lower Appellate Court, and the Judge was right not to entertain it.

The last objection is that interest has been given from the date of suit, and not from the date of decree; but we think this is no more than what the plaintiff is entitled to recover. The appeal will therefore be dismissed with costs.

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The 2nd August 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Jungiebooree Tenure (Cancelment and resumption of)—Evidence.**

Case No. 1038 of 1866.

*Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 24th January 1866, affirming a decision passed by the Assistant Commissioner of Maunbhoom, dated the 19th April 1865.*

Radha Kishen Singh Durpo Shaha Deb (Plaintiff), *Appellant,*

*versus*

Bishambhur Singh Puttur (Defendant), *Respondent.*

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*Baboos Oopendur Chunder Bose* and *Umbika Churn Banerjee* for Appellant.

*Baboo Juggodanund Mookerjee* for Respondent.

The mere admission by the defendant, that the lands in question are within the plaintiff's zemindary, is not sufficient to start the plaintiff's case when he sues, as zemindar, to cancel and resume an alleged hereditary jungleboorée tenure.

In this case, the plaintiff sued as zemindar to cancel and resume an alleged hereditary jungleboorée tenure. The defendant and his ancestors had for a great number of years been in possession of the lands, and no rent had been paid; but the plaintiff asserted that the lands had been held in lieu of wages only, and not under any hereditary right. The plaintiff, however, failed to produce any evidence whatever in support of his case, beyond the admission that the lands were within his zemindary. This, according to the decisions of this Court, is not sufficient to start his case, and the Courts below were right, therefore, in rejecting his claim.

This appeal will, therefore, be dismissed with costs and interest.

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The 2nd August 1866.

*Present:*

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

**Limitation—Pre-emption.**

Case No. 751 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 2nd December 1865, affirming a decision passed by the Sudder Ameen of that District, dated the 28th December 1864.*

Shah Mohsun Ali (Plaintiff), *Appellant,*

*versus*

Nekhnam Singh and others (Defendants), *Respondents.*

*Moonshee Ameer Ali Khan Bahadoor* for Appellant.

*Mr. R. E. Twidale* for Respondents.

A suit to enforce the right to pre-emption must be brought within one year from the time the purchaser has taken possession under the sale impeached, and not from the time when the person claiming the right obtains possession of that which forms the basis of his right.

Plaintiff originally sued for certain property under an alleged right of pre-emption, basing his claim on co-parcenership in the estate sold. It appears that the plaintiff was not in possession of the share of the estate his alleged title to which formed the basis of his claim. The late Sudder Court, in 1857, ruled that a person who claimed by right of pre-emption on the ground of parcenership must be in possession of that which forms the basis of claim before his claim under the right of pre-emption can be enquired into. The plaintiff, therefore, sued for possession of his share in the estate, and obtained a final decree in September 1864, and, 11 days after, brings the present suit for possession of the share purchased by defendant many years ago, on the ground of pre-emption.

The Lower Courts have dismissed his claim under limitation laid down by Clause 1, Section 1 of Act XIV. of 1859.

Plaintiff now appeals specially, urging that, as the Sudder Court ruled that he could not bring his suit founded on a right to pre-emption before he had obtained possession of that which forms the basis of the right, and as he sued accordingly, and having obtained possession of the same, he, within twelve days, has instituted the present action, he is within time.

The Sudder Court simply ruled that no party could claim a right of pre-emption unless he were in possession of that which forms the basis of his claim. It said nothing further and implied nothing further. Plaintiff subsequently sued for possession of his own share in the estate, and, having obtained a decree, now sues by right of pre-emption of the share purchased by the defendant before 1857. This he is clearly unable to do under the law in force, which rules that such suit must be brought within the period of one year from the time the purchaser has taken possession under the sale impeached. As plaintiff has not acted up to the law in force, we dismiss his special appeal with costs.

The 3rd August 1866.

*Present:*

The Hon'ble C. B. Trevor and H. V. Bayley, *Judges.*

**Limitation—Jurisdiction—Suit for money upon registered bond with lien of immoveable property.**

Case No. 1006 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 13th March 1866, reversing a decision passed by the Moonsiff of that District, dated the 22nd December 1865.*

Parushnath Misser (Plaintiff), *Appellant,*

*versus*

Shaikh Bundah Ali and others (Defendants), *Respondents.*

*Baboo Mohendro Lal Shome* for Appellant.

*Baboo Kalee Kishen Sein* for Respondents.

Under Act XIV. of 1859, whether a defendant raises the plea of limitation or not, it is incumbent on the Court to see that it has jurisdiction, and, if that jurisdiction has lapsed by efflux of time, to refuse to exercise a jurisdiction which it has not by law.

If a party has a lien on certain property as security for a loan, he is bound, under the same Act, to obtain both a decree for the money and for the realization of it by the sale of the property pledged within 3 years from the date on which the money became due under the unregistered bond.

PLAINTIFF held from the defendant a bond with a lien of certain property as security for the amount borrowed by him. The defendant did not pay the sum borrowed at the stipulated period, so the plaintiff brought a suit for the same and obtained a money-decree. He subsequently brought a second suit to enforce his lien by the sale of the property pledged, making as defendant the party in possession.

The Judge, omitting points which are not before us, ruled that plaintiff was out of Court under Clause 10, Section 1, Act XIV. of 1859; more than three years having elapsed since his cause of action arose.

Plaintiff now appeals specially, urging that Clause 12, and not Clause 10, applies to the present suit which is for the recovery of an interest in immoveable property, and that, consequently, plaintiff is not out of Court, the former provision of the law giving him 12 years within which to sue; and, *2nd*, that, as the defendant did not urge the plea of limitation, the Judge should not, of his own mere motion, have raised the plea.

Looking to the second objection, we are clearly of opinion that, under Act XIV. of 1859, whether a defendant raises the plea or not, it is incumbent on the Court to see that it has jurisdiction, and, if that jurisdiction has lapsed by efflux of time, to refuse to exercise a jurisdiction which they have not by law. As to the application of the Statute in the present case, we have nothing before us to show that it has been wrongly applied. The Judge quotes the law correctly, though he does not explicitly state the date, and special appellant is unable to supply that date, with a view of showing that an error has been made below. We would only, therefore, observe that, under Act XIV. of 1859, if a party has a lien on certain property as security for a loan, it is incumbent upon him to obtain both a decree for the money and for the realization of it by the sale of the property pledged within three years from the date on which the money became due under the unregistered bond; and if he does not obtain both within that time, he is out of Court under the Statute of Limitation. We reject the special appeal with costs.

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The 3rd August 1866.

*Present:*

The Hon'ble C. B. Trevor and H. V. Bayley, *Judges.*

**Decree—Admission by defendant.**

Case No. 987 of 1866.

*Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 15th January 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 31st May 1865.*

Issur Chunder Roy (Plaintiff), *Appellant,*

*versus*

Nobodeep Chunder Dutt (Defendant), *Respondent.*

*Baboo Romesh Chunder Mitter* for Appellant.

*Baboo Anund Chunder Ghossal* for Respondent.

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Although a plaintiff, when the defendant denies his claim, is bound to prove his case by the document on which he relies, still, if the defendant admits any sum to be due, that admission, irrespective of proof offered by the plaintiff, is sufficient to warrant a decree in the plaintiff's favor for the amount covered by the admission.

THE plaintiff, who is a silk merchant, sues the defendant for Rs. 747, due partly, that is as to Rs. 687, on account of monies advanced, and partly, that is as to Rs. 60, on account of cloth sold to him.

The defendant admits that he owes Rs. 547, but he pleads as a set-off to the debt a sum due to him by plaintiff on account of silk sold, which leaves plaintiff a debtor to him.

The first Court held that there was no proof of the set-off pleaded, and that, as the defendant admitted that Rs. 547 was due to plaintiff, a decree must pass for that amount.

Both parties objected in appeal against the order of the Lower Court, and eventually the Judge was of opinion that the plaintiff had not proved his case, and that the defendant had not proved the set-off pleaded by him; and, notwithstanding that the defendant admitted that he owed plaintiff Rs. 547, still, as plaintiff could not prove his books, he was not entitled to a decree.

Plaintiff now appeals specially, urging, *1st*, that, although he has not proved his books, he is entitled to a decree for the amount admitted to be due to him by defendant; and, *2nd*, that the Judge has come to no finding regarding the cloth, &c., valued at Rs. 60 which he alleged he sold to defendant—a claim evidenced, not by the books, but by witnesses.

On the second point, the special appellant is clearly wrong. The Judge, in the course of his judgment, clearly discredits the evidence by which this plea is supported.

As to the first objection, we think that the contention of plaintiff is sound, and that, although a plaintiff, when defendant denies his claim, is bound to prove his case by the document on which he relies, still, if the defendant admits any sum to be due, that admission, irrespective of proof offered by the plaintiff, is sufficient to warrant a decree for that amount in the plaintiff's favor. We therefore reverse the Judge's order, and revive that of the first Court, decreeing to plaintiff Rs. 547, with interest at 12 per cent. on that sum from the date of suit to the date of realization, and costs to be borne throughout in proportion to the amount decreed and dismissed.

The 3rd August 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Adoption.**

Case No. 154 of 1866.

*Regular Appeal from a decision passed by Mr. S. Wright, Principal Sudder Ameen of Dinagepore, dated the 16th February 1866.*

Pritima Soonduree Chowdhrain (Defendant), *Appellant,*

*versus*

Anund Coomar Chowdhry for self and as guardian of his minor brothers, and others (Plaintiffs), *Respondents.*

*Mr. A. T. T. Peterson* and *Baboos Unookool Chunder Mookerjee* and *Unnoda Pershad Banerjee* for Appellant.

*Mr. R. V. Doyne* and *Baboo Gyanendro Mohun Tagore, Dwarkanath Mitter,* and *Sreenath Doss* for Respondents.

Suit laid at Rupees 72,818-12-8.

The absence of registry and stamped paper may give rise to inferences against the genuineness of, but cannot invalidate, a deed of permission to adopt.

No stereotyped form is prescribed for deeds of this description.

THIS is a suit to set aside a deed of permission to adopt, and is valued at Rupees 72,818-12-8.

The plaint sets forth that Narain Chowdhry, the husband of the defendant, Pritima Soonduree, died on the 8th Pous 1265 B. S., leaving his widow, the said Pritima, who was *enceinte*, and a maiden daughter by name Koomodinee. The widow gave birth to a daughter who died an infant. The elder daughter Koomodinee also died unmarried.

The plaintiffs allege that they are the reversioners, and, after the death of Pritima, entitled to succeed to the estate of the aforesaid Narain Chowdhry; that a dispute arising between Pritima Soonduree and Sre Soonduree, the widow of her step-son, Pritima, in a case of mutation of names before the Collector, filed a fabricated deed of permission to adopt, dated the 15th Bhadro 1265 B. S., alleging that it had been granted to her by her late husband, Narain Chowdhry; that, in point of fact, the husband of the defendant never gave her any such permission; that, although Pritima has not yet carried out her intention of adopting a son, it is not unlikely that she will do so to the injury of the plaintiff's interests as reversioners. The prayer of the plaint is, that the deed may be set aside as fabricated, and that the plaintiffs may be declared to be entitled to the estate of the late Narain Chowdhry after the death of the defendant, Pritima Soonduree. A schedule of the properties comprising the estate of Narain Chowdhry is annexed to the plaint.

The suit was instituted on the 22nd of December 1865, and decided on the 16th February 1866.

In their written statement, the plaintiffs urge that the deed of permission is a fabricated instrument; that, had it been genuine, the defendant would have first made mention of it in the case before the Moonsiff of Thakoorgunge; that the deed filed by the defendant appears to bear the impression of the seal of the deceased Narain Chowdhry, but in point of fact no seal was used by him; that, had the instrument been genuine, it would in all probability have been witnessed by respectable persons, the spiritual guide or the relatives.

The absence of registration is also dwelt upon. That Narain Chowdhry was not sick in Bhadro 1265 B. S., at which time it is alleged the deed was executed.

The Principal Sudder Ameen of Dinagepore, Mr. S. Wright, gives a brief analysis of the oral evidence on both sides, and observes that "the material issue of fact arising in this case is the truth or otherwise of the deed, dated the 15th Bhadro 1265 B. S., empowering the defendant to adopt heirs to her late husband, and that, in the event of this deed proving to be false, whether the plaintiff's rights in the property, as next of kin to Narain Chowdhry, can be upheld."

The Principal Sudder Ameen was of opinion that the document in question was false. He observes "that it is on unstamped paper and therefore *invalid;* that he does not believe that the late Narain Chowdhry ever executed it, for none of the witnesses to it, or those who declare that they were present when it was drawn up, are of any respectability, and most of them do not reside in the same village as the defendant; that the little discrepancy observable in their testimonies shows that they have been well tutored; that the ink is too fresh for a deed of this age; that it is very unlikely that Narain Chowdhry, who had a daughter, and a wife about to give birth to another child which might also have been a daughter, should so entirely have ignored their interests when he is said to have executed it, which is a mere farce." [*Note.*—The judgment here is not very intelligible. We have, however, quoted the very words used.] "That, with regard to the adoption, the deed was so worded as to leave the defendant the entire control of the property, as the adopted heir was only to be allowed to take possession when the defendant thought fit to yield it up to him; that up to this time no son had been adopted; that it is admitted that Narain Chowdhry lived four months after the alleged deed was executed, and yet no attempt was made to register it, which was of the greatest importance, especially when, as defendant declares, there was a bad feeling between her husband and his relatives, and he would not have neglected any means of establishing its validity had he really executed it; that the defendant was called upon to file any other documents bearing her late husband's seal and signature to prove whether those borne on the deed of adoption were really his, but she neglected to do so, though, observes the Principal Sudder Ameen, she must be in possession of some, for he was a wealthy land-holder and must have granted leases, &c., to farmers and others; further, that she did not make mention of this deed of permission to adopt when she asked the Court to confirm her as her deceased husband's heiress."

The suit of the plaintiff was decreed, the deed was set aside, and the plaintiffs were declared to be entitled to succeed to the estate of the late Narain Chowdhry on the death of the defendant, his widow. Costs of suit to be paid by the defendant.

In this Court, Mr. Peterson has been heard for the appellant, and Messrs. Doyne and Tagore for the respondents.

The arguments on both sides have been elaborate and able. We are called upon

to pronounce our opinion upon a single question of fact with respect to which there is oral evidence on both sides. We are fully sensible of the advantage which the Lower Court possessed in having the witnesses before it, but, at the same time, after a full and careful consideration of the whole of the evidence and surrounding circumstances of the case, we have felt no hesitation in arriving at a different opinion from that expressed by the Principal Sudder Ameen.

The deed of permission to adopt is dated the 15th of Bhadro 1265 B. S. This document is to the following effect:—

"I am very ill with fever, &c. It is impossible to say what may happen for good or evil to my body. You are my third wife; you have borne me a daughter, and you are now for the second time *enciente*. If by the will of God you bear a male child, and he live, well and good; if not, looking to futurity, and to the offerings of oblations and funeral rites to myself and ancestors, I give you this deed of permission. If I do not recover from this illness, you will adopt three sons in succession and keep up the offering of oblations, &c. Until you deem your adopted son to be capable of transacting business, or during the period of your life, you will not make him proprietor of any portion of my estate, nor cause registration of his name for my immoveable estate. But the *whole* of my estate is the property of my minor son aforesaid, and you are not entitled to alienate it or bestow it in gift To this effect I have executed this deed of permission to adopt."

There are seven subscribing witnesses to this document, and on the face of it, it is apparent that it has been twice filed in Court, *viz.*, on the 22nd of November 1859 and on the 1st October 1861.

The Principal Sudder Ameen commences his judgment by broadly stating that the deed of permission is invalid, because it is not engrossed on stamped paper. A deed of this description is not invalid for the above reason. Moreover, under the Hindoo Law, a verbal permission to adopt, if supported by reliable evidence, would be perfectly valid. We may also observe that neither under the old nor the new Registration Act is it compulsory to register documents of this description. The absence, therefore, of registry and stamped paper may give rise to inferences against the genuineness of the deed, but is by no means conclusive.

The *onus* is upon the defendant. Has she well discharged herself of it? In estimating the value and weight of the evidence adduced by the defendant, it is important not to lose sight of the admitted fact—a fact disclosed by the proceedings in several suits before the local Courts, copies of which have been filed—that the husband of the defendant, and, after his decease, the defendant, were on bad terms with the other members of the family. The enmity must have been of a very bitter character, for we find one of the members of the family openly and broadly asserting in a Court of justice that the defendant was not the wife of Narain Chowdhry but his mistress; and other members of the family, attempting to take out a commission *de lunatico inquirendo* against Narain Chowdhry. This bad feeling between the members of the family will account for the absence of the relations and others interested in the succession to the estate of Narain Chowdhry at the time the deed was executed.

The witnesses to the deed are just the description of witnesses we should have expected to find under such circumstances and in a case where it was clearly the object of the grantor of the deed to keep the matter secret from his relations. They are the domestic and other confidential servants of the grantor, and if, owing to the delay upon the part of the plaintiffs in bringing this suit in the face of early and bold publicity on the part of the defendant, the latter has been prevented from obtaining more contemporaneous testimony, a Court of Equity will not suffer her to be prejudiced by omissions solely due to the conduct of the plaintiffs.

Early and open publication of deeds of this description has always been insisted upon by our Courts as essential, and very properly so. In this case, we find such publicity. Very shortly after the death of her husband, the defendant applied to be admitted to carry on a suit which had been instituted by him during his lifetime, stating that she was his heiress. She was opposed by her step-son's widow Sri Soonduree, who alleged that she was the legal heiress of Narain Chowdhry, and that the defendant was not the wife, but the mistress of the said Narain Chowdhry. This objection was successful, and Sri Soonduree was permitted by the Moonsiff of Thakoorpoor to carry on the suit. The defendant in this suit, Pritima Soonduree, immediately appealed, and in her petition of the 25th November 1859, the contents of which are recited in the decision

of the Judge of Dinagepore, dated the 16th May 1860, she distinctly states that she was the lawful wife of Narain Chowdhry, and that he had given her a deed of permission to adopt a son. She further denounced the conduct and aspersions of her step-son's widow as instigated by the enmity entertained towards her by her husband's relations. The order of the Moonsiff was reversed, and Pritima Soonduree was permitted to carry on the suit which had been instituted by her husband. In a proceeding of the above description which was of a summary character, it was obviously unnecessary for the defendant Pritima to do more than state that, as widow of Narain Chowdhry, she was entitled to be made his "*locum tenens*" in the suit which was pending—a suit to recover a very small sum of rent. When her very *status* as wife was attacked, she became thoroughly alive to the necessity of protecting her title and that of the son she might adopt under the permission granted to her by her husband, and we therefore find her boldly asserting the existence of such a deed on the 25th November 1859. Moreover, she filed it in the proceedings to cause her name to be registered on the Collector's rent-roll on the 22nd November 1859, or before she made the averment in the petition alluded to above. We fully admit that, during the lifetime of the defendant, the plaintiffs could not inherit, but we also well know that it is usual with the people of this country who, as relatives or connections, have any hope or interest, however remote or contingent, in the succession to a valuable estate such as this is, to enter emphatic protests and denunciations then and there when their rights are in any way imperilled. When was the present suit brought? On the 22nd December 1865, or six years and one month after the open publication of the deed.

It has been said, in the course of the argument, that the deed was not published during the life of the grantor and not until some months after his death. This is true, but it was unnecessary and repugnant to the prejudices of a Hindoo gentleman, situated as Narain Chowdhry was, to publish it during his life. He had not given up all hope of life when he executed it; he had a maiden daughter then alive, and who might have a son; his wife was *enciente;* there was a fair and reasonable hope of male issue. His relations were hostile to him: why should he publish to them and to the world his wishes which depended for their fulfilment upon many contingencies? As to the delay on the part of his widow to publish it—a delay, after all, of a few months only—we know that natives and more particularly native ladies, are not punctual, but procrastinating in their habits of business, and there was no really pressing necessity to produce it until her *status* as wife was attacked; and then, after all, what is this delay of a few months in comparison to the long and unexplained period of six years and upwards which the defendant, well knowing, as they say, that the deed was a rank forgery, suffered to elapse before they ventured to impugn it by suit in Court? If, then, early publicity be a "*sine qud non*," we think that this deed was published at an early and fitting opportunity.

The evidence as to its execution is, on the whole, satisfactory, whereas the witnesses for the plaintiffs are their servants, and one of them is the father of Sri Soonduree, who took an active part in prosecuting the defendant. These witnesses simply state that they never heard of such a deed, and that they are of opinion that no such deed was ever executed. The terms and conditions of the deed may be somewhat unusual, inasmuch as no provision is made for the daughter, and the enjoyment of the estate by the son to be adopted is made to depend upon the discretion of his mother; but looking to the fact that the defendant was the youngest and perhaps the best loved and most trusted of the wives of the grantor, we see nothing so violently improbable in the dispositions made by the grantor as to induce us to question or doubt the genuineness of the deed.

The plaintiffs, in their written statement, allege that Narain Chowdhry had no seal, and that the deed is impressed with a seal. In reply to this argument, all we can say is that, if the deed were a forgery, and the grantor was not in the habit of using a seal, there was no good reason why a seal should have been impressed upon the deed, thus adding to the chances of detection. The defendant, it appears, asked the Court below to give her time to search for other documents bearing the seal and signature of her husband, but the suit was decided within eight days after the call was made. The plaintiffs did not attack the genuineness of the signature, and it would, therefore, have been anything but politic for the defendant to volunteer to supply the means of comparing signatures—a test which, at the best, is but a fallible one.

The learned Counsel, Mr. Tagore, submitted to the Court a specimen of a deed of adoption to be found in Strange's Hindoo Law, and seemed to think that, because the deed in this case is not drawn up according to that form, it is not a genuine instrument; but we are not aware that there is any stereotyped form for deeds of this description. Then, as to his attempt to show that the deed was not valid, we would observe that this point was not taken by his learned senior Mr. Doyne, nor by the plaintiffs in their pleadings below. They went to trial upon the simple issue of the genuineness or otherwise of the deed, and the appeal was argued before us on that issue alone. Being of opinion that the deed in question is a genuine document, we reverse the decision of the Principal Sudder Ameen, and decree this appeal with costs and interest.

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The 3rd August 1866.

*Present:*

The Hon'ble G. Campbell and E. Jackson, *Judges.*

**Bhoomear Tenures—Resumption.**

Case No. 1187 of 1866.

*Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 15th January 1866, reversing a decision passed by the Assistant Commissioner of Lohardagah, dated the 7th December 1864.*

Gopalnath Tewaree (Plaintiff), *Appellant,*

*versus*

Bhooyah Oranoo and another (Defendants), *Respondents.*

*Mr. C. Gregory* for Appellants.

*Baboo Bhowanee Churn Dutt* for Respondents.

**Bhoomears are bound to render certain customary services, but their lands are not resumable.**

This is a case from Chota Nagpore. The defendants are aboriginal Bhoomears holding land on the Bhoomear tenure according to the custom of that country. Plaintiffs allege that they are modern settlers in their present village, and not what they pretend to be. But it is clearly found, as a fact, that they are the ancient Bhoomears of the village holding rent-free on a hereditary tenure which plaintiff cannot touch. There is not the least ground for the special appeal which is dismissed with costs. It is not denied that Bhoomears are bound to render certain customary services, but the land cannot be resumed.

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The 3rd August 1866.

*Present:*

The Hon'ble W. S. Seton-Karr and Shumbhoonath Pundit, *Judges.*

**Land Disputes—Jurisdiction—Evidence—Possession—Title—Onus probandi.**

Case No. 888 of 1866.

*Special Appeal from a decision passed by the Additional Judge of Dacca, dated the 30th December 1865, affirming a decision passed by the Principal Sudder Ameen of Fureedpore, dated the 27th May 1865.*

Baboo Chunder Coomar Roy (one of the Defendants), *Appellant,*

*versus*

Kureem Buksh Chowdhry (Plaintiff) and others (Defendants), *Respondents.*

*Baboos Sreenath Doss* and *Bungsheedhur Sein* for Appellant.

*Baboo Greeja Sunkur Mojoomdar* for Respondents.

The investigation by a Magistrate in a case in which he found that the lands in dispute were not within his jurisdiction but within that of another Magistrate is not evidence.

Nor is the opinion of the Magistrate who has jurisdiction evidence on the question of title, the Magistrate's duty in such cases being confined to the point of possession.

**In a suit for an accretion, the *onus* is on the plaintiff to prove title.**

THE decision of the Judge is both defecttive and wrong in law, and we set it aside altogether. The investigation by Mr. Chapman, the Magistrate of Pubna, is literally no evidence whatever. It was made in a case in which that official found that he had no jurisdiction over the lands, which lay within the jurisdiction, not of Pubna, but of Fureedpore. The Judge will take no notice of the opinion delivered by Mr. Chapman under such circumstances.

The case is one in which the defendant has been kept in possession by the award of a competent Court—that of the Magistrate of Fureedpore. The Magistrate's duty in such cases is confined to the point of possession, and any opinion which the Magistrate of Fureedpore may have given as to title is no evidence, and ought not to form the grounds of the decision of the Civil Court.

In this case, the plaintiff claims the land as an accretion to Khapore, and the defendant as an accretion to Kistojeebunpore. It will be for the plaintiff to prove his case, and if he should set up a strong case of title, and the defendant should fail to rebut it, the plaintiff may then get a decree, but not otherwise. The Judge is desired to pass an entirely new decision in the case, and to pass it with reference to the merits, to the usual presumptions of law, and to the laws regarding accretion and title.

Remand accordingly.

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The 4th August 1866.

*Present:*

The Hon'ble W. S. Seton-Karr and Shumbhoonath Pundit, *Judges.*

**Jurisdiction (of Sudder Ameen)—Joinder of causes of action—Possession of Julkur and Mesne-profits.**

Case No. 989 of 1866.

*Special Appeal from a decision passed by the Judge of Purneah, dated the 21st February 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 24th August 1865.*

Shaikh Khoda Buksh (Plaintiff), *Appellant,*

*versus*

Shaikh Kureem Buksh and others (Defendants), *Respondents.*

*Mr. R. E. Twidale* for Appellant.

*Mr. C. Gregory* for Respondents.

**A Sudder Ameen may join two causes of action, one of which is for possession of a julkur, the value of which is within the cognizance of the Moonsiff, and the other for mesne-profits, provided the value of the whole suit is within the jurisdiction of the Sudder Ameen.**

IN this case, the action was brought by the special appellant in the Court of the Sudder Ameen, and it was valued at Rs. 90 for possession of the fishery, the possession of which is sued for, and at Rs. 652 for mesne-profits asked.

The Sudder Ameen gave a decree. The Lower Appellate Court, on the appeal of the defendant, decreed the appeal. The Lower Appellate Court first decides that, because the valuation of the julkur is within the cognizance of the Moonsiff, the Sudder Ameen should not have heard this case, as, according to the reading of the law by the Lower Appellate Court, these two causes of action could not be joined together so as to be cognizable by the Sudder Ameen. The Judge then proceeds to pronounce some opinion against the merits of the case of the special appellant, which he, after holding that the Court of first instance had no jurisdiction, should not have done. The Court ends with a direction that the special appellant may sue afresh for possession.

The Court below has entirely misread the law. Section 8 of Act VIII. of 1859 authorized the Sudder Ameen to try the whole of this case, as the total value of the suit was within his jurisdiction. The case is, accordingly, remanded to the Lower Appellate Court to try the appeal on the merits.

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The 4th August 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Hindoo Law (Mitakshara)—Partition (Proof of) —Certificate (under Act XXVII. of 1860).**

Cases Nos. 307 and 308 of 1866.*

*Regular Appeals from an order passed by the Judge of Gya, dated the 7th April 1866.*

Mussamut Josoda Koonwur (Plaintiff), *Appellant,*

*versus*

Gourie Byjonath Sohae Singh (Defendant), *Respondent.*

*Messrs. R. V. Doyne* and *W. E. Peacock*, and *Baboos Unnoda Pershad Banerjee, Kishen Kishore Ghose,* and *Mohesh Chunder Chowdhry* for Appellant.

*Messrs. A. T. T. Peterson* and *R. T. Allan,* and *Baboos Dwarkanath Mitter, Kishen Succa Mookerjee,* and *Tarucknath Sein* for Respondent.

Whether a nephew takes his uncle's share by mere survivorship or by inheritance, if he takes on the ground of their having been joint in estate, he "succeeds to" and "becomes entitled to the effects of" the deceased within the meaning of Act XXVII. of 1860.

Under the Mitakshara Law, there may be a partition in estate without any actual division of the lands into parcels, and allotment of those parcels to the different sharers to be held by them in severalty.

THESE are appeals from two orders of the Judge of Gya, the one rejecting the application of the appellant Mussamut Josoda Koonwur for a certificate under Act XXVII. of 1860 as representative of her deceased husband Joy Kurrun Lal—the other granting a certificate under that Act to the respondent Gourie Byjonath Pershad, the nephew of the deceased.

Gourie Byjonath Pershad contends that he and his uncle Joy Kurrun were joint in estate at the time of the death of the latter, and that he is, therefore, the heir and entitled to the estate. The appellant, on the other hand, contends that Joy Kurrun had separated many years before his death from Gourie Byjonath and Gourie Byjonath's father Deanath (the brother of Joy Kurrun); and that, therefore, she, as his widow, there being no male issue, is his heiress, and entitled to the certificate.

The Lower Court, being of opinion that it was not proved that a partition ever took place, rejected the application of the widow, and granted that of the nephew.

In appeal it is urged, *first*, that, on the face of Gourie Byjonath's own petition, it is apparent that he is not entitled to a certificate; and, *second*, that the partition has, in fact, been proved, and, therefore, the widow is entitled to that for which she prays.

On the first point it is argued that the uncle and nephew either were, or were not, joint in estate. If they were not, then clearly the widow would be entitled in preference to the nephew. If they were, and there were no separate property or debts of the deceased, no certificate is necessary, and none can be granted, because the nephew in that case takes all by survivorship, and needs no certificate to enable him to realize the outstandings.

Stress is also laid on the fact that, in his petition, Gourie Byjonath alleges himself to have been "in possession of the *property of the deceased*" since his death, and says that without a certificate it is improbable that "*the dues of the deceased*, amounting to above a lakh of rupees payable by the debtors, can be realized" These expressions are pressed upon us as admissions vitiating the nephew's claim, inasmuch as they show that his avowed object is the recovery, not of joint debts, but of debts belonging to the deceased alone. We think, however, that the words used in the petition ought not to be construed literally. The petition commences with a statement that the family was joint at Joy Kurrun's death, no partition ever having taken place, and that the petitioner is therefore sole heir. Under such circumstances, we are clear that the petition must be read in the only sense in which the petitioner could ever have intended it to be read, namely, as alleging the family to be joint, and, consequently, all debts standing in Joy Kurrun's name to be debts due to the joint estate. To have alleged the debts to be due to Joy Kurrun separately would have been wholly inconsistent with the claim to a certificate which is expressly based upon the ground of there having been no partition, and of Gourie Byjonath being for that reason entitled to succeed. We attach but little weight to the argument that, if the estate were joint, Gourie Byjonath took any debts outstanding in the sole name of Joy Kurrun (like the rest of the joint estate) by survivorship, and, therefore, a certificate was unnecessary, and could not be granted.

* The case (Nos. 307-8) printed at pp. 139-146 is connected with the case (No. 309) printed at pp. 57-58 of Miscellaneous Rulings, and should have appeared under that head.

We are of opinion that, whether the nephew takes his uncle's share by mere survivorship or by inheritance, if he takes on the ground of their having been joint in estate, he "succeeds to" and "becomes entitled to the effects of" the deceased within the meaning of Act XXVII. of 1860.

Then comes the second issue, whether, at the time of his death, Joy Kurrun was or was not joint in estate with Gourie Byjonath. This is the main issue between the parties, for there is no doubt that, if a partition took place, the widow is entitled to a certificate; while, if it had not, the nephew succeeds.

It is admitted that no actual allotment of the lands between the two parceners ever took place; that there was no division into parcels whereby Talook *A* was given to the one to be held in severalty, while Talook *B* was given to the other to be held in severalty. But it is said nevertheless that such events occurred, and such a course of dealing was followed by the parties, as amount in law to a partition.

For Gourie Byjonath, it is broadly pleaded that, by the Mitakshara Law (which is the law applicable to this case), there is no partition in law save when there has been an actual division by metes and bounds, or an allotting of one parcel to be held by the one party alone, and of another parcel to be held by the other party alone. It is contended that no arrangement, however strictly carried out, by which the parties agree to be separate in all respects, and each to be separately possessed of an eight annas or any other share in an estate, absolutely freed from any interest or control of the other party—that no such arrangement can amount to a partition in the absence of the separate allotment of properties in severalty. And certain decisions of the late Sudder Courts at Madras and Agra are referred to which do bear out this position. It is said in the judgment in one of these cases that the rule thus laid down is safe and clear. There is no doubt that it is clear and simple; and, if it be in accordance with the Mitakshara Law, which it is our duty to administer, there is no doubt also that it is safe; while its adoption would enable us to dispose of the present case at once without entering upon any detailed considerations of the merits, and so to avoid the host of difficulties which, in the absence of such a rule, beset the path of those who have to say whether or not there has been a legal partition. Fully alive, however, as we are to the importance and convenience of having any such simple rule, and to the daily practical difficulties which arise from the want of such a rule, it appears to us that the decisions in question are not in accordance with those of this Court or of the late Sudder Court, and that they are not in accordance with the Mitakshara Law as it prevails in those Provinces which are subject to the jurisdiction of this Court. We have not come to this conclusion without much deliberation, and we proceed to review in detail the authorities bearing on the subject, as we deem it necessary to show the grounds on which we refuse to adopt the rule of the Madras and Agra Courts.

The Mitakshara itself says (Chapter II., Section XII.): "1. When partition is denied, the fact of it may be ascertained by the evidence of kinsmen, relatives, and witnesses, and by written proof, or by separate possession of house and field.

"2. If partition be denied or disputed, the fact may be known and certainty be obtained by the testimony of kinsmen, relatives of the father or of the mother, such as maternal uncles and the rest, being competent witnesses as before described; or by the evidence of a writing, or record of the partition. It may also be ascertained by separate or unmixed house and field."

"3. The practice of agriculture or other business pursued apart from the rest, and the observance of the five great sacraments, and other religious duties performed separately from them, are pronounced by Narada to be tokens of a partition. 'If a question arise among co-heirs in regard to the fact of partition, it must be ascertained by the evidence of kinsmen, by the record of the distribution, or by separate transaction of affairs. The religious duty of unseparated brethren is single. When partition indeed has been made, religious duties become separate for each of them.'"

In the Vyavahara Mayukha, the law of which is, on most points, substantially the same as of the Mitakshara, we find Chap. IV., Sec. 3 (page 47 of Stokes's Edition):—

"2. Even when there is a total failure of common property, a partition may also then be made by the mere declaration, 'I am separate from thee.' A partition may even be a mere mental distinction. This exposition clearly distinguishes the various qualities of this term."

Again, in Chap. IV., Sec. 7, pl. 27 (page 80, Stokes's Edition): "Yajnavalkya states the

"modes of decision in case of denial of partition made by any one. 'When partition is "'denied, the fact of it may be ascertained by "'the evidence of kinsmen, relatives, and wit-"'nesses, and by written proof, or by house "'and field separately possessed.' From the "term *separately* possessed, we must understand it, of houses and lands separately "given (to each). Narada also says: 'If a "'question arise among co-heirs in regard to "'the fact of partition, it must be ascertain-"'ed by the evidence of kinsmen, by the "'record of the distribution, or by separate "'transaction of affairs.'"

Further on, in pl. 34, we have—"Narada "declares other signs also of partition, "'Separated brethren * * * may bear wit-"'ness * * *.' 'Gift and acceptance, cattle, "'grain, house, land, and attendants, must be "'considered as distinct among separated "'brethren, as also the rules of gift, income, "'and expenditure.' Those by whom such "matters are publicly transacted with their "co-heirs may be known to be separate, "even without written evidence. * * * "Brihaspati says: 'They who have their "'income, expenditure, and wealth dis-"'tinct, and have mutual transactions of "'trading and traffic, are undoubtedly se-"'parate.'"

The Vivada Chintamoni, p. 310, has the following: "Narada says: If there be any "doubt with regard to partition among co-"heirs, it may be removed by kinsmen, who "are the witnesses to it, by the partition-"deed, and by distinct income and expendi-"ture, and so forth. When the brothers live "together, only one of each set of religious "ceremonies is performed by all of them; "but, after partition, they separately cele-"brate religious rites. Divided partners "give or receive things in mortgage, separ-"ately perform ceremonies every new "moon, and so forth, and contract or "give loans without consulting each other. "Divided brothers can be witnesses to the "concerns of each other, can be sureties for "each other, can make or receive presents; "but undivided ones cannot do so. Those "who perform the above-mentioned deeds "out of their own stock shall be known as "separated, even if there be no partition-"deed.

"When one becomes a witness, and "another contracts a debt or becomes "surety, when one grants and another "receives a loan, they are known to be "separated.

"Yajnyavalkya says that, if there be any "doubt about partition, it may be removed "by kinsmen, witnesses, the partition-deed "(*Yatuka*), different houses and fields. "*Yatuka* means *separate*. It is derived from "*ya*, which means *unmixed*.

"The purport of the above is that the "aforesaid transactions cannot take place "without partition. Therefore partition will "be determined by them."

The Digest of Jugganatha, giving the Bengal Law on the subject, is much to the same effect (Book V., Chap. VI., Sec. 2, art. 2, pl. 385 (Vol. II., Madras Ed., 496), &c. So the Dyabhaga of Jimuta Vahanah, Chap. I., Secs. 8-10, and Chap. XIV.

These are the principal authorities among the native expounders of the Hindoo Law; and, although the separate enjoyment of house and field is mentioned as a criterion of partition, we certainly see nothing which leads us to conclude that separation in house and field is the sole evidence of partition, or that there can be no partition of lands save by an actual division and allotment of parcels in severalty. Nor, to turn to the works of English writers, is there anything which leads to such an inference in Strange's Hindoo Law (*see* Vol. I., pp. 225-229; and Vol. II., pp. 387, 395, and 397). So in Macnaghten's Hindoo Law, Vol. I., p. 53, we find the following:—

"Partition may be made without having "recourse to writing or other formality; "and in the event of its being disputed at "any subsequent period, the fact may be "ascertained by circumstantial evidence. "It cannot always be inferred from the "manner in which the brethren live, as they "may reside apparently in a state of union, "and yet in matters of property each may "be separate; while, on the other hand, they "may reside apart, and yet may be in a state "of union with respect to property, though "it undoubtedly is one among the presump-"tive proofs to which recourse may be had "in a case of uncertainty, to determine "whether a family be united or separate in "regard to acquisition and property."

There is nothing in this or the subsequent passages in the same work to show that actual division and allotment of separate parcels of land was deemed necessary. And in the second Vol., at page 168, we find a case (22, under the head "Partition") where it was held that a legal partition, according to the Mitakshara Law, had taken place, although there had been no allotment of parcels or enjoyment of them in severalty.

Such being the law as it appears in the text-books, we shall proceed to enquire how the subject has been treated in the Courts of Lower Bengal.

In the Reports of the Decisions of the late Sudder Court in 1859 (p. 858), we find a case in which the matter was discussed. In giving judgment, the Court make the following observations: "It has never been held "necessary in this Court that a separation of "brothers in countries governed by the "Mithila Law should be proved by a deed of "partition. Generally speaking, the separa-"tion is gradual, and it is rarely that it con-"stitutes a simple act such as might be fitly "recorded in a deed. The rule upon which "the Court seems always to have acted is that "laid down in the 12th Section of the Mitak-"shara which treats of the evidence of a "partition. 'If,' says Narada, 'a question "'arises among co-heirs in regard to the fact "'of partition, it must be ascertained by the "'evidence of kinsmen, by the record of the "'distribution, or by separate transaction of "'affairs.' The last of these tests alone, "when satisfactorily established, has gener-"ally been considered sufficient evidence of "separation; but in the present case, we "have the first and the last combined, and "we find that Bhola Dutt persevered for "years in his endeavours to secure the "second."

In this case, no actual allotment of separate parcels to the different sharers had been effected, and one of the strong points in the case relied on by the Court in deciding that there had been a separation was that Bhola Dutt (who, it was pleaded, had separated) had, in his own name, given to the proprietors of an indigo factory a lease of his own share of certain portions of the family property, which portions had not been allotted to him in severalty. In deciding as it did, the Court merely followed the course which had been taken by the Sudder Court in dealing with earlier cases. In no instance do we find it laid down that, according to the Mitakshara Law, an actual division and allotment of parcels to be held by each parcener in severalty was necessary. (*See* Sudder Dewanny Adawlut Reports, 1853, p. 618; Select Reports, II., 320; V. 351; VI. 273; VII. 87.) It is, however, to be remarked that, from the imperfect nature of the reports of these cases, it is, in more than one of them, impossible to say whether any allotment in severalty had been made in fact or not.

And so also in the High Court. Thus, in a case at page 18 of Sutherland's Full Bench Rulings,* where the issue was whether a partition, according to the Mitakshara Law, had taken place, no question was raised as to the necessity of proof of an actual taking of the respective shares to be enjoyed in severalty Again, in Belas Koer *vs.* Bhowanee Buksh (Marshall 641†), which is relied on by both the parties now before us, the Court remarks, after stating many circumstances which led to show that no partition had taken place, and a few which might have led to the conclusion that it had: "Nor "will such transactions as those shown us "be sufficient proof of separation, nor, in our "opinion, can proof of separate transactions, "unless it is very amply shown that the "transactions had no reference to joint inter-"ests, preponderate against the facts and pro-"babilities arising from the absence of the "best evidence, *viz.*, that of recorded and re-"cognized separation. But, especially in "this case, those separate transactions are, as "above shown, very far from being of that "complete nature that they can be accepted "as proof of the alleged real partition." In these observations, we see no indication of any opinion that actual separation and allotment of parcels is requisite. The Court goes no further than to say that, in the absence of recorded and recognized separation, there must be full and clear proof of separation—which, there is no doubt, is always necessary.

* *Coram* Trevor, Seton-Karr, and L. Jackson, JJ.

† *Coram* Bayley and Roberts, JJ.

Then there is the case of Badamoo Koer *versus* Wuzen Sing (5 Weekly Reporter 78‡), a special appeal in which there was a difference of opinion between the Judges. We need here only give the following passage from the judgment of Mr. Justice Louis Jackson, there being no nearer approach, in any of the judgments delivered, to an expression of opinion that actual allotment of lands in severalty is essential: "It appears to me that the Lower Court "found, as a matter of fact, that the family "was not separate in estate, and that the "special appellant, by the form of his con-"tention in the Lower Appellate Court, "virtually admitted this to be so. I think "that, unless there has been a definitive "separation in estate indicated by separate "enjoyment and distinct liabilities, the

‡ *Coram* Seton-Karr, L. Jackson, and E. Jackson, JJ.

"family must be held joint, and it will not "establish a separation in estate to show that "the different members of the family dealt "separately with their shares of the pro-"ceeds, or even that they collected rents or "profits from different parts of the estate, "for that might simply result from some "arrangement made for the general con-"venience of the family, and could not in-"dicate any cessation of the joint rights or "responsibilities." Here also we fail to find it laid down that there can be no partition save by actual making over separate parcels to each sharer. Nor is any such opinion to be found in the judgment of another Division Court, in a case in the course of which the question of whether there had or had not been a partition was much discussed—the case of Ramkissen Sing *versus* Rajah Shib Nundun Sing (June 10th, 1865, Regular Appeal No. 167 of 1865*).

* *Coram* Trevor and Loch, JJ.

Another decision which has been referred to in argument by the Counsel for the respondent is one passed on the 30th April 1864 in the Special Appeal No. 1715 of 1863.† The Court there remarks: "When no formal partition "of the family-estate has taken place, the "family must be considered joint and un-"divided, and the succession descends accord-"ingly, and this notwithstanding a separa-"tion in food and residence." The use of the word "formal" in this judgment is relied on for the respondent as showing that the Court contemplated an actual division and allotment of the estate in severalty. But when the whole judgment is read, it is clear that the word "formal" is used only in the sense of *distinct* or *definitive*. The main question in that case was whether evidence of separation in food and residence was sufficient to establish separation in estate also; and what the Court decided is practically no more than this, that separation in food and residence is insufficient, in the absence of clear proof of separation in estate also.

† *Coram* Trevor and Macpherson, JJ.

In the case of Bolakee Lall *versus* Mussamut Indurputti Kowur (3 Weekly Reporter 41‡), we find it laid down that "any act or declaration "showing an unequivocal intention on the "part of any shareholder to hold and enjoy his "own share separately, and to renounce all "rights upon the shares of his co-parceners, "constitutes a complete severance or par-"tition." The judgment of the Privy Council in the case of Rewun Persad *versus* Mussamut Radha Beeby (4 Moore 137) seems to us to bear out the same principle; for their Lordships appear to have been of opinion that a document in the nature of a will operated as a partition of the property given by it.

‡ *Coram* Trevor and Norman, JJ.

The cases specially relied on by the respondent are Shunkur Lall *versus* Mussamut Rohmer Koonwur (N. W. P. Rep. for 1865, p. 379), and Nagappa Nynour *versus* Meedundee Swara Nynour (Madras Sudder Court Reports for 1853, p. 125).

In the former case, four Judges are unanimous in holding that, in order to constitute a partition in law, particular portions of the aggregate area of land must have been divided off and assigned separately to the sharers. The Court express the opinion that, in so deciding, they in no way act inconsistently with, or in opposition to, the principles on which the judgment of the Privy Council in Rewun Persad's case is based, or to anything laid down there by their Lordships—an opinion in which we do not concur, as will appear from what we have already said as to that case. The Court also refer with approbation to two previous decisions of the Agra Court to the same effect—Radakissen *versus* Sreekissen (9 N. W. P. Rep. 357, June 30th, 1854), and Jokhoo Ram Pandy *versus* Muttra Persad Pandy (12 N. W. P., March 25th, 1857). We shall only observe, as to the latter of these two cases, that the decision was that of only the majority of the Court which consisted of three Judges, and that it is in direct opposition to the opinion given by the Hindoo Law Officer of the Court whom the Court consulted, and with whom the dissenting Judge concurred.

In the case of Nagappa Nynour in the Madras Court, nothing was decided save that the mere execution of a deed to effect a division of family property does not suffice to constitute a division, which can only be held to have taken place when the members of the family have actually divided their property, each taking possession of his allotted share.

But whatever may have been the decisions of other Courts, we are clearly of opinion that there is nothing in the text-books which are usually deemed authorities on the subject of Hindoo Law, or in the decisions of this Court, or of the late Sudder Court, which would justify us in holding that, by the

Mitakshara Law, no partition can be effected save by the actual division of lands into parcels, and allotment of those parcels to the different sharers, to be held by them in severalty. We think that a legal partition is proved if it be found that the parties have separated in food and residence, that there has been a distinct separation in estate indicated by separate enjoyment and separate liabilities, and that they have dealt with their respective shares separately and in a manner inconsistent with the idea of their being still joint; if, in short, looking at all the circumstances, it is clear that the parties really did intend to hold, and did, in fact, hold their shares respectively, each freed from any interest therein of any other sharer, and if the separate enjoyment was not merely a matter of arrangement for the private convenience of the family.

This being our view of the law, it remains for us to see what the facts are as they appear on such evidence as is before the Court.

And here we must remark on the exceedingly unsatisfactory manner in which this case has been disposed of by the Lower Court, whose brief judgment does not show distinctly upon what grounds the Judge supposed himself to be proceeding. By consent of the parties, the applications were disposed of partly on certain admissions made, and partly on certain documents filed. This being so, it is very much to be regretted that the Judge should have failed to record intelligibly the precise nature and extent of the admissions made. From the reference to them contained in the judgment, however, and from the statement of Mr. Allan, pleader for Gourie Byjonath, who informs us that he was present in the Court of Gya during the hearing of this matter, we gather that the arrangement come to between the parties was to the following effect, *viz.:* that, for the purposes of these applications, it should be taken as admitted that Joy Kurrun had been, for many years before his death, entirely separate in food and residence from his brother Deanath, and, after him, from Gourie Byjonath; that it should be taken as admitted that, for many years prior to his death, Joy Kurrun had separately collected and enjoyed an eight annas share of the property inherited from Mahadeo, the father of Deanath and Joy Kurrun; that all the documents filed by the parties should be taken to be genuine documents, and to be admissible in evidence; and that the Judge, upon those admissions, and giving due consideration to the effect of the documents and to the inferences legitimately to be drawn from them, should decide whether or not such a state of things was established as would amount to a partition in law, as regards estate, between Joy Kurrun and his brother and nephew. It is, then, upon these admissions, and the documents which are on the record, that we have to decide upon the merits of the claims set up by the several parties to the right to a certificate as representing Joy Kurrun.

It is clear that, on the bare admissions themselves, it would be impossible to hold that a legal partition was established; for there is nothing in the state of facts disclosed in the admissions which, in any way, indicates that there must, of necessity, have been a separation in estate, or which is incompatible with the idea that the estate remained joint. The being separate in food and residence, the separate collections, and the separate enjoyment, are items of evidence which may properly be taken into consideration in viewing the whole case in support of the contention that there was a partition; but, taken by themselves alone, these items are insufficient and inconclusive. When we turn, however, to the documents which have been filed, and take them together with the admissions, the result arrived at is very different.

The documents which have been put in are very numerous, and to some of them we shall refer in detail. These lead, in our opinion, to the irresistible conclusion that both Joy Kurrun and Deanath, not only collected and enjoyed their shares separately, but that, by mutual consent, each brother held and dealt with his share separately from, and independently of, the other, and entirely free from the control and from the liabilities of the other. We think that it was no mere arrangement of joint brothers for their mutual convenience, but that it is clear that each brother resigned his whole interest in the share of the other.

Turning to the documents on the file, we find that Joy Kurrun, on the 15th September 1850, sold an eight annas share of a certain mouzah. The bill of sale recites that the eight annas share belongs to Joy Kurrun, who is "in possession, without the "co-partnership of any other person, and "without opposition by anybody," and purports to sell the share absolutely. Then we have the following: "I have received "the consideration-money in full from the

"purchasers, and appropriate the same to "my own use" * * * * "the entire "sixteen annas, of the mouzah aforesaid, "deduct eight annas the share of my brother "Deanath; the remaining eight annas are "sold." This bill of sale was registered on the 19th of September 1850.

Immediately thereafter, on the 1st of October 1850, Deanath instituted a suit against Joy Kurrun, and the purchasers claiming a right of pre-emption. The plaint in that suit contains a statement that the brothers were separate. It states that the mouzah which had been sold had formerly belonged to Mahadeo, the father of Deanath and Joy Kurrun; "that after the death of "the father, both parties were in possession "of half shares each, *i. e*, an eight annas "share was held by the plaintiff (Deanath), "and the other eight annas by Joy Kurrun, "without any partition or division of the "lands; *but that now, through the evil ma-"chinations of enemies whose object was "to break up the house, Joy Kurrun had "become separate, and had accordingly sold "an eight annas share to the purchasers, "&c.,"* whereupon the plaintiff (the plaint continued) had gone through all the necessary preliminaries to entitle him to the right of pre-emption. After various proceedings taken, the suit was eventually dismissed for default on the 27th April 1852. And on the 5th of January 1853, Deanath himself sold *his* eight annas of the same property to the persons who had bought Joy Kurrun's share, and he gave them a bill of sale in terms similar to those of the bill of sale executed by Joy Kurrun, reciting that he was owner of an eight annas share, and was in possession of it "without co-partnership with any other person," selling the share "absolutely," and stating that he has received the purchase-money, and appropriated it to his own use. Then there is the "detail of shares" at the end of the bill of sale—"Entire "sixteen annas of the estate, deduct eight "annas share of Joy Kurrun which is in "possession of the purchasers by virtue of "the deed of 15th September 1850, the "remaining eight annas is the property "sold."

What more cogent evidence of separation in estate could there be than is afforded by these facts? Joy Kurrun dealt with his share as absolutely his own, and expressly said that he had no co-parcener. If his brother disapproved of the sale, and if the estate had been still joint, he might without difficulty have had it cancelled, inasmuch as, by the Mitakshara Law, the sale by the one parcener without the consent of the other was worthless. But not only did Deanath not attempt to set the sale aside—he actually admitted Joy Kurrun's right to make it without his consent, by asserting and bringing a suit to establish a right of pre-emption. Such a course was wholly inconsistent with Deanath's having considered himself and Joy Kurrun to be jointly interested in the property. Finally, after the suit was dismissed, we have Deanath acting just as Joy Kurrun had done, selling his own share to the same purchasers absolutely, alleging himself to be sole owner without any co-parcener, and acknowledging the sale of the other half already made by Joy Kurrun.

We shall next notice a transaction by which Deanath took from his brother a lease of the latter's eight annas share in a property which had once been joint. On the 5th of Augran 1258 Fuslee, Joy Kurrun granted a pottah of his share in certain lands for three years to one Sheodyal Sing. On the 11th of Bysack of the same year, Sheodyal executed an ikrarnamah, acknowledging he had in fact taken the pottah for Deanath, and assigning it over to him. This again is the strongest proof that the brothers were separate, and that they no longer had any joint interest in the land of which the one thus took a lease from the other.

Further, Joy Kurrun repeatedly sued alone for arrears of rent, &c., in respect of his separate eight annas share, and in one case before the Collector of Behar (21st February 1854), Deanath filed a petition admitting Joy Kurrun's right to the share claimed. So, we have some thirty-six pottah and kubooleuts, extending over many years, all tending to show that Joy Kurrun dealt separately and independently with his eight annas share. It also appears that, in some cases, tenants took two pottahs—one from Joy Kurrun for his half share, the other from Deanath for his half share.

Of date so late as June 1865, we have the plaint in a suit instituted by Gourie Byjonath against a tenant for arrears of rent. Gourie Byjonath was suing on a lease which covered the whole sixteen annas, and his object was to show his right to collect eight annas separately. The plaint states that first the rents had been paid to Deanath and Joy

Kurrun jointly, "*and after the separation* "of Deanath and Joy Kurrun, to Deanath "my father and to Joy Kurrun, and after "Deanath's death, to me."

Then we find many decrees against Joy Kurrun solely, which he alone satisfied. There are also decrees against Joy Kurrun and Deanath or Gourie Byjonath, in which the amounts decreed were paid separately, and separate releases given—as, for example, by Joy Kurrun, paying his half and getting a release, or by the decree going against Deanath alone for half, on the ground that Joy Kurrun had already paid his share. So, we find Joy Kurrun appealing alone to the Privy Council, giving security alone, and the Judge of Gya considering his eight annas share sufficient security, and reporting Joy Kurrun as "in possession without co-partnership," although no separation of interest had taken place in the Collector's books.

There are on the record also several bills of sale (besides those above referred to by us) showing that the parties sold their shares in certain properties independently. There are five such documents executed by Gourie Byjonath himself, dealing with his own half share. These latter bear dates in 1859, 1861, and 1864.

There are many Collectorate receipts for Government revenue produced by the appellant—receipts given for payments made by Joy Kurrun, though there was no separation in the Collector's books.

Finally, there are some twenty bonds given by Joy Kurrun for money lent to himself for which he pledged his own credit and his own half share.

These are some of the documentary proofs of separation in estate relied on by the appellant; and there are on the records many others, the effect of which is similar. Taken together with the admissions of the parties, we think that, for the purposes of the present applications, they very sufficiently make out the appellant's case, and show that she is entitled to the certificate which has been refused to her.

The evidence for Gourie Byjonath no doubt shows that Joy Kurrun and Deanath, and Joy Kurrun and Gourie Byjonath, frequently have sued together, and done other acts jointly in the management of their property. But these acts done jointly for convenience sake, and many of them in themselves showing that the parties considered their interests to be separate, are quite insufficient to rebut the very much stronger body of evidence which we have to show that the brothers were substantially separate in estate. More especially do we think that no inference adverse to the appellant's case is to be drawn from the fact that Joy Kurrun joined with Deanath or Gourie Byjonath in suits in which they sought to get possession of property which they claimed as being the heirs entitled to succeed on the occurrence of certain events which had happened. If they were the next heirs who had just become entitled to the properties in question, the natural and proper course for them, even if separate in estate generally, would be to join in a suit to establish their rights as heirs.

For the appellant it was also contended that, inasmuch as, even supposing no partition in law to be established, it is certainly proved that Joy Kurrun had the separate enjoyment for many years of an eight annas share of the rents and profits, this fact is sufficient to create a presumption that the debts due to him, and now outstanding in his name, are accumulations from the monies so separately received by him, or the produce of such accumulations—and that thus, in the absence of any evidence to the contrary, the debts in question must be assumed to be his separate property, going, on his death, to his widow. It is, however, unnecessary for us to express any opinion on this point, as our decision rests upon the broader ground that a partition is proved.

On the whole, looking at the case as it has been placed before us, we are clearly of opinion that, for the purposes of these applications, it is proved by the admissions which have been made, and by the documents which have been put in, that separation in estate, according to the Mitakshara Law, as well as separation in food and residence, did take place between Joy Kurrun and Deanath, and that, at the time of his death, Joy Kurrun was separate in food, residence, and estate from Gourie Byjonath. We therefore reverse both the orders of the Lower Court, and direct that a certificate under Act XXVII. of 1860 be granted to the appellant Mussamut Josoda Koonwur; that the certificate which has been granted to Gourie Byjonath Pershad be set aside; and that Gourie Byjonath Pershad do pay the appellant all her costs both here and in the Court below.

b.

The 4th August 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Hindoo Law—Succession (of unmarried daughter and her male issue).**

Case No. 1039 of 1866.

*Special Appeal from a decision passed by Mr. O. Toogood, Judge of Beerbhoom, dated the 23rd January 1866, reversing a decision passed by Moulvie Gholam Bolool Tumkin, Sudder Ameen of that District, dated the 30th May 1865.*

Radha Kishen Manjhee (Plaintiff), *Appellant,*

*versus*

Rajah Ram Mundul and others (Defendants), *Respondents.*

*Baboo Nil Madhub Sein* for Appellant.

*Baboo Issur Chunder Chuckerbutty* for Respondents.

According to the Hindoo Law current in Bengal, in default of son, grandson, great-grandson, or widow, the unmarried daughter succeeds in preference to the married daughters; and if the unmarried daughter should subsequently marry and die leaving male issue, her son will succeed to the exclusion of the married sisters and their male issue.

THE Court below has tried this suit on the following issue:—

"Whether, if a Hindoo daughter unmarried "succeed to the paternal property and die "leaving a son, her share goes to her sisters "provided they leave or are likely to leave "sons, or to her own son?"

The Judge found that the estate went to the sisters leaving or likely to leave sons, to the exclusion of the son of the unmarried daughter. Page 147, Vyavastha Durpana, and the decision of the late Sudder Court, dated the 8th August 1821, are quoted in support of this ruling.

It is admitted that this suit is governed by the Hindoo Law current in Bengal. Now, it is clear that, in default of son, grandson, great-grandson, or widow, the unmarried daughter succeeds in preference to the married daughter. In this case, it has been found by the Court of first instance that the wife of the special appellant was unmarried when her father died. This fact is not disputed. She married and died leaving a son. That son is entitled to succeed in exclusion of the sisters and sisters' sons (Macnaghten's Hindoo Law, Volume I., page 25; Elberling on Inheritance, pages 75-76; Dyabhaga, Colebrooke's Translation, Chapter II., page 193, para. 30).

The Judge has quoted from the Vyavastha Durpana a Digest of the Hindoo Law by Baboo Shama Churn Sircar, a work of great research and utility, but which is not recognised by our Courts to be of so great an authority as the more correct and learned work of Sir William Macnaghten.

In the work of the Baboo, we find it laid down that, "on failure of son, grandson, "great-grandson, and wife, the unmarried "daughter is the sole heiress of her father's "estate" (page 147).

It is true that in the same page the following passage occurs: "If the maiden "daughter in whom the succession has vested, "and who has been afterwards married, die, "then, on death of this daughter vested "with property, the estate which was hers "becomes the property of those persons, the "married daughter or others, who would "regularly succeed if there were no such "unmarried daughter in whom the inherit-"ance vested." But the author does not give any opinion as to the rule of succession in a case where the unmarried daughter in whom the succession has vested marries and leaves male issue.

The decision of the late Sudder Court alluded to by the Judge is not at all in point, and does not apply to the question before the Court.

The decision is reversed, and the suit remanded for trial on the merits.

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The 4th August 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Section 258, Act VIII. of 1859—Sale of immoveable property in execution of decree (Reversal of)—Recovery of purchase-money.**

Case No. 1049 of 1866.

*Special Appeal from a decision passed by Mr. A. Abercrombie, Judge of Dacca, dated the 20th March 1866, affirming a decision passed by Baboo Luckhee Narain Mitter, Additional Principal Sudder Ameen of that District, dated the 15th September 1865.*

Brojendur Roy Chowdhry (one of the Defendants), *Appellant.*

*versus*

Jugurnath Roy (Plaintiff) and others (Defendants), *Respondents.*

*Baboos Dwarkanath Mitter* and *Chunder Madhub Ghose* for Appellant.

*Mr. R. V. Doyne* and *Baboo Unnoda Pershad Banerjee* for Respondents.

When a sale of immoveable property in execution of a decree is set aside by a competent Court, the right of the purchaser to recover back his purchase-money under Section 258, Act VIII. of 1859, is absolute, even though he himself caused the property to be put up for sale, provided he was not guilty of any fraud or misrepresentation, or did not guarantee the validity of the sale under the decree.

In this case, it appeared that there were three persons holding decrees against one Shunkho Monee. The first in order of date was the defendant in this suit, the present appellant; the second was the plaintiff in this suit, the present respondent; and the third was one Muddun Mohun Roy. The property of Shunkho Monee was attached by all three creditors, and was put up to sale at the instance of the plaintiff. At this sale, the plaintiff became the purchaser of the property, but the whole, or nearly the whole (it is not precisely stated), of the sum realized was applied in satisfaction of the defendant's debt.

Before the auction-sale, a fourth party, Sunoo Chunder, claimed the property attached as purchaser under a private bill of sale prior to the attachment. His claim was investigated under Section 246 of the Code of Civil Procedure and rejected, and the sale took place. Subsequently, Sunoo Chunder brought a regular suit to set aside the sale and recover the property, in which he was successful.

The present suit is brought by the plaintiff to recover back the purchase-money which has been handed over to the defendant, and the Judge has made a decree in the plaintiff's favor.

Upon this appeal, two objections have been urged against this decree. *First*, it is said that there was no irregularity in this sale, and that, at a sale under a decree for execution, the purchaser takes all risks of title upon himself; but upon the present appeal, we have no power to enter into this question, because the sale has been set aside by a competent Court for reasons which must be presumed to be sufficient. That having been done, the right of the purchaser to recover back his purchase-money under Section 258 of the Code of Civil Procedure is absolute, and this suit may be maintained (*see* 1 Weekly Reporter 55).

Then it is said that, even if this be so in ordinary cases, the plaintiff cannot recover in this suit, because he himself caused the property to be put up for sale. But there is nothing whatever in this objection. It is not suggested that the plaintiff was guilty of any fraud or misrepresentation by which he might be deprived of a right which he would otherwise be entitled to assert; nor did he in any way guarantee the validity of the sale under the decree. He merely did what any judgment-creditor has a right to do; he set those proceedings in motion of which the defendant stepped in and took the benefit.

Both objections, therefore, which have been taken on this appeal fail, and the appeal will be dismissed with costs and interest.

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The 4th August 1866.

*Present:*

The Hon'ble W. S. Seton-Karr and Shumbhoonath Pundit, *Judges.*

**Section 230, Act VIII. of 1859—Execution of decree—Immoveable property.**

Case No. 1043 of 1866.

*Special Appeal from a decision passed by the Judge of Cuttack, dated the 26th January 1866, reversing a decision passed by the Moonsiff of Balasore, dated the 31st March 1865.*

Huro Pershad Roy Canoongoe (Defendant), *Appellant,*

*versus*

Ram Lochun Mundul and others (Plaintiffs). *Respondents.*

*Baboos Chunder Madhub Ghose* and *Obhoy Churn Bose* for Appellant.

*Baboos Bykuntnath Paul* and *Mohendro Lal Shome* for Respondents.

Section 230, Act VIII. of 1859, does not authorize the registry, as a suit of objections by defendants, or purchasers from defendants, dispossessed of immoveable property in execution of a decree, and disputing the right of the decree-holder to be put into possession of such property.

It appears that the special appellant sued and obtained a decree against a certain individual, and, in execution of it, some dispute arose regarding the lands now in dis-

d

pute, between him and a purchaser of a portion of the estate from the defendant against whom the special appellant had obtained a decree for the same. The Court of first instance decided against the objections of the said objector, and then, under the orders of the Lower Appellate Court, passed on the appeal of the said objector, the Court of first instance was directed to register his objections as a suit under Section 230 of Act VIII. of 1859.

That case has now been decided up to the Lower Appellate Court, and the special appellant objects before us in the same suit, that the Lower Appellate Court should not have directed the Court of first instance to register any claim, as there is no appeal against orders refusing to register a claim in execution, and that Section 230 does not contemplate the registry of objections of *defendants*, but of others besides defendants; and, as the objector was a purchaser from the defendant after the passing of the decree in favor of the special appellant, the said objector is no better than the aforesaid defendant himself, and is not a third party entitled to the benefit of the said Section.

We agree with the special appellant, and hold that this suit has been wrongly registered, and so tried without jurisdiction. We therefore decree the appeal with costs, and, reversing the orders of both the Lower Courts, dismiss with costs this suit under Section 230. This order is not, however, intended to prevent the Lower Appellate Court from hearing any Miscellaneous appeal against the orders of the Court of first instance passed in execution of decree, if that Court should think it proper, even after this lapse of time, with reference to the merits of the dispute to allow any such appeal, and to decide any matter that may be essential to the ends of justice.

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The 6th August 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Hindoo Law (Mithila)—Sales by Father—Onus probandi.**

Case No. 151 of 1866.

*Regular Appeal from a decision passed by Mr. E. S. Pearson, Judge of Tirhoot, dated the 15th January 1866.*

Mussamut Bhoorun Koer and others (Plaintiffs), *Appellants,*

*versus*

Sahebzadee and others (Defendants), *Respondents.*

*Mr. R. T. Allan* and *Baboo Kishen Succa Mookerjee* for Appellants.

*Mr. R. E. Twidale* and *Moonshee Ameer Ali* and *Baboos Debendro Narain Bose, Dwarkanath Mitter, Onookool Chunder Mookerjee,* and *Romesh Chunder Mitter* for Respondents.

Suit laid at Rs. 7,345-4-5.

Where a son under the Mithila Law sued to set aside sales by his father—HELD that the purchasers were not bound to show an absolute necessity for the sales, it being sufficient if they have acted *bonâ fide* and with due caution and were reasonably satisfied, at the time of their respective purchases, of the necessity of the sales in order to meet debts which the father had a right to discharge.

The *onus probandi* in such cases will vary according to the circumstances.

THIS is an appeal from a decision of the District Judge of Tirhoot. By his plaint, the plaintiff, who is the present appellant, prays for the cancelment of certain sales of real and personal property.

The sales in question were made partly in execution of decrees obtained against the plaintiff's father, and partly under bills of sale privately executed by him. The plaintiff, under the Mithila Law, claims a joint ownership with the father in the property alienated, and denies the father's right of alienation. He alleges in the plaint that his father, having inherited a large fortune, had, ever since he came of age, given himself up to luxury and immoral practices, and by that means had dissipated the whole property; and on this ground he asks that the purchases should be set aside.

The several purchasers of the property are defendants in this suit, 24 in number. With regard to several of them, however, the claim has been relinquished in the Court below; with regard to others, the plaintiff's claim has been rejected by the District Judge on the ground that the sales took place before he was born; and that part of the decision is not now complained of. Some of the defendants have not appeared, and the result is that we have to consider the cases of defendants Nos, 3,4,5, and 6 only.

None of the defendants deny that the Mithila Law of inheritance is applicable to this property, but they assert that the sales were made in order to enable the father to

meet expenses which he was justified in incurring. They also deny that the father was ever a rich man, or that he was extravagant; and, lastly, they assert that this suit is really brought by the father who is setting up the rights of his son in order to recover the property for his own advantage.

Evidence in support of that portion of the plaint in which it is alleged that the father had been given to luxury and immoral practices was adduced by the plaintiff in the Court below. The Judge expressed his opinion that this evidence was unsatisfactory. The appellant has not, in any way, impugned this expression of opinion by the Court below, and so it must be presumed that he acquiesces in it.

On the other hand, evidence was given in the Court below by each of the defendants whose cases are now under consideration, to shew that the sales to them respectively were justified by the circumstances in which the father was placed; and the general result of this evidence is to establish, beyond dispute, that the father, shortly after he came of age, was involved in an extensive litigation which lasted for ten years; that there were debts outstanding in respect of the *shrad* of his grandmother, which as a religious Hindoo he was bound, and as between him and his son he had a right, to discharge; that the sales in question were conducted openly, and that the purchase-money was adequate; and, moreover, that the father had taken a strong interest in the progress of this suit, instructing vakeels, and even trying to dispose of the claim.

Coming now particularly to the transaction of each defendant, we find that defendant No. 3 purchased property to the amount of Rupees 22,000; that at the time he purchased, the whole joint property had been attached on account of decrees against the father amounting to Rupees 14,000; and that, in addition, there were bond-debts amounting to Rupees 2,000, besides interest and costs, all which had to be satisfied out of the purchase-money; and the defendant alleges that it was to meet these claims that the property was sold.

Defendant No. 4 purchased a 7 annas share of certain property of the value of Rupees 6,000: of this 4 annas were purchased at a sale by auction, and the remaining 3 annas at a sale in execution of a decree. The sale by auction was ostensibly made to satisfy the *shrad* expenses above referred to and expenses of litigation.

Defendants Nos. 5 and 6 purchased property to the amount of Rupees 2,000 and Rupees 1,800 respectively. Both these sales were, at the time, asserted to be made in order to meet expenses of litigation.

The appellant before us has not denied that the above sales were made ostensibly for the purposes which the defendants allege, but he contends that this evidence is insufficient; he maintains that the defendants ought to go further and shew the nature of the debts for which the decrees were obtained, and the necessity of selling the property in order to meet these and other debts incurred. He asserts that the alleged necessity of these sales is a mere pretext to cover the father's extravagance.

Upon this, a good deal of discussion took place as to the precise limits to which each party is bound to carry his evidence, and the exact presumptions which ought to be made in a case like the present.

With regard to the law, it is clear, from the case of Honooman Pershad Pandey *versus* Mussumut Babooee Munraj Koonwaree (6 Moore's Indian Appeals, 393), that a purchaser in a case of this kind does not take upon himself the entire risk of the existence of a case of necessity for alienation. It is there said that the lender (or purchaser, as the case may be—the same rule would apply) "is bound to enquire into the necessi-"ties for the loan, and to satisfy himself as "well as he can, with reference to the parties "with whom he is dealing, that the manager "is acting in the particular instance for the "benefit of the estate." And further it is said, "Their Lordships do not think that "a *bonâ fide* creditor should suffer when he "has acted honestly and with due caution, "but is himself deceived." That was the case of a widow in possession of her husband's property, and having an infant son;—the present case is at least as strong in favor of the purchaser.

In the same case, speaking of the *onus probandi*, their Lordships remark that the question on whom the *onus* of proof lies in such suits is one not capable of a general and inflexible answer, and that the presumption proper to be made will vary with the circumstances, and must be regulated by and dependent on them.

Now, applying the above remarks to the present case, and viewing this case, as the Privy Council say it ought to be viewed, according to its particular circumstances, we think the defendants have given sufficient evidence to raise a presumption in their fa-

vor that the purchases made by them are valid. There is not a suggestion that they acted otherwise than *bonâ fide;* the alleged extravagance on the part of the father is not proved, and there appears to have been nothing to call for more than ordinary caution on the part of the purchasers. On the other hand, it is shewn that circumstances of grave suspicion attach to this case, that it is promoted by the father to serve his own interests. We also find that a very large proportion of the purchase-money was required to satisfy decrees in respect of which the whole of the joint property had been attached, and that a sale was imminent. For nearly the whole of the remainder, the ostensible necessity was that arising out of debts incurred in carrying on the litigation referred to, and there is nothing apparently unreasonable in the amount said to have been required for this purpose. The only remaining item is that of the *shrad* expenses which, as we have already said, the father had a right to discharge.

Under these circumstances, we come to the conclusion that the defendants acted *bonâ fide* and with due caution, and were satisfied, at the time of their respective purchases, of the necessity of the sales in order to meet debts which the plaintiff's father had a right to discharge. We, therefore, concur in the decision of the Judge of the Court below, and dismiss this appeal with costs and interest.

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The 6th August 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Damages—Abuse.**

Case No. 1235 of 1866.

*Special Appeal from a decision passed by the Officiating Principal Sudder Ameen of Purneah, dated the 24th February 1866, reversing a decision passed by the Officiating Moonsiff of that District, dated the 13th September 1865.*

Shaikh Tukee (Defendant), *Appellant,*

*versus*

Shaikh Khoshdel Biswas (Plaintiff), *Respondent.*

*Baboo Roopnath Banerjee* for Appellant.

*Baboo Greesh Chunder Ghose* for Respondent.

Injury might result to a man's feelings from abuse, such as would entitle him to damages.

THE Principal Sudder Ameen has awarded damages for abuse of the plaintiff by the defendant. It is said that, as no direct injury resulted, no damages should have been given. This question as to the amount of injury inflicted by the abuse was within the province of the Judge to decide. Injury might result to a man's feelings such as would entitle him to damages.

Appeal dismissed with costs.

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The 8th August 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Limitation—Cause of action—Malikana.**

Case No. 1248 of 1866.

*Special Appeal from a decision passed by the Judge of Patna, dated the 29th March 1866, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 11th November 1865.*

Heeranund Sahoo and others (Plaintiffs), *Appellants,*

*versus*

Mussamut Ozeerun and others (Defendants), *Respondents.*

*Mr. R. T. Allan* and *Baboos Onookool Chunder Mookerjee* and *Mohesh Chunder Chowdhry* for Appellants.

*Mr. C. Gregory* and *Baboos Unnoda Pershad Bannerjee, Dwarkanath Mitter,* and *Kishen Succa Mookerjee* for Respondents.

Though malikana is not, like rent, a recurring cause of action, yet a suit will lie for malikana, the cause of action as to which is non-payment within 6 years.

IN this case, the ground of special appeal, as set forth in the petition and, before us, is that, admitting malikana sued for by plaintiff, special appellant, not to have been received for twelve years before suit, still the right to malikana is, as a rent-charge on the estate, a perpetually and annually recurring cause of action; and that the special appellant was, under Clause 16, Section 1, Act XIV. of 1859, entitled to six years from the

time his cause of action arose, even if not entitled to twelve years under Clause 12. The special appellant at the same time states that he only does claim six years' malikana prior to suit, and that his title as malik has been found by the Lower Appellate Court, and was admitted by the ancestor of defendant, special respondent.

The pleadings in the case shew that plaintiff claimed malikana at 10 per cent. on the gross collections of Mouzah Senol, and 25 per cent. on the *seyer* collections from 1267 to 1272; and plaintiff alleged that his father had, to the period of his death, received payments at those rates.

Plaintiff also averred that, in the settlement made by Government with the mokurrureedar, there was a sum deducted from the Sudder jumma payable by the mokurrureedar under that settlement, to provide for malikana to be paid to plaintiff by the mokurrureedar.

One defendant denied plaintiff's title to malikanna at all, and they all generally pleaded limitation, and that 10 per cent. on the Sudder jumma was the maximum claimable.

The first Court found the payment to plaintiff's father within twelve years of suit proved, and decreed plaintiff's case.

The Lower Appellate Court records its decision as follows:—

"On the question of title, I think there "is sufficient evidence to shew that plaint-"iff's father did acquire a title to the ma-"likana of Mouza Senol;" and the Lower Appellate Court refers on this matter to a statement of Mahomed Akbar, from whom defendant derives his rights. In respect to the petition of Mahomed Akbar, dated 31st January 1859, filed a year before plaintiff's father's death, the Lower Appellate Court records: "This petition certainly (as said "by the Principal Sudder Ameen) does not "shew that plaintiff's title to malikana has "been extinguished, or was invalid, but "does shew that plaintiff's father's title was "disputed in his lifetime by the person who "is said to have paid him regularly up to "his death."

The Lower Appellate Court then finds that, on the whole evidence, payments to plaintiff's father, or to plaintiff within twelve years of suit, are not proved, and dismissed the suit as barred by limitation.

Against this, plaintiff appeals specially on the grounds before set forth; and respondent, under Section 348, Act VIII. of 1859, takes the objection that the Lower Appellate Court's finding of plaintiff's title to malikana is based on no legally sufficient evidence.

We are of opinion that, in this case, the malikana, though arising out of land and a charge on the estate, is not, strictly speaking, rents, so as to be, as rents, a constantly recurring cause of action. Still the plaintiff could, we think, in the case of such malikana as this, sue within six years from the date of the cause of action which is the date at which the claim to payment might be made; and in this view, this suit might be instituted for non-payments within six years.

Considering, then, the suit for any sum, the cause of action as to which is non-payment within six years, can be entertained, we reverse the decision of the Lower Appellate Court holding the suit barred by limitation, and decree that it may be tried on the merits. And here we would observe that there is not a clear finding by the Lower Appellate Court, whether (as plaintiff alleges) defendant contracted on the settlement to pay the malikana, or (as defendant alleges) defendant did *not* so contract. The evidence on this matter should be fully gone into, and the Lower Appellate Court should then pass such orders as it thinks just and proper.

Remand accordingly.

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The 10th August 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

**Putnee—Recovery of consideration-money.**

Case No. 1119 of 1866.

*Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 26th January 1866, affirming a decision passed by the Assistant Commissioner of Maunbhoom, dated the 4th May 1865.*

Rajah Nilmonee Sing Deo (Defendant), *Appellant,*

*versus*

Messrs. Gordon Stuart and Co., Secretaries to the Bengal Coal Company (Plaintiffs), *Respondents.*

*Mr. R. T. Allan* and *Baboo Bama Churn Banerjee* for Appellant.

*Baboo Mohendro Lall Shome* for Respondents.

Suit for recovery of consideration-money paid in respect of a village which was leased to the plaintiff in putnee as mâl, but which was subsequently found to be lakheraj land belonging to another party.

HELD that the plaintiff's right to recover depended upon his establishing either that the defendant fraudulently induced him to pay that sum by a false representation that he had a good title to the land in question, or that he warranted and covenanted with the plaintiff that he had a good title; and, as the plaintiff proved neither, his suit was dismissed.

THE Bengal Coal Company sued the Rajah of Pachete for Rs. 605-8-6, in a suit which they describe as being for a refund of the consideration-money and for a diminution of the rent, and for certain law expenses incurred by them in defending a suit.

The Lower Appellate Court, confirming the judgment of the first Court, gave to the plaintiff a decree for Rs. 68-4-10, which is described as the proportion of consideration-money paid in respect of a village called Chatnibadee which was entered as *mâl* in the hustobood made at the date of the putnee, but which, or a portion of which—for this is a matter which is not quite clear—was subsequently discovered to belong, as lakheraj, to one Roy Narain Buckshee, who, in a suit against the Coal Company and the Rajah, obtained a decree for possession.

The Lower Courts held that, as regards the claim for diminution of rent, they had no jurisdiction, but that the suit should be brought before the Collector; and, as regards the law-expenses incurred for defending the suit brought against them by the lakherajdar, the plaintiff could not charge the Rajah of Pachete for the costs of defending it.

So far as it goes, the decision of the Lower Courts is, no doubt, correct on these two points.

Mr. Allan appeared for the Rajah of Pachete, who appealed against the decree of the Lower Appellate Court. A preliminary objection was taken by the respondent that no appeal would lie to this Court, inasmuch as the suit was one cognizable by a Court of Small Causes, and that the demand in respect of which the Lower Courts had adjudicated did not exceed 500 rupees.

We are of opinion that there is nothing in this objection, as the demand for which the original suit was instituted *did* exceed 500 rupees, and, if it had been treated, as it might and should have been treated by the plaintiff, as a suit for a breach of contract by the Rajah for not giving that which he had contracted to give—namely, a good title to the land—we think that damages to the extent claimed in the plaint might have been claimed in the suit; and, therefore, the appeal is not taken away under Section 27 of Act XXIII. of 1861.

As regards the principal question in the case, we may observe that the right of the plaintiff to receive back a portion of that which is described as the consideration-money in price must depend upon the establishment of one of two points, namely, either that the Rajah fraudulently induced the Coal Company to pay him that sum by a false representation that he had a good title to the land in question, or that he warranted and covenanted with the Coal Company that he had a good title.

We observe that the Judicial Commissioner uses the expression "fraudulently "entered the land in question as rent-paying "land;" but we do not find any fraud distinctly charged in the plaint; or that there is any evidence at all upon which the Court would be warranted in finding the Rajah guilty of any malpractice, or actual fraud or dishonesty of any kind; and we do not think that the Judicial Commissioner meant to impute actual fraud to the Rajah by the use of the language above quoted.

Then, as regards the other point, Baboo Mohendro Lall Shome, who appeared for the respondent, wholly failed to show us that there was any distinct warranty, or anything that could be construed into any warranty or contract, that the Rajah had a good title.

There is nothing to lead us to suppose that the ordinary course was not followed in this case, that the Rajah did not exhibit his jummabundee, title-deeds, and other papers to the Coal Company, or that the Coal Company had not the fullest opportunity of ascertaining whether the Rajah was in the receipt of the rents for those lands or not. The lands in dispute, we observe, form but a small portion of those leased to the Company in putnee.

It appears to us that the natural and legal conclusion, in the absence of such evidence on the part of the respondent, is that what is called the consideration-money paid was a mere *salamee*, or payment of a gross sum upon the putnee. If it should turn out that the Rajah had no title to any of the villages included in the putnee lease, no doubt a tenant would be entitled to claim an abatement. But we do not think that there was any such understanding or contract between

the parties that the *salamee* was to be treated as severable or divisible into portions corresponding to portions of the property leased, or that the tenant is entitled to ask for the return of any portion of it, because of the Rajah's want of title to a few beegahs in a very small portion of the large estate.

We observe that the Coal Company has been in possession of the property for many years, but that they do not show, as they might have done, that they have been compelled to pay, or even were asked to pay, rent or mesne-profits to any one else in respect of such occupation. If they have paid rent to the Rajah, they have enjoyed the benefit of the lease of the land they bargained for.

For these reasons, therefore, we reverse the decision of the Court below, and decree the appeal with costs and interest.

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The 10th August 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

**Execution—Sale.**

Case No. 1093 of 1866.

*Special Appeal from a decision passed by the Judge of Purneah, dated the 9th January 1866, affirming a decision passed by the Sudder Ameen of that District, dated the 20th July 1865.*

Mirza Saefoollah Khan (Plaintiff), *Appellant,*

*versus*

Luchmeeput Singh Doogur and another (Defendants), *Respondents.*

*Mr. R. E. Twidale* for Appellant.

*Mr. R. T. Allan* for Respondents.

In execution of *A*'s decree a tenure was sold and purchased by *B*. Before the sale, the zemindars *C* and *D* petitioned the Collector to detain the surplus proceeds of the sale for the satisfaction of arrears of rent due to them. But the proceeds were actually attached by *C* alone, and out of the proceeds of sale *A's* debt and *C's* rents were only liquidated. The remainder was afterwards attached by *E* for his own debt, and about that time *D* put up the tenure for sale for the balance of rent due to him. *B* paid the amount of *D's* claim so as to save the property from sale, and now sues to recover the sum on the allegation that *D* ought to have satisfied his claim out of the money deposited in the Collectorate. HELD that *B's* suit could not be maintained.

THE facts of this case, which are somewhat complicated, have not been fully or clearly given by the Judge, and we are in some doubt whether he has perfectly understood the case, or whether his decision could be supported on the grounds alleged by him. But, on the mere statement of facts given by the plaintiff's pleader, we are quite clear that the plaintiff is not entitled to recover.

It appears that a certain property was sold in execution on the 20th of September 1864 at the suit of Kumuroonissa, judgment-holder, *versus* Hyder Ali, and purchased by the plaintiff. Before the sale, the zemindars Dhunput and Luchmeeput had petitioned the Collector that the surplus proceeds of the sale might be detained for the satisfaction of arrears of rent due to them. The proceeds were, however, actually attached by Dhunput alone. Out of the proceeds of the sale, amounting to 1,905 rupees, the debt due to Kumuroonissa and the rents due to Dhunput only were liquidated. The remainder, or 446 rupees, was afterwards attached by Kamanooddeen, another judgment-holder, for his own debt; and about that time Luchmeeput put up the tenure to sale for the balance of rent due to him. The plaintiff, special appellant before us, then paid the sum of 348 rupees, which was that claimed by Luchmeeput, so as to save the property from sale; and this is the sum which the plaintiff has now sued in vain to recover.

We are clear that he cannot be permitted to recover, and that his plea that Luchmeeput ought to have taken his arrears of rent out of the money deposited in the Collectorate has no force. That money had never been attached by Luchmeeput, and it had been legally attached by another decree-holder.

In this state of things, Luchmeeput was exercising a strictly legal right in putting up the tenure, and the plaintiff did the only thing which he could have done to preserve his purchase, and he has no right to recover the sum which, under such circumstances, he voluntarily paid away.

The appeal must be dismissed with costs.

b.

The 13th January 1866.

*Present:*

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

**Onus probandi—Rival lessees.**

Case No. 242 of 1865.

*Application for review of Judgment passed on the 3rd May 1865, in Regular Appeal No. 426 of 1864.**

Ram Dhyan Misser and others, Defendants (Respondents), *Petitioners,*

*versus*

Monrakhun Roy and others, Plaintiffs (Appellants), *Opposite Party.*

*Boboos Chunder Madhub Ghose* and *Hem Chunder Banerjee* for Petitioners.

*Baboos Dwarkanath Mitter* and *Mohesh Chunder Chowdhry* for Opposite Party.

**Where a plaintiff and defendant alike claim under leases from the zemindar who supports the plaintiff's lease and denies that of the defendant, the latter must prove his title.**

We think our original judgment is right and ought to stand. This application for review is dismissed with costs. The *onus* was not improperly thrown on the defendants. The plaintiffs and defendants alike claim under leases from the zemindar who supports the plaintiff's title and denies that of the defendants. Under these circumstances, the defendants certainly must show their right, which they failed to do.

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The 28th February 1866.

*Present:*

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

**Evidence of title—Possession.**

Case No. 2855 of 1865.

*Special Appeal from a decision passed by the Judge of Dacca, dated the 24th August 1865, affirming a decision passed by the Principal Sudder Ameen of Fureedpore, dated the 23rd September 1864.*

Gudadhur Koondoo and others (Plaintiffs), *Appellants,*

*versus*

Ram Koomar Bose and others (Defendants), *Respondents.*

*Mr. R. V. Doyne* and *Baboo Sreenath Banerjee* for Appellants.

*Baboos Kalee Mohun Doss* and *Pearee Lal Roy* for Respondents.

**A decision in an Act IV. of 1840 case is no evidence of title one way or the other.**

**Where the question for trial is the right to possession, it is not essential that the plaintiff should prove actual possession.**

This case must be remanded.

The question is a simple question of title. The plaintiff, if he can prove a *primâ facie* good title to the possession that he seeks, is entitled to a decree, unless the defendants can show sufficient cause to the contrary. The decision in the Act IV. of 1840 case is no evidence of title, one way or other. It merely shows that the person in whose favor that decision was passed was in actual possession under some colorable title. Of course, plaintiff, subsequently suing to get rid of such a decision and to establish his right, must prove his own title before he can put his opponent to proof of his. Had the appellant's position been properly enquired into in the present instance, and had it been found that he made out no *primâ facie* case, then his suit would have been properly dismissed. But the Lower Court has not fully or correctly dealt with the question of the plaintiff's *primâ facie* title. It was not necessary for the plaintiff to prove that he had had *khas* possession. He may possibly have a perfectly good title though he never had any such possession. The question for trial is not possession, but right to possession.

As to some of the lands at least, there seems to us to be (in the defendant's admission of liability to pay rent to the plaintiff, if in no other respect) a sufficient *primâ facie* case made for the plaintiff to render it necessary for the defendants to show their right to resist the plaintiff.

The Court will re-try the case, and, with reference to the above observations, will find distinctly to what portion, if any, of the lands claimed, the plaintiff has not made a sufficient *primâ facie* title. The title of the defendants must then be enquired into, and the whole case adjudicated upon accordingly.

* See Weekly Reporter, Vol. II., p. 324.

The 11th August 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

**Right of occupancy—Continuous possession for 12 years.**

Case No. 1118 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Rajshahye, dated the 8th February 1866, affirming a decision passed by the Moonsiff of Shahazadpore, dated the 29th August 1865.*

Mr. C. J. Phillip (one of the Defendants), *Appellant,*

*versus*

Nund Coomar Banerjee and another (Plaintiffs), and others (Defendants), *Respondents.*

*Baboo Issur Chunder Chuckerbutty* for Appellant.

*Baboo Motee Lal Mookerjee* for Respondents.

Continuous possession for 12 years gives a right of occupancy.

THIS was a suit in which the plaintiff, who is a zemindar, sued for the recovery of some 3 beegahs and 15 cottahs of land of which he alleged that he had been dispossessed by the defendant who forcibly sowed indigo thereon, within the plaintiff's zemindary, on the 25th of Assin 1271. The defendant's case was that he and his predecessors, from whom he had derived an indigo factory, had been in possession of this land, though without any pottah, in connection with the factory, and that he had paid rent for the same to the plaintiff.

The Moonsiff, in a lengthy decision, gave the plaintiff a decree, holding that the plaintiff had been ousted on the date mentioned; that the plaintiff had never acknowledged the defendant as jotedar; that the defendant had not proved that he had paid rent to the plaintiff; and that mere possession for 12 years and upwards would not give the defendant a right to resist the plaintiff.

The Principal Sudder Ameen affirmed this decision, saying nothing as to the alleged dispossession of the plaintiff, but holding that the defendant had not proved that his dakhilahs related to the land in question: that the plaintiff had denied on oath a certain letter; and that the defendant, not having produced any proof of the jotedaree right of himself or of his predecessor, had no right to retain the land.

We have heard both parties at considerable length, and we are convinced that this case has not been properly adjudicated on. and that it ought to be remanded.

The observations of the first Court as to the non-effect of 12 years' continuous possession in conferring a right of occupancy on the defendant are clearly wrong in law. The Principal Sudder Ameen has not adverted to the evidence for the alleged possession and dispossession of the plaintiff; and the Appellate Court is clearly in error in saying that the plaintiff has, on oath, denied a certain letter put forward by the defendant. The plaintiff, as it seems to us, spoke doubtfully as to the body of the writing, but allowed that certain words at the head of the letter were his own.

Moreover, if there had been any doubt as to whether the dakhilas, certain of which were admitted by the plaintiff, really referred to the land in dispute, this doubt could, we think, have been easily solved at the time of trial by reference to the evidence, or to the defendant himself.

On the whole, we think the result of the appeal so inconclusive and unsatisfactory that we remand the case to the Judge, and not to the Principal Sudder Ameen, for a full and fair decision in appeal on the whole merits of the case between the parties.

Two decisions of our Court quoted by the respondent—No. 426 of 1864, Regular Appeal, and No. 2855 of 1865, Special Appeal—do not appear to us to have any bearing on the present case, as the facts and the position of the parties therein are different.

Remand accordingly.

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The 11th August 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

**Section 246, Act VIII. of 1859—Claims to attached property—Purchaser from judgment-debtor.**

Case No. 1132 of 1866.

*Special Appeal from a decision passed by the Judge of West Burdwan, dated the 29th January 1866, reversing a decision passed by the Moonsiff of Bistopore, dated the 6th December 1864.*

Gunga Narain Ghose and others (some of the Defendants), *Appellants,*

*versus*

Haradhun Ghose (Plaintiff), *Respondent.*

*Baboos Kalee Mohun Doss, Nil Madhub Sein,* and *Ashootosh Dhur* for Appellants.

*Baboo Kalee Kishen Sein* for Respondent.

The purchaser from a judgment-debtor cannot take advantage of an order obtained by the judgment-creditor under Section 246, Act VIII. of 1859, to which he is an entire stranger.

THE plaintiff sues for possession of 1 beegah 9 cottahs and 2 cowrees of land of which he was dispossessed on the 5th of Agraun 1270. The Moonsiff dismissed the suit upon the ground that, in a certain former suit, the plaintiff had preferred a claim to this property which was then under attachment at the suit of a creditor named Kartick Ghose, in which his claim was rejected on the 6th of April 1863. The Moonsiff considered the present suit barred under Section 246 of Act VIII. of 1859, because it was not instituted within one year from that date.

On appeal, the Judge reversed the Moonsiff's decree, holding that, as the execution-creditor did not proceed under the order in that case, the now defendants, who are purchasers by a private sale from Kartick Ghose, cannot avail themselves in any why of the acts of the execution-creditor as against the now defendants. The Judge further observes that there does not appear that there was any enquiry or adjudication under Section 246. The defendants appeal.

We think it quite clear that a purchaser from the judgment-debtor cannot take advantage of an order obtained by the judgment-creditor under Section 246, to which he is an entire stranger. It was perfectly unnecessary for defendants to sue for the reversal of an order which has never been acted upon; and we, therefore, dismiss the appeal with costs and interest.

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The 14th August 1866.

*Present:*

The Hon'ble G. Campbell and Shumbhoonath Pundit, *Judges.*

**Special Appeal (Grounds of)—Res Judicata.**

Case No. 1028 of 1866.

*Special Appeal from a decision passed by the Judge of Patna, dated the 26th January 1866, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 16th May 1865.*

Meer Bahadoor Ali and others (Defendants), *Appellants,*

*versus*

Mussamut Suneechuroo and others (Plaintiffs), *Respondents.*

*Mr. R. E. Twidale* and *Baboo Romanath Bose* for Appellants.

*Baboos Chunder Madhub Ghose* and *Tarucknath Sein* for Respondents.

The Court would not allow points not raised before the Lower Appellate Court or in the written grounds of special appeal, to be argued.

A point raised in issue and tried in a previous suit between the parties, having been re-opened by the Judge below in the present case, the High Court reversed the Judge's order, on the principle of *res judicata.*

THIS is a complicated case, and the decisions make it by no means clear. The special appellants, defendants, seek to raise difficult questions regarding the liability of defendants for payments in their nature in some sense voluntary; but neither before the Judge, nor in the written grounds of special appeal, were any such questions raised, and we will not admit them now. We confine ourselves, then, to the written grounds.

It appears that, in a previous suit, plaintiff sued defendants for possession of certain lands on a zur-i-peshgee lease for 500 rupees. Most of the defendants pleaded failure of the consi-

deration, *viz.*, that only Rs. 250 out of the 500 had been paid. An issue was distinctly raised and tried whether the Rs. 500 mortgage money had been paid, and it was decided that only Rs. 250 had been paid. Nevertheless, the Court, among other orders passed on several points in the case, gave plaintiff possession. Plaintiff now sues for money paid by him to get rid of prior mortgages, and defendants seek to set-off the Rs. 250 not paid by plaintiff. The first Court, considering the question of the 250 rupees to be already decided, deducted that sum and gave plaintiff a decree for the money paid, without interest. The Judge, on the appeal of plaintiff, re-opened the question of the Rs. 250, and, deciding against defendants, decreed for plaintiffs for the full amount claimed with interest. We think that the question of the Rs. 250 has been already sufficiently decided between the parties, and that the Judge should not have re-opened it on the facts; and as the payment by plaintiffs was in great degree voluntary, we do not think he has any claim for interest during the period that he neglected to sue defendants. He is lucky to get back his principal with interest from date of suit. Allowing the set-off of Rs. 250, and disallowing interest till date of suit, we reverse the Judge's decision and restore that of the Principal Sudder Ameen. The costs of this appeal in proportion to the decree, and so of the Lower Appellate Court, are to be paid by the respondent.

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The 15th August 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Hindoo Law (Mitakshara)—Succession of brother's grandson.**

Case No. 655 of 1866.

*Special Appeal from a decision passed by the Judge of Patna, dated the 12th December 1865, affirming a decision passed by the Sudder Ameen of that District, dated the 18th August 1865.*

Kureem Chand Gurain (Plaintiff), Appellant,

*versus*

Oodung Gurain (Defendant), Respondent.

*Baboos Dwarkanath Mitter, Kishen Succa Mookerjee,* and *Kalee Prosunno Dutt* for Appellant.

*Baboos Mohendro Lall Shome* and *Nil Monee Sein* for Respondent.

**Under the Mitakshara system of Hindoo Law, in default of all heirs, a brother's grandson can succeed.**

*Jackson, J.*—THE question raised in this appeal is whether, under the Mitakshara system of Hindoo Law, a brother's grandson can succeed to the estate of a deceased person. The Judge of Patna has held that he is not included among the heirs, and has on this ground dismissed his claim to inherit his grand-uncle's estate.

In support of this view of the law, the cases of Government *versus* Gridharee Lal Roy, page 13, Weekly Reporter, Volume IV., and of Mussamut Sona Daee *versus* Bisumbhur Sahoo, pages 168 and 169, Legal Remembrancer, Volume I., have been specially pointed out to us as following former precedents, and distinctly ruling that the enumeration of heirs as laid down in the standard authority on the law, *viz.*, the translation of the Commentary on that law by Sir H. Colebrooke, is an exhaustive enumeration; and it has been next pointed out that in no portion of that law is the brother's grandson any where mentioned as an heir. In Chapter 2, Section 4, verse 1, brothers are mentioned; and in verse 7, brother's sons are mentioned, but brother's grandsons are not alluded to. Again, in Section 5, verse 1, it is laid down that, "if there be not brother's sons, gentiles share the estate;" and this Section goes on to enumerate *who* the gentiles are, *viz.*, first the Sopindahs, or kindred connected by funeral oblations, such as the paternal grandmother, the paternal grandfather, the uncles and their sons and, on failure of that line, the paternal great-grandmother, great-grandfather, his sons, and their issues inherit. And in the next verse, it is laid down that, if there be none such, the succession devolves on Somonodacas, or kindred connected by libations of water, and goes on to point out that Sopindahs cease with the seventh person, while the Somonodacas extend to the fourteenth degree. In the next chapter, again, cognates are declared to be heirs on failure of Sopindahs and Somonadacas, and those cognates are specially enumerated. Acting upon the rule that, when the particular relation is not specially enumerated as one of the heirs, he is excluded from inheritance, a sister's son was excluded in the decisions above quoted; and on the same ground, in the case of Ilias Koonwar *versus* Agund Roy (Select Reports, Sudder Dewanny Adawlut, Volume

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III., page 37) a brother's daughter's son was excluded.

On the other hand, it was shewn for the appellant that the right of a brother's grandson to succeed to an estate under the Mitakshara Law as a Sopindah was virtually upheld both in the Sudder Dewanny Adawlut and by the Lords of Her Majesty's Privy Council in the case of Gunga Dutt Jha and on his death, Rutcheepat Dutt Jha, *versus* Rajendro Narain Roy and others, reported at page 11, Volume II., Sudder Dewanny Adawlut Select Reports; and at pages 132 to 168, Volume II., Moore's Indian Appeals for 1839. In that case, the right of a descendant in the paternal line in the sixth degree to succeed as a Sopindah was held to be preferential to the right of a cognate. It is admitted that this case was governed by the Mithila Law, and it is urged for respondent that there is some distinction on this point between the Mitakshara and Mithila Laws. As respects the Commentary on the Mitakshara Law, the passages above alluded to as having been quoted by the opposite side are referred to as clearly shewing that all the different heirs are not enumerated, and that there are heirs which are not there enumerated.

It is not quite clear to what extent the learned Judges who decided the appeals of Sona Daee and of Government *versus* Gridharee Lal Roy would have carried the principle which they then laid down, that the enumeration of heirs by the Commentators on the Mitakshara translated by Sir H. Colebrooke was exhaustive. The question before them related specially to one particular description of heirs, *viz.*, the cognates or Bundhoos, who are specially treated of in Section 6 of the Commentary. Looking to the wording of that Section, which is peculiar, and in which the quoted words of the law itself do not include all such persons as heirs who would be heirs under the Commentator's view of the law, and looking also to verse 14, Section 1, Chapter I., and to verse 2, Section 1, Chapter II., the Judges in both cases came to the conclusion that the enumeration of heirs as laid down in this standard authority was exhaustive to the extent of excluding the sister's son; and it may be inferred thence that they would exclude any Sopindah or cognate who was not distinctly mentioned either in Chapter 5 or Chapter 6. If that was their view, it is said by appellant to be opposed to the view of the Hindoo Law laid down by the Sudder Dewanny Adawlut, and the Lords of Her Majesty's Privy Council in the case of Gunga Dutt Jha. There is no such difference in the wording of the Mithila and the Mitakshara Law, as would include a descendant in the sixth degree from a paternal ancestor, also in the sixth degree from the deceased, in the one law more than the other. The Sopindah declared entitled to the estate in that case held that decree of affinity to the deceased, and his claim as "Sopindah" was held to be good over that of an admitted cognate. There is no distinct enumeration of such an heir in Section 5 of the Commentary, and, if only enumerated heirs can succeed, the claim of the plaintiff in that case, as an enumerated cognate, would have been superior to that of the defendant who was an unenumerated Sopindah. But the decision went in his favor on the ground that he was a Sopindah entitled to inherit before the cognate.

It may be, however, that, though the learned Judges considered that the enumeration of cognates in the Commentary was exhaustive, they might not also consider the enumeration of Sopindah to be exhaustive; or it may be that they might consider that the words "brother's sons" in verse 7, Section 4, would include brother's grandsons and all lineal descendants in the male line, who could offer funeral oblations, and that the words "uncles and their sons," and "great-grandfather, his sons, and their issue," in the 4th and 5th verses of Section 5 also included all such descendants in the male line who could offer funeral oblations. Can this extended meaning be given to the words "sons" and "issue?" The learned Judge, Mr. H. B. Harington, in the course of his elaborate opinion on the Hindoo Law quoted at page 156 of the Decisions of Her Majesty's Privy Council in the case of Gunga Dutt Jha, laid down that "the term '*putra*' or son in the Mitakshara, and its Commentary the Subodhini, is frequently used as a generic term for male issue or descendant, and must be so construed in several parts of the Mitakshara, or the grandson as well as the great-grandson would be excluded from the immediate succession, though acknowledged in every system of Hindoo Law to represent their father and deceased grandfather." Mr. Harington goes on to give his reasons, alluding specially to the above quoted verses 4 and 5 of Section 5, and pointing out that the words "sons" and "issue" must mean generally lineal descendants in the male line. It may be inferred that he would have given the same interpre-

tation to the words "brother's sons" in verse 7, Section 4; and, if so, that, in his opinion, a brother's grandson could succeed to the estate of his deceased grand-uncle; and it is possible that the learned Judges who excluded the sister's son, putting the same signification on the word "sons," would hold that brother's sons include brother's grandsons, and that, therefore, brother's grandsons are enumerated in the category of heirs who can succeed, always provided that brother's grandsons are kindred who can offer funeral oblations to the deceased.

We are of opinion, then, that the word "*sons*" in the Mitakshara does, as a general rule, include all descendants in the male line who can offer funeral oblations. Otherwise, as has been pointed out by Mr. Harington, great-grandsons could not succeed to the estate, not only of their grandfather, but even of their father, the wealth of every father becoming the property of his son by right of his being his son (verse 3, Chapter I., Section 1, of the Mitakshara Commentary). Otherwise also it would be useles for the Mitakshara to lay down that Sopindahs descended from the sixth degree or Somonadacas from the fourteenth degree can succeed, if it also laid down that this was confined to the sons or the grandsons of the great-grandfather in the seventh or fourteenth degree, as such sons and grandsons could not possibly be alive. The words "sons" and "issue" in verses 4 and 5, Section 5, Chapter I. of the Mitakshara, must, we think, allude to the descendants of the paternal ancestor in the nearest degree who may be then alive up to the seventh or the fourteenth degree. It is to be remarked that not a single Somonadaca is enumerated, though Somonadacas are distinctly mentioned as able to succeed up to the fourteenth degree; and only two sets of Sopindahs. The words, "the relations of Sopindahs ceases with the seventh person," in verse 6, Section 5, Chapter II., allude to the seventh degree in the ascending line, as is clear from all the comments on the law quoted in Gunga Dutt Jha's case before the Privy Council.

It is by no means inconsistent with this view that a brother's daughter's son has been held unable to succeed. A brother's grandson in the male line may be among the enumerated heirs under the words "brother's sons," even if the daughter is thereby excluded. This decision is not, therefore, opposed to that regarding a brother's daughter's son.

We, accordingly, reverse the decision of the Judge of Patna, and remand the case to him for disposal of the remaining issues which arise in it.

*Bayley, J.*—We would add that, even if a brother's grandson cannot inherit in the direct order of succession after a brother's son and before the paternal grandmother, it does not follow that he cannot inherit at all. He is mentioned by Strange as an heir after the brother's son. Macnaghten seems to exclude him from the direct inheritance after the brother's son. There are several Commentators on the Mitakshara Law, who, however, hold a different opinion. However this may be, we think that, even if the brother's grandson cannot succeed after the brother's son, still that he can succeed generally as a Sopindah or one of the kindred who can offer funeral rites to the deceased. In this case, one brother's grandson has obtained possession of the whole estate—another sues him to obtain possession of his share of it. There is no nearer heir to the estate. The sole question is whether, under any circumstances, in default of all heirs, a brother's grandson can succeed. We think that he can.

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The 15th August 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Ancestral property—Section 260, Act VIII. of 1859.**

*Special Appeals from a decision passed by the Judge of Purneah, dated the 16th March 1866, affirming a decision passed by the Sudder Ameen of that District, dated the 14th September 1865.*

Case No. 1263 of 1866.

Achumbeet Roy (Defendant), *Appellant,*

*versus*

Sulabut Roy (Plaintiff), *Respondent.*

*Mr. R. T. Allan* and *Baboo Juggodanund Mookerjee* for Appellant.

*Baboos Onookool Chunder Mookerjee* and *Dwarkanath Mitter* for Respondent.

Case No. 1525 of 1866.

Sulabut Roy (Plaintiff), *Appellant,*

*versus*

Achumbeet Roy and others (Plaintiffs), *Respondents.*

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*Baboos Onookool Chunder Mookerjee* and *Dwarkanath Mitter* for Appellant.

*Mr. R. T. Allan* and *Baboos Juggodanund Mookerjee* and *Tarucknath Sein* for Respondents.

Suit for possession of certain property alleged by plaintiff to be joint, but which defendant pleads to be self-acquired. HELD that, if any portion of ancestral property is found to be in the plaintiff's possession before the death of a third party, the defendant's allegation that the third party had virtually abandoned his rights in his own property and divided it among his heirs, and that consequently properties in dispute, though acquired prior to a partition, were not brought in to be partitioned by reason of being self-acquired by the defendant, would become greatly confirmed whether the partition was effected by the deed produced by the defendant, or otherwise. Section 260, Act VIII. of 1859, is not applicable to such a case.

PLAINTIFF sued for possession of his share of two properties, stating them to be joint, and the defendant pleaded that both of them were self-acquired, and so not divisible.

The Court of first instance gave a decree to the plaintiff for the share of one of these properties, and awarded the second entirely to the defendant, on the ground that it was acquired without the intervention of joint funds, and was separate property of the defendant.

Both parties appealed to the Lower Appellate Court, and there the order of the first Court was upheld.

Upon this, both parties have appealed to the High Court.

Having fully considered the pleadings and decisions of the Lower Courts, and the arguments of the pleaders below and here, we think that it is clear that the Lower Appellate Court has not taken any notice of a tukseemnamah filed by the defendant, which was found by the Court of first instance not proved; but the reasons given in the decision of the first Court on the merits is not altogether satisfactory.

We think that the case should be remanded to the Court of first instance for re-trial of the whole case; that it should try the question of the tukseemnamah and its effects, and other issues arising out of the averments of the defendants as to that deed; that it should, even if the defendant fail to make out the genuineness of that deed, try to investigate whether there was really any partition of any moveable or immoveable property between the parties at the time of the tukseemnamah, or at any time before or after; and, if so, and of what properties, whether the lands alleged to have been allotted to the plaintiff are in his possession or in existence; and, if in his possession, what are his averments and proofs regarding its acquisition.

We think that, if any portion of admitted or proved ancestral property is found to be in the possession of the plaintiff from a time anterior to the death of Mahatab, the allegation of the defendant that Mahatab Roy had virtually abandoned his rights in his own property, and that the same was then divided among his heirs, and that, consequently, properties in dispute, though acquired prior to the said partition, were not brought in to be partitioned by reason of being self-acquired property of the defendant, would become greatly confirmed, whether the partition was effected by the deed produced by the defendant, or otherwise. If, on the contrary, the deed is not proved, and the ancestral property alleged to have been allotted to the plaintiff is proved not to be in existence or self-acquired as between the plaintiff and his brother, the ancestor of the defendant, the case of the defendant would be materially disproved.

With regard to the two properties in dispute, proof should be taken from both parties to establish their respective allegations.

It is clear that Section 260 of Act VIII. of 1859 does not apply to the claim of the plaintiff with regard to his claim to the one property not purchased in auction in the name of a third person or other, to which the Section is pleaded by the defendant.

Case remanded accordingly.

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The 16th August 1866.

*Present:*

The Hon'ble H. V. Bayley and G. Campbell, *Judges.*

**Attachment in execution—Limitation.**

Cases Nos. 1310 and 1321 of 1866.

*Special Appeals from a decision passed by the Judge of Patna, dated the 14th April 1866, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 27th May 1865.*

Achumbeet Lal and another (Plaintiffs), *Appellants,*

*versus*

Radha Kishen and others (Defendants), *Respondents.*

*Messrs. R. V. Doyne* and *C. Gregory* for Appellants.

*Moulvie Syud Murhumut Hossein* for Respondents.

In execution of a decree against *A* and *B*, property belonging to *C*, who made himself liable for *A's* debts, cannot be attached if it has been held by *D* for 21 years under a sale from *C*.

THE creditor, under a decree against Ameerooddeen and Miriam, attached the property of Moradun, a sister of Ameerooddeen, alleging that, under a subsequent arrangement, she became liable for her share of the debts. Be this as it may, we think that, as respects the present plaintiffs who have held the property for 21 years under a sale by Moradun, the property cannot be made liable. The Judge's decision seems to be entirely wrong. He distinctly records that, though collusion was alleged, it was not argued before him; yet he treats plaintiffs' possession for 21 years as wholly immaterial. It seems very doubtful, indeed, whether Moradun could have been made liable under the decree in which she was not included; and, if she sold to a *bonâ fide* purchaser for value, he would not be liable, no attachment of this property being found by the Judge. At any rate, whatever the previous liability, plaintiffs, having held for 21 years, are now protected by limitation.

The appeal is decreed with costs, and plaintiffs will recover the property.

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The 16th August 1866.

*Present:*

The Hon'ble H. V. Bayley and G. Campbell, *Judges.*

**Alluvial Land—Pleading.**

Case No. 1343 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Rajshahye, dated the 21st February 1866, reversing a decision passed by the Moonsiff of that District, dated the 15th July 1865.*

Oodo Puramanick (Plaintiff), *Appellant,*

*versus*

Mr. James Simson and others (Defendants), *Respondents.*

*Baboos Anund Chunder Ghosal* and *Upprokash Chunder Mookerjee* for Appellant.

*Messrs. R. T. Allan* and *J. S. Rochfort* for Respondents.

The mere omission of a defendant, on first starting his case, to specify the lands in dispute as an accretion, does not affect his right to them, when the fact of their being an accretion comes out in the course of the case.

THE gist of this special appeal, cleared from vague repetition and verbiage used in the petition, is that, as the special respondents never claimed the land in dispute as an *accretion*, no land of that description ought to have been decreed to them; and that right to hold *accretions* could only be allowed beneficially to attach to parties in the position of special respondents, *viz.*, subordinate holders under the zemindar, when it could be shewn that the tenure was clearly one containing those rights of occupancy which might carry such privileges; while in this case this fact was not shewn.

Plaintiffs (special appellants) claimed the lands in suit as included in their pottahs from the zemindar. Defendants (special respondents) claimed the land as belonging to the jote of Ali Puramanick, through whom they derived.

The Lower Appellate Court finds, as a fact on the third issue, that the lands in dispute did belong, as plaintiffs alleged, to the jote of Ali Puramanick.

As a mere matter of technicality, specification of the whole or part, being claimed by right of accretion, may not have been originally the drift of defendant's pleading, but the fact of accretion being the character of the land was found as the case proceeded; and we do not see why, under such circumstances, the land, if found as a fact (as it was found) to be, as defendants allege, theirs, as part of Ali Puramanick's jote, should not be awarded to defendants only, because they did not specify their rights to be by accretion on their first starting of their case.

On the point of the right to accretion not being with such under-tenants as special respondents are, we do not see that this was anywhere pleaded below. The special respondents termed their tenure to be *Kaeemee*, *i. e.*, of a *permanent and transferable* character. The special appellants on this, no where, by motion, petition, or otherwise, seem to have traversed this plea. It may then, by all rules of legal practice, be fairly considered to be an undenied fact that defendants' tenure was of the character which they represented it to be; and, in that case, the right of occupancy of the accretion found to be in their tenure would attach to them.

This being our view of the case, we see no reason to interfere with the decision of the Court below, and dismiss this special appeal with costs.

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The 16th August 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

**Estoppel (Misstatement)—Sale in execution of decree.**

*Regular Appeals from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 29th December 1865.*

Case No. 117 of 1866.

Baboo Roopun Singh (Defendant), *Appellant,*

*versus*

Baboo Ughorenath Suhae and others (Plaintiffs), *Respondents.*

*Baboo Romesh Chunder Mitter* for Appellant.

*Mr. R. T. Allan, Moonshee Ameer Ali Khan Bahadoor,* and *Baboo Mohesh Chunder Chowdhry* for Respondents.

Case No. 118 of 1866.

Baboo Girwar Narain Singh (Defendant), *Appellant,*

*versus*

Baboo Roghoonath Suhae and others (Plaintiffs), *Respondents.*

*Baboos Unnoda Pershad Banerjee* and *Dwarkanath Mitter* for Appellant.

*Mr. R. T. Allan, Moonshee Ameer Ali Khan Bahadoor,* and *Baboo Mohesh Chunder Chowdhry* for Respondents.

There must be some intentional misstatement and consequential prejudice before proof of the real state of things can be shut out. As purchaser of what had been sold in execution, a party is bound to exercise all due caution.

THESE two appeals arise out of a suit on a bond brought by the plaintiff against three defendants—the two appellants before us, and a third person, Lulleet Singh.

The facts are as follows: The plaintiff lent the sum of 4,601 rupees on a bond signed by Roopun Singh, the appellant in No. 117, and dated the 11th of November 1859. The person who really took the money lent on the bond is, the plaintiff states, Lulleet Singh, and the Lower Court has found on the evidence that Lulleet Singh was the person who actually borrowed the money.

Lulleet Singh, who was cited as a witness, never appeared in the Court below, and he has not appealed to this Court.

As security for the loan, the mouzah of Pooranee, which stood in the name of Roopun Singh, was mortgaged.

A few days after the bond was signed, the defendant Lulleet Narain executed a deed of sale of another mouzah named Titree, which stood, not in the name of Roopun Singh, but in his own, in favor of the plaintiff for 12,000 rupees. The plaintiff, being unable to obtain possession of his purchase, sued for possession, and in that case the plaintiff stated that the bond for which Mouzah Pooranee was hypothecated had been given up in part-payment of the consideration-money for Titree, and returned to the defendant. This, however, was not admitted by the defendant. The Court found that the bond had not been taken in part-payment, and consequently no deduction from the purchase-money was allowed. The purchaser, plaintiff in both these cases, was thus held liable to pay the full sum for his purchase of 12,000 rupees. This was on the 25th of April 1864, and the plaintiff has now brought this suit for the full amount of principal and interest due on the bond of November 1859.

As we have already said, Lulleet Singh is not before us, and the main contention with which we have to deal is that raised by Girwar Singh, the defendant, who purchased the Mouzah Pooranee, on the 14th of October 1863, from a decree-holder, one Toree Ram, who had had the same put up to sale in execution a few days previously, or on the 5th of October 1863.

The arguments used by the pleader in appeal for Girwar Singh are mainly those used in the Lower Court, *viz.*, that the plaintiff Roghoonath had induced the appellant to become the purchaser of Pooranee, by stating that the bond-debt for which Pooranee was hypothecated had been cancelled, and that, relying on this statement formally made in Court, the defendant had purchased the property for valuable consideration and had acquired a good title.

We think that the law on this question has been quite correctly laid down by the Lower Court. The Principal Sudder Ameen finds that, in the previous suit decided on the 25th of April 1862, there was no enquiry as to the genuineness of the bond. The only question was, whether it was given up in part-payment of the consideration-money for the purchase of Titree. He also rules correctly that there was no fraudulent or designed misrepresentation on the plaintiff's part, and that, when he made the statement relied on, he thought that he then had no lien on Pooranee. The deci-

sion of the Court entirely altered that state of things.

The law applicable to such cases, we take to be this, that there must be some intentional misstatement and consequential prejudice, before proof of the real state of things can be shut out. Now, there was no deliberate or wilful misstatement of the plaintiff which could or ought to affect the defendant, appellant.

As purchaser of what had just been sold at a sale in execution, the defendant was bound to exercise all due caution, and he must have known that he was purchasing what had been, and still was, the subject of controversy in a litigated suit.

Our judgment on this point is quite in conformity with that of the Principal Sudder Ameen; and we cannot hold that Mouzah Pooranee is not still liable to the lien of the bond for which it was hypothecated, or that Girwar Narain has purchased it free from encumbrance.

In this view, the appeal of Girwar Singh must be dismissed with costs.

As regards the separate appeal of Roopun Singh, in which the main fact of the bond is not disputed, we have only to say, in explanation of the order of the Lower Court, that the plaintiff must get his costs against Roopun Singh in both Courts, and that Roopun Singh is liable for the same personally, and that the decree for the bond will be executed on the mouzah of Pooranee for the amount due on the bond, and the costs in this suit against Girwar Narain Singh. Girwar Singh can, of course, if he thinks fit, pay off the lien on Pooranee and retain his purchase.

Both appeals are dismissed with costs.

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The 16th August 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

**Sales in execution of decrees—Section 248, Act VIII. of 1859.**

Case No. 1368 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 28th February 1866, reversing a decision passed by the Moonsiff of that District, dated the 21st August 1865.*

Hurish Chunder Roy (Defendant), *Appellant,*

*versus*

Brojo Soondur Mojoomdar (Plaintiff), *Respondent.*

*Baboos Sreenath Banerjee* and *Chunder Madhub Ghose* for Appellant.

*Baboos Kalee Mohun Doss* and *Luleet Chunder Sein* for Respondent.

**There is nothing in Section 248, Act VIII. of 1859, which restricts claims under it to titles derived from the judgment-debtor or out of the estate. It comprises all claims or objections to the sale of lands in execution of decrees.**

THIS is a suit by the plaintiff who claims 8 annas of Talook Nursingpore Mojoomdar, alleging that the defendants had obtained a decree for a kubooleut against him under Act X. of 1859.

The defendant alleges that the suit is barred under Section 246 of Act VIII. of 1859, and Clause 5, Section 1 of Act XIV. of 1859.

It appears that Talook Nursingpore Mojoomdar was attached in execution of a decree of the Civil Court in 1860, upon which the now plaintiff intervened under Section 246. He alleged that, out of 8 annas taken as 16 annas in Talook Nursingpore Mojoomdar, 10 annas were his ancestral and purchased property, and 6 annas had been given to him in pursuance of a vow; that this property had been attached on the allegation that it belonged to the debtor, and that his, the now plaintiff's, rights were lotted for sale. The Principal Sudder Ameen disallowed the claim.

It is admitted that the Principal Sudder Ameen's order was wrong, and, in fact, proceeded on a mistake as to the effect of the disallowance of a claim to another talook by the now plaintiff in 1853.

The defendant is the purchaser at the sale which took place after this disallowance of the plaintiff's claim.

The Moonsiff, Baboo Huro Chunder Doss, held that the suit was barred by limitation; but his decision was reversed by the Principal Sudder Ameen.

The defendant appeals.

We think that the decision of the first Court was right, and that the suit is barred. The respondent's vakeel contended that the order disallowing the claim was only final as to that part of the property, *viz.*, the 6 annas given in pursuance of a vow which the claimant alleged he had obtained by gift from the execution-debtor. But we see no reason for making any distinction between the several parcels claimed. There is nothing in Section 248 which restricts claims to be made under it to titles derived from the judgment-debtor or out of the estate. It comprises all claims or objections to the

sale of lands attached in execution of decrees. If the decision of the Principal Sudder Ameen was wrong, there was then greater reason why the now plaintiff, who had full knowledge of the facts, should have brought his suit at once and without delay. Purchasers at sales in execution of decrees have little or no means of knowing whether the claims of objectors are well founded or not.

The decision of the Lower Appellate Court is reversed, and the suit dismissed with costs and interest.

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The 17th August 1866.

*Present:*

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

**Limitation—Suit for possession.**

Case No. 1086 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 5th January 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 23rd March 1865.*

Mussamut Jhisoman Koonwur (one of the Defendants), *Appellant,*

*versus*

Baboo Roop Narain Singh and others (Plaintiffs), *Respondents.*

*Mr. R. T. Allan* and *Baboos Dwarkanath Mitter* and *Unnoda Pershad Banerjee* for Appellant.

*Mr. J. Coryton* and *Baboo Sreenath Doss* for Respondents.

A suit to obtain re-possession of property by setting aside a prior decree for the same property must be brought within 6 years.

The Principal Sudder Ameen is clearly wholly in error on the point of limitation, since the suit, according to his own showing (and he improperly assumes that the plaintiff did not attain his majority, till the day that he applied for a certificate), was brought more than three years after plaintiff's majority. That being so, plaintiff was entitled to no deduction on account of minority. The question of limitation has been tried altogether on a wrong issue. The plaint is faulty and obscure. The case is treated as one to set aside a deed of sale, and obtain possession of property; but it appears that, in reality, a prior decree for the property had been obtained on the deed of sale against plaintiff's guardian. A suit to obtain re-possession will not lie within 12 years of dispossession. The suit can only be brought to set aside the prior decree on the ground of fraud, and the limitation is 6 years. The present suit is more than 6 years from the decree, and can only be brought on the ground that plaintiff's father and guardian have been by fraud kept from all knowledge of the transactions impugned till a time within 6 years of suit, so as to give plaintiff the benefit of Section 9, Act XIV. of 1859. If plaintiff can prove this, the suit will lie, but, after the lapse of so long a time, it will be for him to prove such a case satisfactorily and clearly.

As the Lower Courts have misunderstood the law and the matters in dispute between the parties, we will give plaintiff an opportunity of amending his plaint, and accordingly remand the case to the first Court, with the direction that, if, within a reasonable time, plaintiff so amends his plaint as to make his suit on the face of the plaint within time, plaintiff shall have an opportunity of proving his case, and the suit be tried *de novo.*

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The 17th August 1866.

*Present:*

The Hon'ble H. V. Bayley and G. Campbell, *Judges.*

**Alluvial Land—Settlement—Agreement.**

Case No. 92 of 1866.

*Regular Appeal from a decision passed by the Judge of Tipperah, dated the 18th December 1865.*

Brindabun Doss and others (Defendants), *Appellants,*

*versus*

Jugodessurce Chowdhrain and others (Plaintiffs), *Respondents.*

*Baboos Chunder Madhub Ghose, Romesh Chunder Mitter,* and *Sreenath Banerjee* for Appellants.

*Baboo Kishen Succa Mookerjee* for Respondents.

Suit laid at Rupees 26,304-12-2.

In one character the defendants claimed the whole 16 annas of certain churs as former proprietors; in another, as arrears of a small share of another hostile estate. In the former character they entered into an agreement with the plaintiff that, if he, at his own expense and trouble, obtained a settlement of the churs for them, they would assign a 4 annas share of them to him. After some time, the Revenue Authorities finally decided against the defendant's claim in the former character, but made a settlement with them in the latter capacity. Plaintiff now sues for his share under the agreement.

HELD that, as the basis of that agreement was the establishment of the first right, and as that right had failed, the plaintiff was not entitled to take from the defendants anything of that which they hold in virtue of their second right.

THIS case is connected with Regular Appeals Nos. 94, 95, 96, 97, 98, and 170 of 1861, decided by this Court on 30th June 1863.

There was but one case in the Court below, and the several defendants separately appealed in the former and present appeals.

The action was brought by the plaintiffs, claiming under the old proprietor of the estate of Joogdeah, against the present proprietors, for certain shares in the churs attached to the estate. The former decision disposed of his claim as against the new purchasers of shares in the estate, and so far his suit was dismissed.

The present appeal is by some of the old proprietors who also retain certain shares in the present estate at the present day, and who are, in fact, admitted to be the grantors under whom plaintiffs claim. They did not appeal in the first instance, the fact, we may gather, being that the decision of the Court below, as it stood, would have gone to establish the present appellants' claim to the whole of the churs, less the share granted to the plaintiffs. That decision having been reversed by this Court, they have been specially admitted to appeal after time, their position being wholly altered by that reversal. They resisted plaintiff's claim on the ground that their grant to him was conditional on his obtaining for them the settlement of the whole of the churs. If the decision of the Court below had stood, the object would have been in fact attained. The final decision being, however, the other way, the object for which appellants ceded to plaintiff a share in their rights, has wholly failed. The question, then, is whether, plaintiff and the appellants having failed to establish their exclusive right to the churs, plaintiff can now, under the terms of his agreement, maintain the decision of the Court below, so far as the decree gives him a share of appellants' rights in the churs held by them as present co-proprietors of Joogdeah.

Our former decision explains the case as between the old and present proprietors of Joogdeah claiming the churs; the one in respect of former ownership before the settlement of the estate, the other in respect of *present* ownership. We have now to deal with the effect of the *agreement* between the present appellants and the plaintiff.

The agreement recites what was the old property of the appellants in the sites in dispute; the diluviation and re-formation of the land; appellants' efforts to establish an exclusive title and obtain settlement; the exhaustion of their resources; and goes on to assign to plaintiff a 4-annas share out of the whole 16 annas of the churs, with the condition that plaintiff should, as the consideration, obtain the settlement for the appellants at his own expense and labor; and, on getting settlement, should cause his own name to be registered as a 4-annas shareholder.

After this agreement, fresh application for a settlement was made by plaintiff and appellants, and during many years the claim experienced a great variety of fortune. A settlement was not actually obtained, but the title of appellants to it was at one time recognised, and plaintiff was put in charge as Surburakar. For want of a final decision, however, appellants could not obtain substantial profits. The malikanah was kept in deposit, and an order was passed that it should not be paid till the claimants agreed among themselves. The appellants had resisted plaintiff's claim; but under this pressure, they eventually executed documents admitting it, and at last, the malikanah was paid to appellants and plaintiff according to their respective shares under an indemnity-bond. But in 1857, the Revenue Authorities finally decided against the exclusive claim of the old proprietors (with plaintiff) to the *churs*, and made the settlement with the present proprietors of *Joogdeah*, shutting out plaintiff altogether. Thereupon plaintiff brought the present action for his full 4-annas share of the churs under the grant of the old proprietors, together with another share in right of purchase from one of them.

Appellant's vakeel has before us principally argued that plaintiff failed to exercise

due diligence to obtain settlement in accordance with the conditions of the grant; that, after a first application, he took no further steps to get a settlement for them, but left them to fight their own battle, and, in fact, rather opposed them in their applications for settlement, preferring to continue the arrangement under which he acted as Surbarakar. The agreement, it is pleaded, is therefore void. We think, however, that, whether or not the facts be as alleged by appellants, all plaintiff's *laches* have been condoned by the subsequent documents under which the appellants admitted his claim, and, in fact, put him in possession by receipt of malikanah. If the common right of appellants and plaintiff thus obtained, had held good, we have no doubt that plaintiff must have had his share under the agreement. We think that the appellants' true ground is that, the title under which plaintiff claims having wholly failed, and the state of things contemplated by the agreement not having come to pass, plaintiff cannot claim from appellants that which they hold on a wholly different title. The agreement recited the claim of appellants, as *former owners*, to the whole 16 annas of the churs as a separate estate from the present mehal *Joogdeah*, and assigned to him 4 annas of those churs, to be received as soon as their title was established. That title having wholly failed, appellants have only a small share in the churs, and not on the title contemplated by the agreement, but as proprietors of a small share of *Joogdeah*—a right which no one disputed, and which they would have had quite independent of the obligations contemplated by the agreement. Appellants had, as it were, two characters. In one, they claimed the whole 16 annas of the churs as their estate; in the other, they had a small share in the, as it were, hostile estate of Joogdeah. Their object was to establish their *first* right, to the defeat of the *second* right, in which they had only a smaller interest in common with their opponents. They gave plaintiff a share in that *first* right to enlist him on their side, and which was to be fructuous only when the right should be established. We think that, under this agreement, plaintiff has no right to take from the appellants anything of that which they hold in virtue of their second right, which was one not contemplated by the parties, except in so far as the object of their alliance was to defeat it.

We, therefore, reverse the judgment of the Court below, and decree the appeal with costs of both Courts.

The 17th August 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges*.

**Review of Judgment.**

Case No. 1184 of 1866.

*Special Appeal from a decision passed by the Officiating Principal Sudder Ameen of East Burdwan, dated the 27th January 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 9th August 1865.*

Onoop Chunder Paul and others (Defendants), *Appellants*,

*versus*

Ekkowree Singh and others (Plaintiffs), *Respondents*.

*Baboo Romesh Chunder Mitter* for Appellants.

*Baboo Obhoy Churn Bose* for Respondents.

An application for review of judgment of a Lower Court is not admissible after the limited period, merely in consequence of a decision of the High Court or of the Privy Council modifying the law or practice, which prevailed at the time when the judgment sought to be reviewed was passed.

THIS is a suit for resumption. The defendant pleads a lakheraj tenure, and the Sudder Ameen of East Burdwan gave a decree in favor of plaintiff. After the expiration of two years and some months, the defendants put in a petition of review which was admitted by a new Sudder Ameen. Upon the review, the Sudder Ameen reversed the decision of his predecessor and dismissed the plaintiff's suit. On appeal, the Principal Sudder Ameen reversed the decision of the first Court, upon the ground that the application for review had been improperly admitted. Against that decision, defendant now appeals before us.

We are of opinion that the Principal Sudder Ameen was quite right. The party applying for a review did not show any cause whatever for *not having preferred* the application within the limited period. It is perfectly true that he suggests that, by the decision of 22nd February 1865, of a Full Bench, a new interpretation was put upon the law relating to the matter decided in

this suit; and that would be a very good reason for preferring the application at the present time. But it is not a reason for *not having preferred* the application in proper time. It is neither consistent with the law nor reason that questions which have been long ago finally decided by competent tribunals are to be re-opened at any period of time, however remote, in consequence of a decision either in this Court or in the Privy Council, which is supposed to modify the law or practice which prevailed at the time of such decisions.

We think the judgment of the Principal Sudder Ameen is perfectly right, that the Sudder Ameen had no jurisdiction, under Section 377, to receive the application for review; and we, therefore, dismiss the appeal with costs.

We find that our decision is in accordance with one of Mr. Justice Campbell and Mr. Justice Glover, of the 18th January 1864.

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The 21st August 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Right of occupancy—Sub-tenant.**

Case No. 1468 of 1866.

*Special Appeal from a decision passed by Mr. S. Wright, Principal Sudder Ameen of Dinagepore, dated the 9th January 1866, affirming a decision passed by Moulvie Abdool Wajid, Moonsiff of Rajarampore, dated the 11th December 1865.*

Ketal Gain and others (Defendants), *Appellants,*

*versus*

Nadur Mistree (Plaintiff), *Respondent.*

*Baboo Anund Gopal Paleet* for Appellants.

*Baboo Debendur Narain Bose* for Respondent.

A sub-tenant of a cultivating ryot cannot acquire a right of occupancy.

THE special appellant argues that the Lower Appellate Court has not enquired into the nature of the tenure of the opposite party; that, if it be found that the same is held by the plaintiff under a higher and better title than by mere right of occupancy, the special appellant, though a sub-tenant, will be entitled to plead that he has, by 12 years' occupancy, acquired a right to continue to occupy.

We find that it is established, as a fact, in the opinion of the Court below, that the lands in dispute are parts of a jote purchased by the plaintiff, and that the special appellant was a sub-tenant of that jote, holding at will, and had before held under a lease for five years, on the expiry of which he *never renewed* the lease.

As such a sub-tenant of a cultivating ryot cannot acquire a right of occupancy, we reject the special appeal with costs.

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The 22nd August 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Pleading—Plaint.**

Case No. 1490 of 1866.

*Special Appeal from a decision passed by Mr. W. F. McDonell, Officiating Judge of Nuddea, dated the 24th April 1866, reversing a decision passed by Baboo Gopeenath Bose, Sudder Moonsiff of that District, dated the 21st July 1865.*

Woomesh Chunder Goopto (Plaintiff), *Appellant,*

*versus*

Raj Narain Roy (Defendant), *Respondent.*

*Baboo Anund Chunder Ghosal* for Appellant.

*Baboos Bungsheedur Sein* and *Mohesh Chunder Chowdhry* for Respondent.

The Lower Court dismissed this suit, because plaintiff had first represented himself in his plaint as a zemindar, and in a supplementary petition as a Shikmee talookdar. The question in the case, however, being whether the land in suit was land of the put ee lease, or of the separate talook of defendant—HELD that the decision of such a question was not affected by the *status* or character of the grantor of the putnee.

IN this case, the point urged before us in special appeal is, that the Lower Appellate Court has erred in holding that special appellant's suit should be dismissed, because he had first represented himself in his plaint as a zemindar, and in a supplementary petition as the Shikmee talookdar.

The Lower Appellate Court holds that these two representations constitute such a changing of the character of the suit as to be held illegal on the precedents cited by it.

But those precedents are all to the effect that a party may not so change the facts and character of his case as to make it a different case from that originally brought, so that something must be adjudicated distinct from what was sought to be adjudicated at first.

Now, applying this very test, we think the Lower Appellate Court is wrong.

The matter in dispute was whether the land in dispute was inside or not inside the putnee-lease. That plaintiff gave such a putnee was *never* denied before us. Therefore, whether it be the putnee of the zemindar, the *superior* landlord of all, or of the Shikmee talookdar, the inferior landlord, is quite immaterial. There is no question of such a putnee being so given. The only question is whether the land in suit was land of the putnee-lease, or of the separate talook of defendant. The decision of this is not affected by the *status* or character of the giver of the putnee in this case.

We therefore decree this appeal with costs, and remand the case for re-trial on the merits.

Remand accordingly.

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The 22nd August 1866.

*Present:*

The Hon'ble C. B. Trevor and F. B. Kemp, *Judges.*

**Suit for possession of Maheteran lands—Seal in execution of decree against Ghatwals—Intervention by Government.**

Case No. 1046 of 1866.

*Special Appeal from a decision passed by the Deputy Commissioner of Maunbhoom, dated the 28th December 1865, reversing a decision passed by the Officiating Moonsiff of that District, dated the 29th May 1865.*

The Government (Defendant), *Appellant,*
*versus*
Khetoo Dutt and another (Plaintiffs), *Respondents.*

*Baboos Kishen Kishore Ghosé* and *Juggodanund Mookerjee* for Appellant.

*Baboos Kishen Succa Mookerjee* and *Kalee Kishen Sein* for Respondents.

Suit for possession of Maheteran lands purchased by the plaintiff in execution of a decree against certain Ghatwals, and from which he had been illegally ejected by the Ghatwals after having been formally put into possession of the same. HELD that the Government could not, as an intervenor in such a suit, and in special appeal, ask the Court to determine whether the sale was illegal or collusive as between the plaintiff and the zemindar.

THIS was a suit for possession of certain Maheteran lands said to be situated in the village of Saboo Baha, in the District of Maunbhoom. The allegation is that the plaintiff purchased these lands in execution of a decree against the Ghatwal defendants in this suit, and that he was formally put into possession of the same; that he exercised rights of ownership in granting leases, &c., and was subsequently illegally ejected by the Ghatwals.

The Government were not arrayed as defendants, but appear to have intervened, and to have attempted to question the legality of the sale, though no action had been brought by them, nor any objection preferred in the execution-stage.

The Lower Appellate Court has found that the plaintiff purchased the rights and interests of the judgment-debtors, the Ghatwals, in the lands, the subject of this suit; that he was put in possession, and was subsequently illegally ejected. The suit was therefore decreed.

The Ghatwals, who are clearly the most interested party, do not appear before us.

The Government alone appeals.

We think that the decision of the Lower Court must be affirmed. There has been a finding that the plaintiff was put in possession of the lands in dispute in execution of the decree, and that he was in possession until illegally ejected by the Ghatwals. The Government may have a claim to the services of the Ghatwals, and the lands may be subject to police-services; beyond this, the Government can have no title to the land.

If there has been collusion between the zemindar and the Ghatwal defendants, which is not impossible seeing that they do not appeal, with a view to making out the lands to be Maheteran, when they are Ghatwalee lands upon which the Government have a service-lien, the Government is at liberty to bring a suit, if so advised; but, as an intervenor in the present suit and in special appeal, they are not entitled to ask the Court to determine the question whether the sale was illegal, or whether there has been collusion between the plaintiff and the zemindar.

The special appeal is dismissed with costs and interest.

The 22nd August 1866.

*Present:*

The Hon'ble C. B. Trevor and F. B. Kemp, *Judges.*

**Ancestral Property (Right to share in)—Limitation—Onus probandi.**

Case No. 1040 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 12th February 1866, reversing a decision passed by the Moonsiff of that District, dated the 28th August 1865.*

Bydonath Ojha (Defendant), *Appellant,*

*versus*

Gopal Mal and others (Plaintiffs), *Respondents.*

*Baboo Nil Madhub Sein* for Appellant.

No one for Respondents.

In a suit to enforce the right to a share in immoveable property on the ground that it is family-property, it is incumbent on the plaintiff to show that, within 12 years before the institution of the suit, the estate was in the possession of persons claiming under his ancestor, or that, if not actually in their possession, they received a portion of the profits during their lives from the defendant as trustee in possession.

PLAINTIFF sued defendant, who was the son of plaintiff's grandfather's brother, for possession of certain land, the share of the property belonging to his maternal grandfather.

The defendant pleaded that the property in suit never belonged to plaintiff's maternal grandfather, that neither he nor his maternal grandmother or mother were ever in possession, and that, consequently, plaintiff is out of Court on the Statute of Limitation. On the merits, he urges that the property belonged to his father as his self-acquired, and has always been in his possession.

The first Court found that, from the evidence, it appeared that defendant had for a long time, and his father before him, been in uninterrupted possession of this property, and that it has not been proved that, after the death of plaintiff's maternal grandmother, his mother ever acquired possession; his right, consequently, has lapsed under the Statute of Limitation.

The Principal Sudder Ameen has found that, as plaintiff has sued within 12 years from the death of his mother whether she was in possession or not, he is altogether in time; and, on the merits, the Principal Sudder Ameen has found that the property was joint property of plaintiff's grandfather and defendant's father, and that plaintiff is entitled to what he asks for. He therefore gave plaintiff a decree.

Defendant now appeals specially, urging that plaintiff is out of Court, unless it can be shewn that, after his grandfather's death, his grandmother and mother were in possession of the property.

We think that, in the present suit, which is one to enforce the right to a share in immoveable property on the ground that it is family-property, it is incumbent on plaintiff to show that the estate within 12 years before the institution of the suit was in the possession of persons claiming under his grandfather, *viz.*, his grandmother or mother, or that, if not actually in their possession, they received a portion of the profits during their lives from the defendant as trustee in possession. On proof of either of these facts, plaintiff will not be barred; otherwise he will be. As, however, the finding of the Principal Sudder Ameen on the point of limitation is clearly erroneous, we remit it to him for a fresh finding on this issue, in accordance with the view laid down above. If he finds plaintiff barred, his suit falls, whatever the nature of the property; if he finds it not barred, the Principal Sudder Ameen's finding on the merits will stand good.

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The 22nd August 1866.

*Present:*

The Hon'ble C. B. Trevor and F. B. Kemp, *Judges.*

**Ancestral Property (Suit for possession of share of)—Limitation.**

Case No. 1604 of 1865.

*Special Appeal from a decision passed by the Judge of Hooghly, dated the 15th March 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 12th December 1864.*

Hureehur Mookerjee (Plaintiff), *Appellant,*

*versus*

Teençowree Dossee (Defendant), *Respondent.*

*Baboos Dwarkanath Mitter* and *Bama Churn Banerjee* for Appellant.

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*Mr. R. T. Allan* and *Baboo Chunder Madhub Ghose* for Respondent.

In a suit against an elder brother for possession of the younger brother's share of a putnee talook purchased by the plaintiff at a sale held by the Sheriff in execution of a decree, which property the plaintiff alleged was joint although purchased in the name of the elder brother, the defendant pleaded that for 12 years before the date of plaintiff's purchase, neither plaintiff nor his vendor ever was in possession, either by receipt of rent or otherwise, of any portion of the putnee talook. HELD that evidence on this point should be required from both parties, and that, if defendant's allegation be substantiated, plaintiff was barred by limitation.

PLAINTIFF, the special appellant in this case, purchased the rights and interests of one Gobind Chunder Biswas in a putnee talook at a sale held by the Sheriff in execution of a decree against that person on the 4th February 1864.

The plaintiff now sues the defendant Kisto Chunder, the elder brother, for the share of the property belonging to Gobind Chunder. He alleges that the property, though in the name of Kisto Chunder, was really joint and purchased with monies supplied by Gobind Chunder, who was the working brother; that, consequently, he is entitled to 8 annas of the same.

The defendant, who is the wife of Kisto Chunder's son—in other words, Kisto Chunder's daughter-in-law—states that the property was in the name, and purchased by the monies, of Kisto Chunder; that the brothers were separate, and consequently plaintiff is not entitled to take anything by his purchase.

The first Court gave plaintiff a decree, and the Judge on appeal reversed the Principal Sudder Ameen's decision.

Plaintiff now appeals specially, urging—

*1st.*—That the Judge has not enquired into the source whence the purchase-money for the putnee came, and that, on plaintiff proving that it was Gobind Chunder's, that fact, together with the admitted fact of the commensality of the two brothers, is sufficient under Hindoo Law to raise the presumption of joint estate, and to throw the burden of proving the separate interest of the brothers on the defendant.

*2nd.*—That the Judge has, throughout his judgment, argued as if the probate of the will of Gobind Chunder had not been taken out by his widow Kisto Kaminee, but had been rejected; that this is altogether an error in fact, and, being so, all the reasons founded on the evidence falls, and the will remains a fact, with Kisto Chunder's signature annexed to it, thereby vouching for the correctness of the recital as to the nature of the property mentioned in it; that these facts, together with the others above alluded to, are quite sufficient to prove plaintiff's case; and

*3rd.*—That the Judge has not noticed, in weighing the evidence, the disregard of the defendant, in whose power alone it was to show by the family-books whence the money came, to file them, though he intimated his disbelief of their statement that they are destroyed; that the refusal on their part to file the best evidence as to the most material point at issue is one that should weigh strongly against them, and requires, together with plaintiff's other evidence, unless it be met by evidence of a most potent character on the side of the defendant, that a decree should be given in plaintiff's favor; that, consequently, in order to enable the Judge to take up all these points in his judgment, the case should be remanded for re-investigation.

We are clearly of opinion that the Judge's enquiry, as it stands, is unsatisfactory, and that the case must be remanded for further investigation.

The defendant pleads that, for 12 years before the date of plaintiff's purchase, neither plaintiff nor plaintiff's vendor ever were in possession, either by receipt of rent or otherwise, of any portion of the putnee talook. Evidence on this point should be required from both parties, and, if defendant's allegation be substantiated, plaintiff is out of Court under the Statute of Limitations. Should, however, plaintiff prove that his vendor is within time, it will then be necessary for the Judge first to demand from the plaintiff evidence of the source whence the money came for the purchase. If plaintiff proves his allegation, this fact, together with the fact of commensality, will not raise a presumption under Hindoo Law, in a case like the present, that the family was joint, but it will be a strong evidence in favor of plaintiff's contention, and, when considered together with the will, of which probate has been taken out, and the evidence of the signature of Kisto Chunder on that document, and with the failure of defendant to file the best evidence procurable as to the source whence the purchase-money for the putnee came, will be sufficient to prove the plaintiff's case. The Court will then look to the

defendant's allegations and consider the evidence produced by him to prove them; and, after having given both parties the opportunity to file any evidence that they may desire, and having considered the same attentively, will pass whatever judgment seems just and proper.

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The 23rd August 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Limitation (in case of co-plaintiffs under Section 73, Act VIII. of 1859).**

Case No. 431 of 1866.

*Special Appeal from a decision passed by the Judge of Dacca, dated the 30th November 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 29th April 1865.*

Kalee Kishore Chatterjee and others (Plaintiffs), *Appellants,*

*versus*

Lukhee Debia Chowdhrain and others (Defendants), *Respondents.*

*Baboo Romesh Chunder Mitter* for Appellants.

*Baboo Kishen Kishore Ghose* and *Juggodanund Mookerjee* for Respondents.

Where a plaintiff is admitted as a co-plaintiff under Section 73, Act VIII. of 1859, limitation will count against him, not up to the date of his own admission, but up to the date of the filing of the original plaint.

THE special appeal was originally by all the plaintiffs in the case. The pleader for the original plaintiff gives up the case as far as the latter is concerned, and argues only for the zemindar who was admitted as a co-plaintiff under Section 73 of Act VIII. of 1859.

The original plaintiff in the case was the howaladar under the zemindar.

This howaladar was cast in a case under Act IV. of 1840, and the plaint was filed more than three years from the final orders in the aforesaid case. Long after the institution of the plaint, the zemindar was, under Section 73 of Act VIII. of 1859, allowed to become co-plaintiff; and it is admitted that he was no party to the Act IV. case.

The Lower Appellate Court holds that, the original plaintiff being affected by Section 7 of Act XIV. of 1859, the suit is dismissed on limitation as against the original plaintiff.

The Lower Appellate Court further decides against the zemindar on the ground of his action also being out of time, as he was a party to the survey-award, and it was more than three years after the final decision in the survey-case that he was admitted a co-plaintiff, though the original plaint was filed within three years of this final order.

The zemindar argues that the Lower Appellate Court is wrong in its law that, after any person is admitted as a co-plaintiff under Section 73 of Act VIII. of 1859, though he is not bound by any disability or default which may affect the original plaintiff, he is yet entitled to ask that, for all purposes of limitation, the date of the filing of the original plaint should be taken into account, as neither Section 73, nor any other law, intends to rule that any such co-plaintiff will be fixed to the date of his own admission as the date of the plaint, as far as he is concerned.

We agree with the zemindar, special appellant. The zemindar was made a plaintiff to the original suit. Limitation will be counted up to the date of the filing of the plaint. The defendant would not be allowed in such a case to plead an adverse possession of 12 years, by shewing that, though the plaint was filed within 12 years of the original dispossession, yet, as against the co-plaintiff, he, the defendant, has held for more than 12 years up to the date that this co-plaintiff was admitted as a party in the suit.

We reverse the decision of the Lower Appellate Court, and remand the suit of the zemindar to the Court for trial on the merits.

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The 24th August 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Mahomedan Law—Pre-emption—Affirmation.**

Case No. 800 of 1866.

*Special Appeal from a decision passed by the Judge of Dacca, dated the 20th December 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 12th June 1865.*

Mahomed Waris (one of the Defendants), *Appellant,*

*versus*

Hazee Emamooddeen (Plaintiff), *Respondent.*

*Baboo Chunder Madhub Ghose* for Appellant.

*Baboos Dwarkanath Mitter* and *Lulleet Chunder Sein* for Respondent.

A delay of one day is not such a delay as to interfere with a right of pre-emption under the Mahomedan Law.

The demand by affirmation should be made with the least practicable delay.

The ceremony of affirmation should be carried out before either the vendor or the purchaser, or be performed on the premises.

THE special appellant complains that the Lower Appellate Court has not tried whether the purchase was made by the special appellant or by his father; that the Court of first instance found that the demand by affirmation of witnesses was made only by the father of the special appellant; and that, if he, the special appellant, was the real purchaser, plaintiff's affirmation to the special appellant's father would not be sufficient according to the Mahomedan Law. The special appellant further argues that this demand by affirmation was made one day after sale, and so it was made too late.

As to the second plea, the case reported in page 454 of Volume I. of the Sudder Dewanny Decisions for 1857 shews that it is not tenable, as it was held in that case that a delay of one day "is not such a delay as to interfere with the plaintiff's rights to pre-emption under the Mahomedan Law."

The law requires that the demand by affirmation should be made "with the least practicable delay" (page 483 of Baillie's Digest of Mahomedan Law).

As to the other plea of the special appellant, it is clear that the *special appellant* admits that the plaintiff had done the ceremony of affirmation by witnesses on the premises and to the seller, and it is immaterial whether he did it, or not, to the purchaser, or to his father. The law requires that it should be carried out before either the vendor or the purchaser, or that it should be performed on the premises.

We see no reason to interfere, and reject the special appeal with costs.

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The 28th August 1866.

*Present:*

The Hon'ble C. B. Trevor and H. V. Bayley, *Judges.*

**Sale—Payments by Shikmeedar.**

Case No. 877 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 18th January 1866, reversing a decision passed by the Moonsiff of Manickgunge, dated the 9th September 1865.*

Poorno Chunder Doss Chowdhry (one of the Defendants), *Appellant,*

*versus*

Sreenath Goopto (Plaintiff) and others (Defendants), *Respondents.*

*Baboos Lulleet Chunder Sein* and *Kalee Mohun Doss* for Appellant.

*Baboos Greeja Sunkur Mojoomdar* and *Pearee Lall Roy* for Respondents.

A shikmeedar is not entitled to recover money voluntarily paid by him to preserve an estate from sale.

IN this case, plaintiff sued for 39 rupees as money paid by him to save an estate of certain co-parceners from sale. Plaintiff alleged his right to recover this money on the ground that he was a shikmeedar, and had therefore, in making the payment, an interest to preserve the estate from sale. It is, however, found as a fact below that the plaintiff's property in the estate consisted solely of a house, and that there was no shikmee tenure at all. This would stop plaintiff's claim. But, irrespective of this, even if the plaintiff's property had been found to be a shikmee, there is no law entitling shikmeedars to sue to recover money paid to preserve estates from sale. Therefore, plaintiff's was a voluntary payment which he cannot recover by this action. Plaintiff's suit must be accordingly dismissed with all costs altogether; and we therefore reverse the decision of the Lower Appellate Court, and decree this appeal with costs.

The 28th August 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Sale—Mooktearnamah—Verification—Recovery of purchase-money.**

Case No. 861 of 1866.

*Special Appeal from a decision passed by the Additional Judge of Dacca, dated the 30th December 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 9th May 1865.*

Issur Chunder Chowdhry (Plaintiff), *Appellant,*

*versus*

Shaikh Ameenooddeen Ahmed and others (Defendants), *Respondents.*

*Baboo Romesh Chunder Mitter* for Appellant.

*Baboos Onookool Chunder Mookerjee* and *Chunder Madhub Ghose* for Respondents.

Where a mooktearnamah was duly executed by *A*, authorizing *B* to sign her name to a deed of sale, notwithstanding that the mooktearnamah was not verified until after *A's* death, the sale under that deed made after *A's* death was held to be valid as regards the right of the purchaser to recover the purchase-money.

SPECIAL appellant had a decree for Rs. 1,150 against one Sabur Bibee, and, according to the case of the plaintiff, it was agreed between him and the said Sabur Bibee, that special appellant should not execute this decree, but purchase from her a certain estate in consideration of the decree for 1,150 rupees, and for a further consideration of 500 rupees in cash.

It is further alleged that the woman executed a power of attorney on behalf of a third party authorizing him to sign her name to the bill of sale, which power recited all the conditions of the sale. Before, however, this mookhtearnamah could be verified, and the agent could, under the power, sign the deed of sale, the principal Sabur Bibee died. Notwithstanding her death, the special appellant took a conveyance of sale from the agent of the dead principal. The plaintiff urges that he then paid to the said mooktear 500 rupees and took possession of the estate, and held it for some years, until he was ousted by the heirs of Sabur Bibee and the other defendants who claim to have purchased her estate. He then sued for recovery of possession in this case.

In the former case of the special appellant, it was decided by the Courts which tried it that the deed of sale executed by the agent after the death of the principal could not, on account of that event, convey any proprietary right to the special appellant; and so his claim for possession was dismissed.

The special appellant now sues the heirs of the mooktear, also the heirs of Sabur Bibee, and all other parties whom he says he finds now in possession of the property sold to him, and over which he thinks he has a lien, for the money paid by him, as well as for the amount of his decree not executed by him according to his contract of purchase, and which decree he cannot now execute owing to limitation affecting his rights.

The special appellant strongly urges that, under these circumstances, the estate of Sabur Bibee, who is her debtor by the final results of the act of sale, is responsible to him for her debts, and cannot be held by heirs (or purchasers *from these* heirs) free from debt of the original proprietress. Whether he has a right to follow the property is quite a separate matter.

The Lower Appellate Court has mainly dismissed the claim of the special appellant, on the ground that, the deed of sale being pronounced invalid, the special appellant has no right to recover the consideration alleged to have been paid by him for the purchase. The Court of first instance thinks that plaintiff has failed to prove that he paid the consideration; but it must, we think, be meant to direct these remarks only to the alleged payment of the additional 500 rupees. The Lower Appellate Court says this 500 rupees must have been realized by the special appellant while he was holding the property for two years.

It is not clear that the Lower Appellate Court really found that it was satisfied that the special appellant had been allowed to hold possession as he alleges, but, if he held so, we have reason to think that the purchasers who allege to have held from a time anterior to the purchase by the special appellant could not have held as they allege to have done. This will raise a strong suspicion of fraud against the alleged conveyances to these defendants of what belonged to Sabur Bibee.

The Lower Appellate Court further adds that the heirs of Sabur Bibee are not bound by any action of her agent done by him after her death; but, in our opinion, if this money reached the heirs as part of the

contract of purchase to which they agreed, and they accepted it as such, we are quite unable to see why they should not be held liable for it when the property is taken away from the special appellant.

At the same time that the Lower Appellate Court does not try whether this 500 rupees reached the heirs of Sabur, both the Lower Courts appear not to have distinctly tried whether the mooktearnamah was executed by Sabur Bibee. If the mooktearnamah be proved to have been duly executed, then, notwithstanding its verification after Sabur Bibee's death, the purchase by the special appellant under that deed, made after the death of the principal, would not be invalid, as regards the rights of the special appellant to recover the money paid for the purchase. Both the Courts vaguely allude to some question of fraud, and the Lower Appellate Court speaks of a want of a reasonable enquiry by the special appellant before he took the deed from the mooktear. We do not clearly understand what is meant by this allegation of fraud. If the mooktearnamah was really executed, there could be no fraud, even if the value of the property sold may be found to exceed 1,650 rupees, which, however, nobody says is the case. The fact of the special appellant holding a decree for 1,150 rupees against Sabur Bibee, and his not being paid for it in cash, and of his not having executed the decree which he could have executed if he had not obtained the deed of sale and possession under it, are not denied; and, if it be true that the heirs of Sabur Bibee, as well as the other defendants (having, as they stated below, previous rights), allowed the special appellant to hold possession of the property for years, we repeat that we do not see why they all should not be considered to be the cause of the plaintiff's being now deprived of his right to fall back upon his decree, and why those who have by their acts prevented the special appellant from executing his decree should not be held responsible for his loss. There is, therefore, neither proof of fraud nor proof of any negligence of the special appellant.

The fraud mentioned in the Lower Courts must, in case of the mooktearnamah being proved, be limited to the fact that the plaintiff, when he took the conveyance of sale from the mooktear, knew that his vendor had died when he took the conveyance from her agent. The fact of this knowledge will not of itself necessarily prove any fraud, as plaintiff may fairly have believed that, after the execution of the mooktearnamah by the debtor authorising an agent to sign for her a deed of sale, the agent, even after the death of the principal, had the power to sell and convey the property to the plaintiff with whom all the conditions of the sale had already been settled by the debtor before her death, and so complete a *bonâ fide* transaction under a *legal* power, especially when the major portion of the consideration consisted of not executing a decree against the estate of the principal, and which decree the special appellant could have before executed against Sabur Bibee's property.

The Courts below should, therefore, decide whether the mooktearnamah was executed by Sabur Bibee, and, if that fact is also denied, whether there was a decree for 1,150 rupees due to the special appellant, and that, though it was capable of being executed, it was not executed on account of this transaction of sale.

It should also, if necessary, be enquired whether plaintiff had possession, and whether 500 rupees reached the heirs of Sabur Bibee. If the benefit of not executing the decree reached to the estate of Sabur, then every portion of it, either in the hands of Sabur's heirs or of those holding under them, or at least that portion which may be in the hands of their heirs only, may be liable for the amount of the decree. If the heirs be found to have disposed of the estate of their predecessor without paying her debts, they may, to a certain extent, be personally liable. If 500 rupees reached the heirs of Sabur, they and the estate of Sabur held by them are equally liable for this sum. If this sum did not reach the heirs of Sabur, the heirs of the agent alone may be responsible for that sum; and the fact of the special appellant having realized anything from the estate of Sabur Bibee may not be a sufficient answer to his claims against the heirs of the agent.

The payment of 500 rupees, as well as the discharge of the decree by the special appellant, under the circumstances of this case, were not voluntary payments which the plaintiff cannot recover.

If plaintiff is held entitled to recover, an account may be taken of what he collected during the time of his possession; and, if he has realized more than the interest he abandons for the period of his own possession, the surplus may go towards the reduction of his dues.

The liability of the purchasing defendants is to be separately enquired into by the Lower Courts.

As the decision of both the Courts appear to us to be defective and wrong, and as we apprehend justice has not been done to the case of the special appellant, under the circumstances above recorded, and the wrong view of his rights, we reverse the decisions of both the Lower Courts, and remand the case to the Court of first instance for the purpose of re-trying the whole case with reference to all the above remarks.

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The 28th August 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Joint Family Property—Suits between co-sharers—Partition—Estoppel.**

Case No. 941 of 1866.

*Special Appeal from a decision passed by the Judge of Patna, dated the 17th January 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 31st August 1865.*

Ram Surohee Singh and others (Plaintiffs), *Appellants,*

*versus*

Kashee Roy and others (Defendants), *Respondents.*

*Mr. C. Gregory* and *Baboo Chunder Madhub Ghose* for Appellants.

*Baboos Kishen Kishore Ghose, Kishen Succa Mookerjee, Upprokash Chunder Mookerjee,* and *Obhoy Churn Bose* for Respondents.

In a suit by a co-sharer who is also a purchaser of the rights of several of the other co-sharers, against all the shareholders, the fact of the shares of each partner being differently described in another suit against the present plaintiff will not bar the present suit, if the plaintiff is holding according to his allegation in his plaint. Nor will a partition made by some of the heirs of half of the property in opposition to the description of the shares now given by the plaintiff bar his suit to the share he is legally entitled to in virtue of his own rights and those of his vendors, if the shareholders who made the partition do not hold according to that partition.

Because the decree in a former suit against the present plaintiff and the alleged holders of a separate half-share awarded to another co-sharer who was the plaintiff in that case, owing to a mistake of that plaintiff supported by the admission of the present plaintiff, less than he was legally entitled to, the mistake need not be perpetuated, nor will his former admission estop the present plaintiff.

It appears from the statements of the pleaders and from the record that one Dhopa Roy had six sons by two wives—three sons by each wife. He held 4 annas of a certain property. One of the sons by each of the two wives had further self-acquired a separate half anna of the same property.

Adhyan (one of the three sons by the second wife), who had purchased one of the half-anna shares, died childless. It is not shown whether he had survived his father or was succeeded by all his brothers in his ancestral share, if he had any, or in his purchased share. If he became once vested with his share of his father's 4 annas, and this share was inherited by his uterine and step-brothers, or if he had not succeeded to any ancestral share at all, because of his father surviving him, the share of each of the five brothers in the ancestral lands would be 16 dams. If all the five brothers succeeded to the 10 dams purchased by Adhyan, then 2 dams would fall to the share of each of the five brothers. If the ancestral share of this Adhyan as well as his purchased half-anna are inherited by only his uterine brothers, then the heirs of the two other sons by the second wife of Dhopa Roy would hold 2½ annas between them, and only the remaining 2½ annas would be left to the heirs of the three sons by the first wife; and of this 2½ annas, the heirs of the son who had purchased the other half-anna would have 10 dams in addition to their one-third of the ancestral share of 2 annas.

Even if Adhyan Roy did not survive his father, his purchased share would still go to his five brothers as inheritance from their father.

Plaintiffs in the present suit are the sons of Pahar Roy, one of the three sons by the first wife.

The shares of the other heirs by the first wife, except that of the plaintiffs and of one Ajoodhya, one of the four sons of Puhlwan (a uterine brother of Pahar), were from time to time separately purchased by Ajoodhya and by the plaintiffs.

Ajoodhya had sued before for 16 dams in this property, *viz.*, 4 dams as his share of the ancestral 4 annas, and 12 dams as the ancestral share of one of the two sons of Hunooman, the second uterine brother of Pahar, and of one out of the four sons of Puhlwan (Ajoodhya's grandfather). Ajoodhya sued for these 16 dams, stating that each of the five brothers had 16 dams, but did not include in his claim any portion of the 10 dams purchased by Adhyan, the childless son by the second wife. If Ajoodhya thought that the ancestral share of Adhyan, who died childless, was to be divided

among the five brothers, then, because Adhyan had not survived his father, his 10 dams also would, after the death of Dhopa Roy, fall equally to the share of all his five brothers.

The Lower Appellate Court speaks of some decree of 1831 fixing the shares of the heirs of Dhopa Roy; but we have thought it not necessary to enquire into the details of this decree in this stage, for, as regards this decree, the Judge says he was not made aware that it had ever been executed.

Ajoodhya did not, however, when he sued, consider himself or any of his vendors to be entitled to any share of the 10 dams purchased by Adhyan, and so did not sue for 2 dams which, on the ground of the 10 dams of Adhyan falling to the shares of all the five brothers, he could have sued for, besides the 16 dams for which he sued and obtained a decree. It is said that, previous to the decree of 1831 mentioned above, the two or three sons of Dhopa by the second wife had caused to be separated under a separate number in the Collectorate Towjee, 2½ annas out of the 5 annas held by the heirs of Dhopa Roy; and if this proceeding occurred after the death of Adhyan, it might be assumed that the deceased had succeeded to his one-sixth share, and that, after his death, his share, as well as his 10 dams by purchase, had fallen to the share of his two surviving uterine brothers—that is, no portion of his property had gone to his three step-brothers. The remaining 2½ annas alone are said to have been held by the heirs of the three sons by the first wife, and these were annexed to an 8 annas share of the property held by somebody else. Who held the remaining 4 annas, and how, is not shewn on the record.

It is now to be seen how far this arrangement of dividing the 5 annas into two equal shares was disturbed by any decree afterwards obtained by the heirs of Dhopa Roy for fixing the amount of their shares. By this arrangement of dividing the 5 annas into two equal shares, the heirs of the other two sons of Dhopa by the second wife (if they have been all along allowed to hold as before) would hold 14 dams in excess of their legal share—that is, if Adhyan had not succeeded to his one-sixth share, and if his 10 dams were divided or were divisible between all his five brothers. Now, of these 14 dams, Ajoodhya might be entitled to 2 for which he did not sue before, and the present plaintiffs are entitled to the remaining 12 dams for which their present claim has been dismissed below.

The present action is brought against all the shareholders of the entire 5 annas, and if the plaintiffs are found entitled to recover also these 12 dams, they will clearly get that portion from the heirs of the two sons of Dhopa by the second wife.

The Lower Appellate Court considers that, in the suit brought formerly by Ajoodhya, it was proved that the decree for 16 dams was given only against the present plaintiffs out of the 10½ annas share, and that the heirs of the other two sons of Dhopa by the second wife, holding the separate 2½ annas, were released from all liability in the suit.

The Lower Appellate Court further thinks that, in the suit by Ajoodhya, it was admitted by the present plaintiffs that they held only 2½ annas share out of the 5 annas, and that the heirs of the other two sons of Dhopa by the second wife held the remaining 2½ annas. The Lower Appellate Court appears to admit that, but for the decree passed in the former case, the plaintiffs, as the heirs of one of the four sons of Puhlwan, one of the five brothers, are entitled to a share of 2 annas and 6 dams by right of inheritance, and by purchase of the rights of the other descendants of Dhopa Roy; but if the decree of Ajoodhya for 16 dams is to be considered to be a decree only against the 2½ annas held by the plaintiffs as the share representing the portion of the heirs of the three sons by the first wife, then, after deducting the 16 dams decreed to Ajoodhya from the 2½ annas, only 1 anna and 14 dams will be left for the present plaintiffs.

It is, however, worthy of remark that the Courts could not have decreed 4 dams to Ajoodhya as his ancestral share, or the 12 dams as the shares of his vendors, without holding that each of the five sons had 16 dams; and this they could not have correctly held if the two sons by the first wife already held 2 annas as their ancestral share, and had left only the remaining 2 annas to be divided among the three sons by the first wife. If, however, it is found that the decree was, notwithstanding the order for 16 dams in favor of Ajoodhya intended to be considered as a decree only against the 2½ annas held by the present plaintiffs, it was inconsistent; and if the decree released the sons of the second wife holding them entitled to possess 2½ annas, the mistake of that decree, if not carried out, is not required to be perpetuated. The mistake unhappily cannot now be amended, if the sons by

the second wife and their heirs had before the decree in the case of Ajoodhya, and have been since allowed to hold adverse to the plaintiffs to the extent of 12 dams, which in fact, as above shewn, was more than what the former were lawfully entitled to hold.

It is also clear that, if the decree of Ajoodhya was fully carried out, and plaintiffs *be not* in possession of the 12 dams out of the 16 decreed to Ajoodhya, or if the heirs of the two sons by the second wife are in possession of 2 annas of the ancestral property and the half-anna of Ajoodhya's purchase, the present claim of the plaintiffs, even if it had been for obtaining possession, is not tenable.

If, however, the plaintiffs have any right to assert that, notwithstanding the decree passed in Ajoodhya's favor, they (plaintiffs) are still in possession of their entire share of 2 annas 6 dams as alleged by them, or that the heirs of the two sons of Dhopa by the second wife do not hold 2½ annas, but 12 dams less than that amount, the fact of the decree for 16 dams in favor of Ajoodhya being against only the plaintiffs, or the fact of a previous partition and separate towjee for the two divided 2½ anna shares, would not prejudice the present claim of the plaintiffs for confirmation of possession; nor will the admission and the allegation of the plaintiffs in the former case estop them in their present claim.

The admission in that case would estop the party who made it as far as that case is concerned, and cannot legally be made to operate to the prejudice of his rights required to be investigated in another case.

It is further clear that Section 2 of Act VIII. of 1859 would not bar the adjudication of the plaintiffs in this case.

If Ajoodhya has not taken possession from the plaintiffs of the entire 16 dams, he may not now be in a position to oppose the claims of the plaintiffs to obtain a decree, if not against the other holders of the entire five annas, at least against Ajoodhya himself.

On the whole, we are of opinion that the Lower Appellate Court has not decided the question regarding the plaintiffs' allegation of possession over 2 annas and 6 dams by any evidence in this case, either with regard to the plaintiffs possession, or the possession of either Ajoodhya or of the adverse possession of the heirs of the two sons of Dhopa Roy by the second wife. The Lower Appellate Court seems to have relied upon the plaintiffs' alleged admission, and the decision in the case of Ajoodhya against them.

We must, accordingly, remand the case to the Lower Appellate Court to decide the question regarding the extent of the possession of the plaintiffs by the evidence in the case, irrespective of their admission or the decision in the case of Ajoodhya.

Having done this, it will pass a decree with reference to the above remarks. Further, while enquiring into the question of the extent of the share in plaintiff's possession, the Court will also enquire whether Ajoodhya had succeeded to any share of the ancestral estate, and find out by whom he was succeeded, and to what extent; and how far possession of that has been with the heirs of the two sons of Dhopa by the second wife.

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The 29th August 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt*, *Chief Justice*, and the Hon'ble Shumbhoonath Pundit, *Judge*.

**Limitation—(Time for pleading).**

Case No. 622 of 1866.

*Special Appeal from a decision passed by Mr. F. L. Beaufort, Judge of the 24-Pergunnahs, dated the 1st December 1865, affirming a decision passed by Baboo Koylas Chunder Deb, Principal Sudder Ameen of that District, dated the 25th May 1865.*

Moonshee Buzl Ruheem (Defendant), *Appellant*,

*versus*

Sreenath Bose (Plaintiff), *Respondent*.

*Mr. R. T. Allan* for Appellant.

*Baboo Mohendro Lal Shome* for Respondent.

Where a case was remanded by the Lower Appellate Court on a point affecting the merits, and the defendant, after that point had been tried and determined against him, then for the first time raised the question of limitation—HELD that the Lower Appellate Court properly refused to enter upon that question.

IN this case, the suit was tried originally by the Principal Sudder Ameen. No issue was raised as to the question of limitation. The Principal Sudder Ameen found in favor of the plaintiff. If the defendant had wished to raise the question of limitation, he should have objected before the Principal Sudder Ameen, and have requested him to raise an issue to that effect; and if the Principal Sudder Ameen had refused, he might have appealed to the Judge. But he

did not do so; and, when the case came up to the Judge on appeal in the first instance, the defendant did not object that the Principal Sudder Ameen had not tried the question of limitation. The Judge then remanded the case on a particular point having reference to the merits, and then also the defendant did not object that the plaintiff was barred by limitation.

Now, after that point on the merits has been tried and determined against the defendant, the defendant comes up for the first time and says that the plaintiff ought to have been put out of Court on the question of limitation, there being no evidence that he was turned out of possession within the period of limitation.

It appears to us that the Judge has given a proper and sufficient reason for not entering upon the question of limitation, and that there is no ground of special appeal in this case.

The decision of the Lower Appellate Court is affirmed with costs.

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The 29th August 1866.

*Present:*

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

**Jurisdiction—Sale of transferable tenure—Fraud—Registration.**

Case No. 940 of 1866.

*Special Appeal from a decision passed by the Judge of Backergunge, dated the 13th January 1866, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 12th May 1865.*

Mohesh Chunder Shomaddar (Plaintiff), *Appellant,*

*versus*

Huronath Acharjee and others (Defendants), *Respondents.*

*Baboo Nilmonee Sein* for Appellant.

*Baboos Dwarkanath Mitter* and *Greeja Sunkur Mojoomdar* for Respondents.

**Where a person, with the knowledge of the zemindar, purchased a half-share in a tenure transferable by sale, and the zemindar chose to treat the actual owner of 8 annas as though he still remained the owner of 16 annas with a view of injuring and avoiding the rights purchased by the new tenant—HELD that a suit would lie in the Civil Court against the zemindar as well as against the vendor; and that the Court, notwithstanding that the formal act of registration had not been gone through, would take care that the zemindar gained no advantage from his fraudulent act.**

ONE Huronath Acharjee had a shikmee talook called Ram Gopal Acharjee, from which he was dispossessed in 1266. In 1267, or 1860, he sued the zemindar for possession under Section 23 of Act X. of 1859; and, whilst that suit was pending, the plaintiff, special appellant, purchased 8 annas of the tenure, and was made a joint plaintiff. Eventually, the suit of the plaintiff was decreed both in the Court of first instance and on appeal. The plaintiff's vendor, Huronath Acharjee, refused subsequently to take out execution; so the plaintiff alone moved the Court in execution of his share of the decree. The Court, holding his application on that could not be attended to, inasmuch as the plaintiff got possession of an undivided tenure by the decree, rejected it. Subsequently to this, the plaintiff learned that his vendor had relinquished his old tenure and taken a new lease from the zemindar. He therefore brings the present suit in the Civil Court to set aside the new arrangement which had been entered into between the zemindar and his vendor with a knowledge of his purchase of, and ownership in, 8 annas of the tenure, and with the intention of defrauding him of his just rights.

The Judge was of opinion that this suit was not tenable in the Civil Court, and that the suit was barred by limitation; and also that the deed propounded by plaintiff only transfers to him the right and interest in the suit then pending.

The plaintiff now appeals specially, urging that, on all the above points, the Judge's judgment is incorrect, and the respondent admits that, on the two last points, he cannot support the Judge's judgment; but he urges that the decision of the Judge on the first point is quite correct; that plaintiff was not registered in his Sheristah; that he was not bound to recognize him; and that, therefore, whether he had knowledge of the transfer or not to him, no action would lie against him.

We are clearly of opinion with the special appellant that, in this case, a suit will lie in the Civil Court against the zemindar as well as against his vendor. He alleges that they both fraudulently, with knowledge of his title to 8 annas of the property, entered into a contract by which his rights were injured. Now, there can be no doubt that, if two parties collude to do any act injuring the rights of a third party, that party has an action against them of some sort or other. But it is contended that there is no action against the

zemindar, because he need not recognize the plaintiff until he is registered as a co-owner in his Sheristah. But this is too unlimited a proposition. The zemindar need not proceed against him for rents, the tenure being liable, in the first instance, until he be so registered. But after a person has purchased, with the knowledge of the zemindar, a share in a tenure transferable by sale, the zemindar is bound to act as against that person in good faith; and if, with that knowledge, he chooses to treat the actual owner of 8 annas as if he still remained the owner of 16 annas, with a view of injuring and avoiding the rights purchased by the new tenant, the Court, notwithstanding that the formal act of registration has not been gone through, will take care that the zemindar gains no advantage from an act which, on the supposition, is a fraudulent one in itself, and one tending to defeat the very nature of the tenure which is transferable by the custom of the country.

We remit the case to the Judge for trial of the case, regard being had to the above remarks.

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The 29th August 1866.

*Present:*

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

**Limitation—Ancestral property—Relinquishment by Hindoo widow—Possession by reversionary heirs.**

Case No. 964 of 1866.

*Special Appeal from a decision passed by the Additional Judge of Dacca, dated the 28th December 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 29th March 1865.*

Kalee Coomar Nag (one of the Defendants), *Appellant,*

*versus*

Kashee Chunder Nag and others (Plaintiffs), and others (Defendants), *Respondents.*

*Baboo Kishen Succa Mookerjee* for Appellant.

*Baboos Chunder Madhub Ghose, Kalee Mohun Doss,* and *Nilmonee Sein* for Respondents.

Where a widow relinquished her right to her husband's property in favor of his then reversionary heirs who were accordingly put into possession, and other persons subsequently claimed the property as the husband's heirs, the cause of action of such other persons was held to have accrued from the time when the then reversionary heirs came into possession of the property.

One Ram Kant died 45 years before suit. He left a widow and three persons then his reversionary heirs. It is patent, on previous litigation between the parties, that the widow had ceded and waived her life-interest to the then heirs, accepting a maintenance instead; and the original heirs of Ram Kant and their descendants have ever since remained in possession in certain shares as arranged among themselves. The widow having lately died, plaintiffs now come in, saying that (owing to the ancestor of defendants having predeceased their ancestors), at the present date, they are the heirs of Ram Kant, to the exclusion of defendants, and they sue to oust defendants of their share. The Judge, considering that, during the life of the widow, the parties must be considered to have been the agents of the widow, and that the cause of action arose on her death, decreed in favor of plaintiffs. But a former suit, to which both sides were parties, declared the widow's right to maintenance as distinguished from the right to hold the property; and it is undoubted law that a widow can relinquish her right in favor of her husband's heirs. We consider that, from the time when, under a family-arrangement, the then heirs came into the possession of the property, that property then vested in them, and that the death of the widow gave no cause of action to the plaintiffs. Therefore, the plaintiffs having come after the defendants have held for very many years, the suit is barred and unfounded. We decree the appeal and dismiss the suit with all costs.

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The 29th August 1866.

*Present:*

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

**Ejectment—Right of occupancy.**

Case No. 1104 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Shahabad, dated the 31st January 1866, reversing a decision passed by the Moonsiff of that District, dated the 21st August 1865.*

Motee Roy and others (Defendants), *Appellants,*

*versus*

Nadur Ali Khan (Plaintiff), *Respondent.*

*Baboo Chunder Madhub Ghose* for Appellants.

*Baboo Kalee Kishen Sein* for Respondent.

Suit to recover possession of certain land leased to plaintiff by a Sezawal acting under the orders of the zemindar. It being found, as a fact, that the lease was granted, and that plaintiff obtained possession, and was afterwards ousted by defendant; and the defendant having pleaded that he was the original ryot of the land, that the village was let in farm, and that the zemindar had no right to oust him—HELD that the proper issue for trial was whether the defendant had any right of occupancy.

PLAINTIFF sues to recover possession of certain land leased to him by a Sezawal acting under the orders of Maharajah Moheshur Buksh Singh, and it is found as a fact that the lease was granted, that plaintiff obtained possession, and that he was afterwards ousted by defendant. But defendant, special appellant, pleads that he was the original ryot of the land, that the village was let in farm, and that the Maharajah had no right to oust him. The Lower Appellate Court has rejected this plea on the ground that defendant has not proved a hereditary Gozeshtah tenure. But that is not the proper issue. The real question is whether defendant had any right of occupancy, for, if he had, he cannot be turned out by plaintiff. It is especially necessary to find this distinctly, since the finding of the first Court is very strong in defendant's favor, *viz.*, that defendant held the land as a "Bagh," and in 1269 sold the trees to the Railway Company—a state of facts which would certainly seem to imply a right of occupancy. We therefore remand the case for a distinct finding whether defendant had any right of occupancy. If he had, the decree must be in his favor.

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The 30th August 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

**Evidence (Cross-examination).**

Case No. 163 of 1866.

*Regular Appeal from a decision passed by the Principal Sudder Ameen of the 24-Pergunnahs, dated the 29th March 1866.*

Meer Sujad Ali Khan Nawab Zoolfukar Dowla Bahadoor (Defendant), *Appellant,*

*versus*

Lalla Kasheenath Doss and others (Plaintiffs), *Respondents.*

*Baboos Kishen Kishore Ghose* and *Dwarkanath Mitter* for Appellant.

*Messrs. R. E. Twidale* and *C. Gregory* and *Moulvie Aftabooddeen Mahomed* for Respondents.

Suit laid at Rs. 9,681-7-0-10.

Remarks on the object and importance of cross-examination.

THIS is a suit by Lalla Kasheenath, describing himself as a co-sharer and managing member of the firm of Kasheenath Doss and Benarussee Doss (now deceased), against Meer Sujad Ali Khan Zoolfukar Dowla, for the sum of Rs. 9,681-7-6, on balance of an account for the price of buildings, works, and repairs alleged to have been executed by the plaintiff's firm at the defendant's request.

The effect of the defendant's answer is that his dealings were with Benarussee Doss only; that the plaintiff was not a partner of, or co-sharer with, and was not the heir of, Benarussee Doss; and that he had not obtained a certificate under Act XXVII. of 1860.

*Secondly*, he pleaded that the suit was barred by limitation.

*Thirdly*, he denied all liability, stating that the claim was a fraudulent one, and that the books produced by the plaintiff had been manufactured for the purpose of supporting it.

*Fourthly*, he said that Benarussee Doss, having acted as his cashier from 1269 to 1280, had received sums of money and jewels amounting to Rs. 8,64,802, of which full details are given; that he had rendered no accounts, though repeatedly called on to do so; that there was a cash balance due from him for which the defendant was about to sue, when the plaintiff brought this suit in order to make it appear that there was a balance in his favor.

*Lastly*, that the orders for all work such as those referred to were given by the defendant to Benarussee, not under any agreement or understanding that he was to be paid as a contractor, but as orders given to him as a servant, and the works were executed at the expense of the defendant.

The evidence was very fully and carefully taken on the 4th, 5th, 6th, 7th, and 8th of December 1865, before Baboo Koonj Lal Banerjee, Principal Sudder Ameen of the 24-Pergunnahs, acting during the absence on deputation of Baboo Greesh Chunder Ghose.

We observe, however, that Mahomed Jafur Ali Khan having stated in his exa-

mination-in-chief, as a witness for the defendant, that Benarussee Doss was Tuhbildar, and, without any doubt, servant of the defendant; that he did not know whether rupees, jewels, and clothes were deposited with him; and that he used to carry out any orders given him by the defendant. He was asked by the plaintiff's vakeel, on cross-examination, "Do you know if he had similar dealings with other parties?" The question was disallowed by the Principal Sudder Ameen on the ground that this was a plaintiff's question, but that the witness was not the plaintiff's witness. It is clear that the Principal Sudder Ameen was wrong in disallowing this question. It might have been of considerable importance to the plaintiff if he could have shewn that Benarussee was not a mere cashier of the defendant; that he received the defendant's money as he did that of any other person, and kept it merely as a banker.

The plaintiff's vakeel was fully justified in using all the arts of an advocate to extort admissions from the defendant's witnesses leading to that inference.

Similar questions were put to Moonshee Sufdur Ali, and disallowed for similar reasons.

It is difficult to see why Baboo Koonj Lal Banerjee, who heard the evidence, did not give judgment in the case. He was more capable of forming a satisfactory opinion upon it than any one else.

Before we pass to the consideration of the general merits of the case, we will make some observations with reference to the disallowance of the questions above mentioned.

The essence of cross-examination is, that it is the interrogation by the advocate of one party of a witness called by his adversary with the object either to obtain from such witness admissions favorable to his cause, or to discredit him. Cross-examination is the most effective of all means for extracting truth and exposing falsehood.

Sitting as a Court of Appeal, we have constantly to regret that witnesses have not been cross-examined in the Lower Courts in the Mofussil. An instance was recently brought to our notice, in which a Principal Sudder Ameen, having himself summoned a witness and examined him, refused to allow any question to be put to him by either of the parties to the cause. And in appeal to this Court, in consequence of the absence of material evidence on explanation which that witness could have given had a question been put to him, we were informed that the appellant was compelled to assent to a compromise.

Now, it is a well-known rule that all witnesses examined-in-chief, or sworn, are subject to cross-examination. The test for determining whether the depositions of witnesses who are absent, or who have been examined in a former suit, can be received, is, whether the party against whom they are to be used had the power to cross-examine. If he could not have cross-examined, the deposition of the witness ought not to be admitted against him.

We think it not out of place to refer to a celebrated passage of Quintilian on the subject of cross-examination,* of which we have given a free translation. He says: "In dealing with "a witness who is to be compelled to speak "the truth against his will, the greatest "success consists in drawing out what he "wishes to keep back. This can only be "done by repeating the interrogation in "greater detail. He will give answers "which he thinks do not hurt his cause: "and afterwards, from many things which "he will have confessed, he may be led into "such a strait that what he will not say, "he cannot deny. For, as in an oration, we "generally collect scattered proofs, which "singly do not appear to press on the accused, "yet by being put together prove the "charge. So a witness of this sort should "be asked many things as to what went "before—what came after—as to place, "time, and persons, and other things, so "that he may fall upon some answer after "which he must necessarily either confess "what is desired, or contradict his former "statements. If this does not happen, "it may become apparent that he will "not speak, or he may be drawn out "and detected in some falsehood foreign "to the cause: or by being led on to "say more than the matter requires in "favor of the accused, the Judge may "be led to suspect him, which will damage his "cause not less than if he had spoken the "truth against the accused. It sometimes "happens that the testimony given by a "witness is inconsistent with itself. Sometimes (and that is the more frequent case) "one witness contradicts another. A skilful interrogation may produce by art that "which usually happens accidentally. "Apart from the cause, witnesses are usually asked many questions which may be "useful, as to the lives of other witnesses,

* The passage is quoted in Best on Evidence, page 737.

"as to their own character and position, "any crimes they have committed, their "friendship or enmity to the parties—in the "answers to which, they may either make "some useful admission, or be detected "either in a falsehood or the desire of in-"juring the opposite party."

The faculty of interrogating witnesses effectively is one which requires a careful study and a considerable knowledge of human nature. It is one of the highest arts of an advocate, and can only be acquired after years of observation and experience.

(*The rest of this case goes upon facts, and is therefore omitted.*)

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The 31st August 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

**Minors (Enforcement of suits in favor of).**

Case No. 1462 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Sylhet, dated the 8th March 1866, affirming a decision passed by the Moonsiff of that District, dated the 16th November 1865.*

Mahomed Hatum and others (Defendants), *Appellants,*

*versus*

Mussamut Jumeera Bibee and others (Plaintiffs), *Respondents.*

*Baboo Debendro Narain Bose* for Appellants.

No one for Respondents.

**There is no reason why a judgment obtained in any suit by an infant should not be enforcible in favor of the infant.**

THE plaintiff has obtained a decree for certain lands of which the defendant is in possession under an alleged sale by the plaintiff's father which the Principal Sudder Ameen finds to be fictitious—one of the main reasons assigned for his finding being that the plaintiff's father and his family remained in possession after the date of and notwithstanding the alleged sale.

Two objections were raised before us on special appeal: *first*, that the defendant objected, before the Lower Appellate Court on appeal, that the plaintiff is an infant, and therefore cannot sue, but that the plea was not tried by the Lower Appellate Court.

The plaintiff alleges that she came of age in 1271, and the first Court found that she was of age, that she had attained 18 years of age at the time of the hearing. Possibly, if the plaintiff was under age, the proceedings might have been stayed until a guardian was appointed under Section 3 or 4 of Act XL. of 1858, or security for costs given. But there is no reason why a judgment obtained in any suit by an infant should not be enforceable in favor of the infant. In Bird *versus* Pegg, 5 Barnewell and Alderson, page 418, the point was distinctly determined by the Court of Queen's Bench in England. If there were any doubt in the matter, which there is not, Section 350 of Act VIII. of 1859 would remove all difficulty, because it is clear that the objection did not in any way affect the merits of the case.

*Secondly*, the defendant objected that the point of limitation had not been tried. But, applying the defendant's own objection, that the plaintiff is an infant, to the facts as found, limitation is out of the question, because the very ground of the Principal Sudder Ameen's decision is that the plaintiff's father was in possession after the alleged bill of sale, and presumptively down to the time of his death, when the plaintiff, his infant daughter, was dispossessed by the defendant.

It is clear, therefore, that the Principal Sudder Ameen has fully determined all that it was necessary for him to try, and we reject the appeal with costs.

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The 31st August 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

**Mortgage—Limitation.**

Case No. 1517 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Fureedpore, in Dacca, dated the 12th March 1866, affirming a decision passed by the Moonsiff of that District, dated the 30th August 1865.*

Huro Chunder Gooho (Plaintiff), *Appellant,*

*versus*

Gudadhur Koondoo and others (Defendants), *Respondents.*

*Baboo Mohinee Mohun Roy* and *Shib Chunder Mojoomdar* for Appellant.

*Baboo Otool Chunder Mookerjee* for Respondents.

A mortgagee, who was empowered by his mortgage to take possession of the mortgaged property on default of payment in 1255, sued and obtained a decree for foreclosure against the mortgagors in 1860, and now sues the purchasers from the mortgagors who have been in possession ever since their purchase in 1253.—HELD that the plaintiffs' right of action accrued in 1255, and that the decree in the foreclosure-suit gave no starting point, and could in no way affect the right of the purchasers who were not parties to that suit.

THIS is a suit by a mortgagee to recover possession of mortgaged property. It is stated by the vakeel for the appellant that the mortgage was dated in 1246, and empowered the mortgagee to take possession on default of payment in 1255. The now-plaintiff sued and obtained a decree for foreclosure against the mortgagors in 1860. He then brought the present suit against the defendants, purchasers from the mortgagors, who have been in possession ever since the date of their purchase in 1253.

On this statement, we think it clear that the plaintiff's right of action—that is, his title and power to demand present possession, accrued in 1255. The decree in the foreclosure-suit gave him no starting point, and can in no way affect the right of the now-defendants who were not parties to that suit.

The present suit, having been instituted on the 2nd of December 1864, is barred under Clause 12, Section 1, Act XIV. of 1859.

Appeal dismissed with costs.

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The 1st September 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble C. B. Trevor, G. Loch, L. S. Jackson, and Shumbhoonath Pundit, *Judges.*

**Limitation—Section 14, Act XIV. of 1859—Non-suit.**

Case No. 3296 of 1865.

*Special Appeal from a decision passed by Mr. A. A. Swinton, Judge of Tipperah, dated the 31st August 1865, affirming a decision passed by Moulvie Anwur Ali, Principal Sudder Ameen of that District, dated the 9th March 1865.*

Chunder Madhub Chuckerbutty (Defendant), *Appellant,*

*versus*

Bissessuree Debea and others (Plaintiffs), *Respondents.*

*Baboo Kalee Kissen Sein* for Appellant.

*Baboos Dwarkanath Mitter* and *Romesh Chunder Mitter* for Respondents.

According to Section 14, Act XIV. of 1859, a plaintiff is not entitled to deduct the time occupied by him in prosecuting a former suit in which he was non-suited, much less the time occupied in appealing from that decision and the time intervening between the non-suit and the filing of the appeal (Loch and Shumbhoonauth Pundit, JJ., dissenting).

*This case was referred to a Full Bench by Kemp and Campbell, JJ., under the following order:—*

*Referring order.*—IN this case, the question is whether plaintiff can deduct from the period of limitation the time during which a former litigation on the same subject was pending, the former case having been non-suited. Plaintiff appealed from the order of non-suit, and the appeal was unsuccessful. He claims to deduct the whole period from the institution of the suit to conclusion of the case in appeal.

With respect to the construction of Section 14, Act XIV. of 1859, it appears to us that there has been a conflict of opinion on the meaning of Section 14. That Section would seem to be limited to cases prosecuted in the wrong Court; but, on reading the text of the Section, we find that exception is made of the time during which the suit was *bonâ fide* prosecuted in any Court which, from defect of jurisdiction or other cause, shall have been unable to decide upon it.

In the first case noted in the margin,* it seems to be assumed that the time occupied by a former suit is not to be excluded; while in the other cases also noted, it was held that both the time occupied by a non-suited case, and that occupied in appealing against the non-suit, should be excluded.

In the present case three questions arise—

* Nund Doolal Sircar *versus* Dwarkanauth Biswas, decided by Norman, *Offg. C.J.*, and Steer, J., 7th January 1865 (Weekly Reporter, Civil Rulings, page 9, Volume II.).

Shah Keramut Hossein *versus* Golab Koonwar, decided by Steer and Morgan, *JJ.*, 22nd June 1865 (Weekly Reporter, Volume III., page 101, Civil Rulings).

Shumboonauth Biswas *versus* Kishto Dhun Sircar, decided by Peacock, *C.J.*, and L. S. Jackson, *J.*, 9th March 1866 (Small Cause Court References, page 8, Weekly Reporter, Volume V.).

*First.*—Whether the time occupied by the non-suited case should be excluded.

*Second.*—Whether the time occupied by the appeal should be excluded.

*Third.*—Whether the time occupied between non-suit and filing appeal (the appeal being filed within the prescribed time) should be excluded. Looking to the conflict of decisions and the difficulty and importance of these points, we refer the case for the decision of a Bench of not less than 5 Judges.

*Full Bench Judgments.*

*Peacock, C. J. (Trevor, J., concurring.)*—This is a case which was brought whilst Act XIV. of 1859 was the Law of Limitation, and, therefore, that law is applicable to the suit. Section 14 enacts:—

"In computing any period of limitation "prescribed by this Act, the time during "which the claimant, or any person under "whom he claims, shall have been engaged in "prosecuting a suit upon the same cause of "action against the same defendant or some "person whom he represents *bonâ fide*, and "with due diligence in any Court of Judicature "which, from defect of jurisdiction or other "cause, shall have been unable to decide upon "it, or shall have passed a decision which, on "appeal, shall have been annulled for any "such cause, including the time during which "such appeal, if any, has been pending, shall "be excluded from such computation."

The first question is whether the time during which the plaintiff was prosecuting a suit which was non-suited comes within the words of Section 14, "the time during which "the claimant shall have been engaged in pro-"secuting *bonâ fide* and with due diligence "in any Court of Judicature which, from de-"fect of jurisdiction or other cause, shall have "been unable to decide upon it." It appears to me that, where a plaintiff is non-suited, he cannot be said to have prosecuted *bonâ fide*, &c., with due diligence. Further, I am of opinion that the words "or other cause" must mean a cause of like nature as defect of jurisdiction. Now, a defect of jurisdiction would be a cause that would not include any neglect on the part of the plaintiff either in stating his case or in other respects. For instance, if the plaintiff should fail to appear or to produce his witnesses on the day fixed for the hearing, the Court would be unable to decide upon his cause of action. But that would not be a cause for which time ought to be deducted under the Section, for it could not be said that the plaintiff was prosecuting his suit *bonâ fide* and with due diligence, or that the Court was prevented by want of jurisdiction or other cause not connected with the plaintiff's own negligence from deciding upon the case.

I am of opinion that the time during which the plaintiff was non-suited ought not to be deducted. It was contended that the plaintiff was non-suited merely because he neglected to state the boundaries of his land; but, if the uncertainty of what the plaintiff was suing for was such as to prevent the Judge from deciding upon the case in the first suit, it must equally prevent the Court in the second suit from determining whether the former suit was for the same cause of action. Suppose a person were to sue for damages, and state that he has sustained damage by some act, without specifying it, which the defendant committed. Suppose the Judge were to say, "I cannot discover "what it is for which the plaintiff claims "damages," and should dismiss his claim, I do not think that that would be a cause for deducting, in the second suit specifying the injury, the time occupied by the plaintiff in the former suit.

Then, if the cause alleged in the case—namely, the non-statement of the boundaries of the land in question—was such as to prevent the Judge from knowing really what the plaintiff was suing for, I do not see how it can be shown in the present case that this suit is brought for the same cause of action. If the ambiguity prevented the Judge from deciding that suit, how can it be said that the former and present actions were brought for the same cause?

For these reasons, I am of opinion that the time during which the plaintiff was prosecuting his former suit ought not to be deducted.

Therefore, the question propounded may be answered that the plaintiff is not entitled to deduct the time occupied by him in prosecuting the former suit in which he was non-suited. If the time occupied in prosecuting the suit cannot be deducted, it follows that neither the time occupied in appealing from that decision, nor the time occupied between the non-suit and the filing of the appeal, can be deducted.

It is said that this is a hard case. It appears, however, that, deducting all the time occupied in prosecuting the former suit and appeal, with the exception of the short period between the time of the non-suit and the filing of the appeal, 12 years and 11 days elapsed between the accruing of the cause of

action and the commencement of the present suit. In fact, more than sixteen years and a half intervened between the date of dispossession and the commencement of the present suit. The plaintiffs have only themselves to blame for their delay.

The appeal is dismissed with costs, and the decision of the Lower Appellate Court affirmed with costs.

*Loch, J.*—It appears to me that the peculiar circumstances of this case must be considered. The case was instituted under the old procedure; and under that procedure, where boundaries were not given, a case was non-suited, and the plaintiff had to pay all the costs. That was considered the penalty for filing a defective plaint.

During the pendency of that suit in appeal, this new law has been passed, and the party now tries to bring in his fresh action under the new law, and he finds that he is out of time, and he points to Section 14, Act XIV. of 1859, and says, "Allow me the time which is mentioned in this Section, and I shall be in time. I formerly prosecuted the suit *bonâ fide* in a Court having jurisdiction, but it was non-suited under the then existing rules of procedure; but that order did not dismiss my claim."

Looking to the wording of Section 14, Act XIV. of 1859, it appears to me that the words "other cause" are large enough to embrace the present case. The absence of boundaries in a plaint was a defect which had, under the old procedure, its peculiar penalty attached to it; but the defect was not considered of so serious a nature as to deprive a plaintiff of the benefit of the time during which his case had been pending. In this case, all the circumstances which warrant a Court, under the present law, granting time, appear to meet. The parties are the same as in the former case. The cause of action is the same. The former suit was brought in good faith and prosecuted with due diligence to a successful termination before the Principal Sudder Ameen; but in appeal it was non-suited, not for want of jurisdiction in the Court, but from another cause, *viz.*, the absence of boundaries in the plaint—a defect which, under the former practice, was a sufficient ground for an order of non-suit with costs, but which carried no further penalty with it. The plaintiff was not prevented from bringing a fresh suit, nor did he lose the time while his former case was pending. It is difficult to understand the meaning to be attached to the words "other cause" if they be not applicable to cases such as the present.

Under this view of the case, I think the suit is within time.

*Jackson, J.*—I concur with the Chief Justice in opinion. It appears to me that, to entitle a plaintiff to the benefit of the terms of Section 14 of the Limitation Law, it must be shown that his suit had been prosecuted *bonâ fide* and with due diligence, and that the Court was unable to decide upon it from some cause quite unconnected with the default or negligence of the plaintiff. To hold otherwise, would be inconsistent with the use of the words "*bonâ fide* and with due diligence." It does not by any means follow in every case that, because the Court had been obliged to refrain from deciding the case for want of jurisdiction, the party would have been entitled to avail himself of the time during which the suit was pending, because it might so happen that the party knew well that the Court in which his suit had been brought was not the Court to which he ought to go. In that case, the suit was not *bonâ fide*, and he is not entitled to that time.

It appears to me that the inability of the Court must be either some unavoidable circumstance over which no one has any control, or something incidental to the Court itself, and unconnected with the acts of the parties.

*Shumbhoonath Pundit, J.*—I admit that the case of the appellant is to be guided and determined by Act XIV. of 1859, but hold that, when in the former case brought by the special appellant, on the appeal of the opposite party, the claim of the appellant was dismissed *without a trial* on the merits, on the ground of the plaint being deficient in specifications of certain boundaries of the lands claimed, the appellant is entitled to a deduction of the period for which the former case was pending.

When the Court hearing the appeal (in the former case) thought that the plaint in it was so defective that no decree could be passed upon it, plaintiff is entitled to the benefit of Section 14 of Act XIV. of 1859, because, for want of boundaries, the Appellate Court trying the former case had thought itself *unable* to try it on its merits.

It is admitted that the deduction provided for in the above Section of the law is not limited to cases dismissed without trial for want of jurisdiction, but is also intended to apply to many *other cases* decided without trial of merits for several other causes. Just

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as the institution of a case in a wrong Court not having jurisdiction must necessarily be, in the eye of the law, an act of neglect of the plaintiff, so the omission of boundaries by him is the effect of neglect. In fact, in most of the cases decided without trial of merits, the cause of the inability of the Courts to decide on the merits must always be plaintiff's fault. When plaintiff had in right earnest brought his former suit, and proceeded with it, the fact of a Court of Justice having considered itself unable to decide it on the merits, owing to some mistake of the plaintiff, would not be any good ground for denying to the said plaintiff the deduction allowed by the aforesaid Section.

The defendant did not object below that the present action is not for the same lands that the plaintiff had sued for before; and the details of both the claims distinctly show that the cause of action in both the cases was one and the same.

Under the old law and practice, the Mofussil Courts often non-suited plaintiffs for want of boundaries—an accident not likely to happen under the present law, Act VIII. of 1859. I admit that, even for cases dismissed for want of jurisdiction, the Court asked to make a deduction must be satisfied that the former case was a *bonâ fide* suit before it would be empowered to allow the deduction asked for; but I am not prepared to rule that, in this case, the Appellate Court trying the first case considered itself, and was therefore able to decide the suit on the merits, or that the omission of boundaries shows that the suit was not *bonâ fide*. We cannot in this case try whether that Appellate Court had rightly or wrongly non-suited the case, but cannot disavow the fact that that Court did not try the case on the merits.

We must hold that, legally, this decision of that Court amounts to an admission of its inability to try it on the merits; and, if it held so, it should be held, for the purposes of this deduction asked, that that Court was *unable* to decide the suit on its merits.

I would therefore allow the deduction asked for.

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The 1st September 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, L. S. Jackson, G. Campbell, and A. G. Macpherson, *Judges*.

**Costs—Appeal.**

Case No. 473 of 1866.

*Special Appeal from a decision passed by Mr. F. C. Fowle, Judge of Rungpore, dated the 22nd December 1865, affirming a decision passed by Mr. S. DaCosta, Officiating Principal Sudder Ameen of that District, dated the 9th June 1865.*

Greedharee Lal Roy (Defendant), *Appellant*,

*versus*

Soonder Bibee and others (Plaintiffs), *Respondents*.

*Baboos Kally Prosunno Dutt, Kissen Dyal Roy*, and *Shoshee Bhoosun Sein* for Appellant.

No one for Respondents.

An appeal will lie upon a question of costs, though any interference with the order of the Lower Court as to costs ought to be exercised with discretion.

*This case was referred to a Full Bench by Kemp and Seton-Karr, JJ., under the following order:—*

*Referring order.*—THE only point in this case is whether there did or did not lie a right of appeal to the Judge from an order of a Lower Court about costs.

The Judge, quoting a ruling of the High Court of the 10th of January 1865, Volume II., page 33, Weekly Reporter, says that there "is no appeal" to him, and that he cannot interfere.

We have doubts as to the correctness of this ruling, and it certainly appears to us to conflict with the ruling reported at page

97, Volume I. of the Weekly Reporter, 9th September 1864, and with that of the 29th of June 1865, reported at page 109 of Volume III., Weekly Reporter.

The view taken in these latter rulings appears to us to be that a right of appeal is not barred, though any interference with the order of the first Court as to costs should be exercised with discretion and for good cause shown.

We refer the present case to a Full Bench to decide which ruling is correct, and whether there is or is not a right of appeal on such a point, whatever may be the discretion which Courts, either of first instance or of appeal, ought to exercise in such matters.

*Full Bench Judgments.*

*Peacock, C. J. (Loch, J., concurring).*—The point in this case is whether there is or is not a right of appeal from a decree so far only as it relates to costs. The Division Bench, after referring to certain decisions which appeared to them to conflict with the ruling of the High Court reported in Vol. II., page 33, Weekly Reporter, say: "The view taken in these latter rulings "appears to us to be that a right of appeal is "not barred, though any interference with "the order of the first Court as to costs "should be exercised with discretion and "for good cause shown."

Speaking for myself, I have no doubt that an appeal will lie upon a question of costs, though any interference with the order of the Lower Court upon that subject ought to be exercised with discretion.

Section 187 of the Code of Civil Procedure says: "The judgment shall in all cases direct "by whom the costs of each party are to be "paid, whether by himself or by another "party, and whether in whole or in what "part or proportion, and the Court shall "have full power to award and apportion "costs in any manner it may deem proper."

The power given to the Court to award and apportion costs in such manner as it may deem proper is a power to be exercised according to law, and not according to mere caprice. It is a power to be exercised subject to all the provisions of this Code; and a decree, so far as it relates to costs, is subject to an appeal in the same manner as any other part of the decree.

Words similar to the words "in any manner it may deem proper" in Section 187 are also used in Section 193. There it is said "The Court may order interest, at such rate "as the Court may think proper, to be paid, "&c." That does not mean any sum that the Court may think proper without any appeal, otherwise the Court may award 100 per cent. instead of the ordinary rate of 12 per cent. or the rate, if any, expressly agreed to be paid by the contract under which the principal became due.

Similar words are used with regard to interest in Section 196.

It appears to me that the discretion vested in the Court in all these Sections is subject to the controlling power of appeal, whether regular or special, according to the nature of the case.

The decree must specify the amount of costs and by what parties they are to be paid (Section 159), and the Section which gives an appeal against a decree makes no exception as regards the award or no award of costs.

Whether a special appeal will lie or not, must depend upon circumstances. If the Lower Court should award costs to the losing party, it might be an improper exercise of discretion against which a regular appeal would lie, but it would not be a matter of special appeal, unless it should be held contrary to law to award costs under any circumstances to the losing party. If costs should be allowed contrary to law, it would be a subject of special appeal.

For instance, if the Court should allow costs for three pleaders for one plaintiff, where the law allows costs for only one pleader, or should allow costs for a pleader calculated according to a higher percentage than the law allows, it would be an error of law and a matter for special appeal. Many other instances might be cited in which the Court might exercise its discretion in awarding costs contrary to the law laid down in some Act or Regulation. In such a case, a special appeal would lie, but, where there has been merely an unsound exercise of discretion, a special appeal would not lie.

The first case referred to by the learned Judges (2 Weekly Reporter, p. 33) appears to be a case of the latter sort. In that case, the discretion exercised was not contrary to law. The first Court gave the plaintiff a decree, but released the Collector, and, in so doing, refused to award any costs to him.

thinking that it was necessary to join the Collector as co-defendant. The Collector appealed to the Principal Sudder Ameen for his costs; the Principal Sudder Ameen dismissed the appeal, and from that decision the Collector appealed to the High Court. The Court said that, as "the awarding of "costs is a matter left to the discretion of "the Court, we are of opinion that no "appeal lies;" *i. e.*, that a special appeal having reference to a mere matter of discretion would not lie in a case in which the Court was competent by law to refuse costs. In that case, it was not contrary to law to refuse to award costs to the Collector.

The case of the 9th September 1864 (reported in the Weekly Reporter, Vol. I., p. 97) was one in which it was held that the award of costs was contrary to law, and therefore a special appeal did lie.

In the last case referred to, the decree of the Judge reversing the decree of the Lower Court as to costs was reversed on special appeal, for not stating the reasons for his judgment.

In all cases it will be for the Appellate Court to determine whether the error in the award of costs is a matter of special or regular appeal.

The question referred in this case is not whether a special appeal will lie under the circumstances. The Judge was wrong in holding that he had no power to interfere with the question of the award of costs. The case was before him in regular appeal; the case upon which he relied was a decision in special appeal.

The case must go back to the Division Bench which referred it, in order that the Court may determine the appeal with reference to this expression of the opinion of a Full Bench.

*Jackson, J.*—I am of the same opinion. I would only add that it seems to me that, the direction of the Court of first instance as to costs being, by Section 189, a part of the decree, must, in my opinion, be open at least to regular appeal. Section 189 says that the decree shall "state the amount of "costs incurred in the suit, and by what "parties and in what proportions they are "to be paid, and shall be signed by the "Judge and sealed with the seal of the "Court."

It appears to me that, in many cases, not only in a matter of costs, but also in some small matters being a part of what is ordered by the decree, the plaintiff or defendant might be dissatisfied with the decision, and come up to the Appellate Court in appeal, although he might acquiesce in the principal part of the decree.

Then, under Section 189, "the Court shall "have full power to award and apportion "costs in any manner it may deem proper." Now, the words just cited must be taken in connection with the words in Section 187. It does not appear to me that the words "shall have full power" mean anything more than the words "*may order* interest at such rate as the Court may think proper" in Section 193, or than the words "may provide . . . . interest thereon at such rate as the Court may think proper" in Section 196.

In short, the award of costs appear to me to be, like the award of damages, in the discretion of the Court, but subject, as in the latter case, to an enquiry as to the mode in which that discretion has been exercised in all cases by regular appeal, and in certain cases also, as pointed out by the Chief Justice, in special appeal.

*Campbell, J.*—I also entirely concur with the Chief Justice. It seems clear that the discretion vested by law in the first Court with regard to costs is a discretion subject to regular appeal, and that the Appellate Court may also exercise its discretion.

The ground of special appeal is very much narrowed by the law which gives entire discretion to the Lower Courts, and nothing within the limit of that discretion can be the subject of special appeal. But when, in the matter of costs, the order is absolutely illegal, a special appeal also will lie.

*Macpherson, J.*—I have, in more than one case, held that there is no appeal on a mere question of costs. I considered that such appeals were undesirable in principle, and that the words of Section 187 of Act VIII. of 1859, namely, "the Court shall have "full power to award and apportion costs in "any manner it may deem proper," were so wide as to give a discretion to the Courts which it was not intended should be the subject of appeal when no other ground of dissatisfaction with the decree of the Lower Court was alleged. The matter, however, has always appeared to me to be open to doubt; and, as the majority of the Court are unanimously of opinion that an appeal will lie on a mere question of costs, I do not desire expressly to dissent from that opinion.

The 4th September 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Lakheraj—Ejectment—Recovery of possession.**

Case No. 1518 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Beerbhoom, dated the 14th March 1866, reversing a decision passed by the Moonsiff of Doobrajpore, dated the 29th July 1865.*

Shaikh Goburdhun and others (Plaintiffs), *Appellants,*

*versus*

Shaikh Tofail and others (Defendants), *Respondents.*

*Baboos Hem Chunder Banerjee* and *Chunder Madhub Ghose* for Appellants.

*Baboo Bama Churn Banerjee* for Respondents.

Where a lakherajdar ousted by a pottahdar sued to recover possession—HELD that the Lower Court should not have tried the validity of the plaintiff's lakheraj title; but that, if it found that the lakherajdar was in possession until ousted, it should have restored him to possession, leaving the zemindar to sue to resume and assess the land on proof that it had paid mâl rents, and that he, the zemindar, was not barred by limitation.

IN this case, a pottahdar under the zemindar ousted the lakherajdar on the strength of his pottah. The lakherajdar sued to recover possession on the ground that, till thus ousted, he had always had rent-free possession, and that, not only could not the pottahdar oust him, but that the zemindar himself could not do so without showing that mâl rents had been collected, and that he was also not barred by the Law of Limitation.

The first Court gave plaintiff a decree. The Lower Appellate Court, however, trying the validity of the lakheraj title, and holding it not proved, reversed the decision of the first Court. Plaintiff consequently appeals specially, and urges the grounds of law set forth above as the basis of his action.

We think these grounds quite correct. The Lower Appellate Court should not have tried the validity of the lakheraj title at all, but if it found, as the first Court did, that the lakherajdar was in possession, as such, till 1271, and was then ousted, it should have restored him to possession, leaving the zemindar to sue to resume and assess the land on proof that it had paid mâl rents, and that he, the zemindar, was not barred by any Law of Limitation.

We, accordingly, decree this special appeal, and remand the case to be re-tried with reference to these remarks.

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The 4th September 1866.

*Present:*

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

**Transferable tenures—Custom—Putnee.**

Case No. 1114 of 1866.

*Special Appeal from a decision passed by the Judge of Hooghly, dated the 31st January 1866, reversing a decision passed by the Moonsiff of Salikha, dated the 27th February 1864.*

Chunder Coomar Roy and another (Plaintiffs), *Appellants,*

*versus*

Pearee Lal Banerjee and another (Defendants), *Respondents.*

*Baboos Sreenath Doss* and *Bungsheedhur Sein* for Appellants.

*Baboo Bama Churn Banerjee* for Respondents.

A custom as to the transferableness of khodkasht jotes need not be absolutely invariable.

A putneedar cannot question a transfer made and recognized by the zemindar before the creation of his putnee.

THE plaintiff in the present suit was a putneedar, and he sues to oust the defendant, a ryot, inasmuch as he is a trespasser, being in possession from a party who had no right to transfer the jote.

This case was remanded by the High Court on the 24th July 1865, "in order "that the Lower Court might try what was "the nature of the tenure sold, whether the "ryot who held it before and sold it was "a khodkasht ryot, or not, and whether, "by the custom of the place, the tenure is "transferable, or not, without the consent "of the landlord. The tenure must be "judged with reference to its rights as "sanctioned by law and custom, irrespective

"of Act X. of 1859, as the sale to the spe-"cial appellant took place before that Act came into operation."

The Judge has now found that the tenure of the defendant was that of a khodkasht ryot; that such tenures were not transferable according to the custom of Zillah Hooghly, but that, inasmuch as defendant's tenure had been recognized and registered by the zemindar, and rent had been paid by him to the ijaradar representing the zemindar previous to the creation of the putnee talook, plaintiff cannot be in a better position than the zemindar would be; and as the zemindar would himself be bound to recognize the defendant's transfer, so is the plaintiff also.

Plaintiff now appeals specially, urging that the Judge is wrong in holding that the zemindar is bound by the act of the ijaradar in possession.

The Judge has held as a fact that the custom of Hooghly does not sanction the transfer of khodkasht jotes. That point has not been brought before us, and as the fact depends upon evidence, we cannot interfere in special appeal. We think it right to say, however, that a custom of this nature need not be absolutely invariable; it can be proved by evidence amounting to much less than this. Moreover, the case which the Judge cites from the Sudder Reports refers to Mooshedabad and not to Hooghly, and, therefore, can be no authority for proving a custom in the former district.

On the point before us, it has been proved that the zemindar recognized the transfer, registered it, and that the ijaradar received rent from the transferee, all on dates prior to that of the creation of plaintiff's putnee. It is consequently not competent for him to question a transfer made before his rights had existence and recognized before that date by the party to whom he owes his own existence. We dismiss the special appeal with costs.

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The 4th September 1866.

*Present:*

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

**Verbal evidence (to show parties to deed).**

Case No. 1100 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Rajshahye, dated the 2nd February 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 14th November 1864.*

Tara Monee Debia, mother and guardian of Shumboonath Tulapattur, Minor (Plaintiff), *Appellant,*

*versus*

Shibnath Tulapattur and another (Defendants), *Respondents.*

*Baboo Mohinee Mohun Roy* for Appellant.

*Baboos Sreenath Doss* and *Issur Chunder Chuckerbutty* for Respondents.

Verbal evidence is admissible to show that the name of the party used in a deed was only benamee for another person.

PLAINTIFF, Tara Monee, sues, as the guardian to her son Shumboonath, to set aside a deed of sale executed by her minor son's elder brother Shibnath in favor of the defendant Ooma Soonduree. She alleges that the property was the joint property of both her sons, and, therefore, that it was not competent to one of them to sell the property.

The defendant Ooma Soonduree, in her statement, alleged that the property belonged to her husband Moheshnath Bhadooree; that it was purchased in Shibnath's name, and, as a matter of form, transferred to her by Shibnath; that the plaintiff's minor son had never any right to it, and the present suit should be dismissed.

The first Court gave plaintiff a decree, and on appeal, the Principal Sudder Ameen reversed the same, being of opinion that the property was, from the oral evidence in the case, clearly shown to have belonged to the defendant's husband, and that plaintiff's minor son had no claim to it.

Plaintiff now appeals specially, inasmuch as the Lower Appellate Court has admitted parol evidence contrary to the terms of the deed filed in this case.

The Lower Court has not admitted parol evidence to alter the *nature* of the transaction entered in the written statement; it has merely admitted oral evidence to show that the name of the party used in it was only benamee for another person. The ruling of a Full Bench of the High Court alludes to the admission of evidence to try the nature of a transaction, and not to show the real parties to it; and until the Legislature declares benamee transactions to be illegal, the Court cannot ignore them, however objectionable they may be. We reject the appeal with costs.

The 4th September 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Jurisdiction—Partition—Shikmee Talook.**

Case No. 1508 of 1866.

*Special Appeal from a decision passed by Moulvie Nazeeroodeen Mahomed, Principal Sudder Ameen of Dacca, dated the 12th March 1866, reversing a decision passed by Baboo Mohesh Chunder Sein, Sudder Moonsiff of that District, dated the 11th July 1865.*

Mothoor Chunder Kurmokar and others (Defendants), *Appellants,*

*versus*

Manik Chunder Bungo and others (Plaintiffs), *Respondents.*

*Baboos Onookool Chunder Mookerjee* and *Romesh Chunder Mitter* for Appellants.

*Baboos Hem Chunder Banerjee* and *Dwarkanath Mitter* for Respondents.

A suit by a co-sharer of a shikmee talook for a partition of his share, is cognizable in a Civil Court, even without the consent of the landlord, when the partition is asked to be made only between the co-sharers, and is not to be binding upon the landlord. In such a case the landlord is not a necessary party.

In this case, plaintiff sued, as against his own co-sharers and his superior landlords, for a partition of his share of a certain shikmee talook.

It is admitted before us by both sides that the superior landlords are co-parceners, and they hold Mehal No. 24 Khalisa or Nowara, as also No. 21 Jagheer resumed. It is further stated that these are held in 11 annas and a fraction, and 5 annas and a fraction shares.

It is, too, allowed that this shikmee talook is situated within the limits of Mehal Khalisa No. 24, and it is distinctly stated that the plaintiff's object is not to make the partition binding as against the superior landlords.

The first Court dismissed plaintiff's case holding that no such partition could be allowed, without the consent of the superior landlords; and further, that such partition could not be affected, as the due distribution of the assessment over the two mehals in relation to the revenue of Government would not be properly made.

The Lower Appellate Court so far reversed this decision, that, while holding that the Civil Courts could not of themselves decree the partition sought for by plaintiff, they might direct the Collector to carry out the partition under the Revenue Laws for butwarah, and his decree conveyed such an order.

Against this decision of the Lower Appellate Court defendant appeals *specially*, contending that the Civil Courts cannot order any partition either themselves or through the Collector; and that no such partition can be made without the consent of all co-parceners of the shikmee talook, and of the superior landlords also.

We entirely differ from this view with reference to the circumstances *of this case. Here*, it is expressly declared that the partition is not to bind the superior landlords *at all*, as to their lien upon the whole shikmee talook for the rents due for it. The superior landlords, therefore, can, in no way, suffer in their rights.

Next, the shikmee talook is admitted to belong to Mehal No. 24, and to cover specified lands. In this case, or in any case, a partition of a shikmee-talookdar's share cannot affect the Government revenue, nor is the consent of the other owners of the jagheer (5 annas and a fraction share) at all a matter for consideration under such a state of facts as this. We have been referred to a case in which partition of an under-tenure was refused, but it was a very different one from this, and the consent of both co-parceners was essential there. The declaration of a right to a share of any property is a civil right, open, in our opinion, to be sued for by civil action; and where, as here, no Statutory prohibitions prevent it, we think the right, if proved, should be accorded.

In this view, we reverse the decision of the Lower Appellate Court, and remand the case for re-trial as to the shikmee talookdar's right to the share alleged. As the special respondents unnecessarily made the superior landlords parties to the case, their costs will be defrayed by special respondents.

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The 5th September 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

**Joint Family Property—Zur-i-peshgee lease—Sale—Proof of necessity.**

Case No. 1404 of 1865.

*Special Appeal from a decision passed by Mr. W. H. Brodhurst, Judge of Sarun, dated the 27th February 1865, affirming a decision passed by Moulvie Itrut Hossein, Principal Sudder Ameen of that District, dated the 13th August 1862.*

Mussamut Nowruttun Kooer (Plaintiff), *Appellant*,

*versus*

Baboo Gouree Dutt Singh and others (Defendants), *Respondents*.

*Mr. R. T. Allan* and *Moonshee Ameer Ali* for Appellant.

*Baboos Unnoda Persad Banerjee, Mohesh Chunder Chowdhry, Romesh Chunder Mitter*, and *Kalee Kishen Sein* for Respondents.

Although, in the case of joint family property, it may not be necessary for the lender of money upon zur-i-peshgee, or for the purchaser of an estate which is actually sold, to see to the application of the purchase-money, it is necessary for him to make due enquiry as to the necessity to borrow or sell.

We are of opinion that the judgment of the Lower Courts ought to be reversed. We think that there is no evidence of the necessity either for the sale or the zur-i-peshgee leases. When the case came on before Mr. Justice Steer and Mr. Jastice Leving, it was contended that the finding of the Judge was without evidence, and that, in respect of the zur-i-peshgee mortgages, the Judge had failed to enquire or express any opinion as to whether they were given under necessity or not.

The learned Judges of the High Court say—

"With respect to the zur-i-peshgees, we find that the objection raised is correct. Nothing is said in the judgment whether these charges upon the estate were justified or not on the ground of legal necessity. This objection goes to the root of the judgment, for without that necessity, Gouree Dutt could not encumber or affect the devolution of the property. This omission or error would oblige us to remit the case under any circumstances, and as the case must go back, we also think it right to direct a more particular enquiry as to the necessity also for the sale of the four villages to the kinsmen of Gouree Dutt's first wife which are stated to be of great value compared with the price given for them. The way this property so immediately afterwards found its way into the hands of Gouree Dutt's daughter-in-law savours so strongly of a family arrangement as to warrant a doubt whether there was in fact any sale at all. The Judge does not seem to have sufficiently weighed and considered the importance of this fact; and the evidence on which he has relied, as proof of the necessity for the sale, has been altogether of a too general character to meet the requirements of such a case as this. If there is any just reason to regard with suspicion the *factum* of the sale by Gouree Dutt to the kinsman of his first wife, there is the greater reason to require that all doubt on that point be cleared up by good and reliable proof, not only of the reality of the sale, but the necessity for it. Statements made of the need of money, based on vague and uncertain evidence, will not do under the peculiar circumstances of this case. We would also call the Judge's attention to the too general statement made as to the fact of a number of cancelled bonds affording evidence of pre-existing debts—there being only two mentioned by the pleaders on the argument before this Court in support of the judgment; one being for the insignificant sum of Rupees 100.

"There does not appear to be any finding by the Judge on the prayer of the plaint for the annulment of the zur-i-peshgee deed dated the 29th March 1860, which alone would necessitate a remand. We, therefore, require the Judge again to take up this case, and, having regard to the foregoing remarks, re-hear the case, and decide on the existing necessity for creating the charges by Gouree Dutt, the fact of due enquiries made by the lender, and the *bona fides* of the whole case; and we should remark that the Judge should take the evidence of the witnesses sworn and examined in his own presence, and not rely on evidence given by persons before Arbitrators, taken under an abortive reference which fell to the ground."

The Judges appear to have been under an error in supposing that several witnesses had been examined before the Arbitrators.

It turns out that Gouree Dutt alone was examined. When the case went back for a new trial, the Judge in his judgment observes:—

"The order for the examination of witnesses appears to be founded on a mistake of the Additional Judge, where he alludes to the statement of witnesses before the Arbitrators, for both parties admit that Gouree Dutt was the only person who then gave evidence; and as he is dead, he cannot be summoned to give his evidence afresh before this Court. It was, therefore, agreed that there were no witnesses requiring to be summoned, and that the case only required to be heard and argued."

No further evidence was taken on this new trial. The Judge says:—

"The case was fully argued on both sides. The evidence as to the legal necessity for the zur-i-peshgees and for the sale of the four villages consists in the deeds themselves, in the filed decrees of Court, kistbundees, sales, ikrarnamahs, bonds, and mortgages."

Now, the deeds themselves did not prove the necessity. They only proved that the conveyance was executed; and as to the bonds and mortgages referred to by the Judge, they appear to be old bonds and mortgages, and our attention has not been pointed to any one of the documents which was an existing debt. They only showed that, in former times, the family had been indebted. But these documents appear to have been brought into Court and filed by the parties to show that they had been paid off; and those, no doubt, were the documents to which the Judges of the High Court referred as being the bonds and securities which had been paid off.

The Judge goes on to say:—

"These deeds embrace a period from 1st June 1802 to 26th April 1826. They are all registered or sealed, and show debts incurred by Ishur Dutt, the father of Gouree Dutt, amounting to Rupees 1,70,119. Other deeds, again, registered and filed, and for a period between 1833 and 1837, show that Gouree Dutt was in debt to the extent of Rupees 1,10,242. Both father and son appear to have lived by borrowing."

The Judge proceeds to say that certain mouzahs had been mortgaged; but these are not the mouzahs included in the zur-i-peshgee leases.

The advances on the zur-i-peshgee leases amounted altogether to 7,241 rupees. The mode in which the money is said to have been disposed of was—875 rupees were given to a creditor, 1,640 rupees to another creditor, and 325 rupees to a third party. The rest of the money was disposed of in sundry expenses set forth in a jumma khurruch. That does not prove the necessity for borrowing 7,241 rupees. With regard to the sale, it also depends upon the deed of sale and upon the evidence of Gouree Dutt. He says that the sale was for 12,000 rupees, and that he disposed of 3,000 rupees in payment of certain debts. As to the remaining 9,000 rupees, he does not show that it was necessary for the payment of debts.

Although the case cited shows that it may not be necessary for the lender of money upon zur-i-peshgee, or for the purchaser of an estate which is actually sold, to see to the application of the purchase-money, still it is necessary for him to make due enquiry as to the necessity to borrow or sell. But no evidence of the kind was given to show that the kinsman who purchased this estate, from enquiries made by him, was lead to believe that 12,000 rupees were necessary for payment of debts. If the necessity existed, or if the purchaser, from enquiries *bonâ fide* made, was led to believe that a necessity to sell existed, the sale would not be invalidated by Gouree Dutt's failing to apply the money properly; but no necessity is proved, nor is it shown that any reasonable or proper enquiry was made by the kinsman purchaser as to whether there was any necessity. The Judge has found that there was necessity for the sale upon evidence which did not legally warrant that finding. Under these circumstances, the decision of the Judge is erroneous in point of law. Upon the remand of this case by the High Court, the parties could have come forward and given their own evidence to show that necessity existed; because, although Gouree Dutt was dead, the circumstances of the family might have been proved to be such that it was necessary to borrow the money, or that the purchaser from enquiries made, believed that it was necessary to make the sale and borrow the money under the zur-i-peshgee leases.

An issue was raised whether the plaintiff was born at the time when the zur-i-peshgee lease was executed. There being an issue under which the parties might have given evidence before the Principal Sudder Ameen, they abstained from giving that evidence.

Hurryhur Dutt does not add anything to the evidence of Gouree Dutt as to the important point whether or not there was necessity for executing those zur-i-peshgee

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leases. He does say that the money was handed over to the mortgagor, but that he did not see it handed over. In so far as respects the handing over the money to the mortgagor, the evidence of Hurryhur Dutt is contradictory to that of Gouree Dutt.

The decision of the Lower Court will be reversed with costs, and the plaintiff's suit decreed.

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The 5th September 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Ryots without written lease (Rights of).**

Case No. 1624 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 23rd March 1866, affirming a decision passed by the Moonsiff of Oundah, dated the 25th November 1865.*

Doorga Churn Mullick (Defendant), *Appellant,*

*versus*

Bhoormon Manjhee (Plaintiff) and others (Defendants), *Respondents.*

*Baboo Bungsheedhur Sein* for Appellant.

*Baboo Gopeenath Banerjee* for Respondents.

**Ryots do not lose their rights of occupancy, or their right to hold at fixed rates, merely because they cannot produce a written lease.**

THE special appellant contends that the Lower Appellate Court should have tried the nature of the jote of the plaintiff, that is, whether it was mourosee as alleged by the plaintiff, or merely temporary as alleged by the landlord who supports the lease of 1257 set up by the special appellant; that the plaintiff has not produced the original lease or secondary evidence in support of its existence; that the Lower Appellate Court should not have tried the question of limitation along with the merits; and that it should have, before passing a decree in favor of the plaintiff, taken into consideration also the evidence produced by the defendants.

The special appellant is not right in any one of his assertions, either as regards the law or the facts urged by him.

The Lower Appellate Court fully tried the case of the defendants, and found that the alleged abandonment by the plaintiff in 1252, or the alleged termination of his lease in 1256, the alleged khas possession by the landlord, and the pottah alleged to have been given by the latter to the special appellant in 1257, were all groundless and false. If the Lower Appellate Court failed to add that, having disbelieved the pottah of the special appellant, it consequently discredits also the receipts for rents produced by him, there can be no ground to admit this special appeal.

In order to justify a decree to the plaintiff in this case, it was sufficient to decide, as the Lower Appellate Court has done, that the plaintiff held as a ryot before he was dispossessed, that the proved date of his dispossession is within the period of limitation allowed by law, and that the pottah set up by the defendant was false. It was not at all legally necessary to try further the exact nature of the tenancy of the plaintiff, or to settle the exact amount of rent payable by him to his landlord.

Ryots in this country seldom hold written leases, and ryots like the plaintiff cannot lose the rights to hold, and to hold even at fixed rates, merely because they cannot produce a written lease. The provisions of the law are to the contrary.

On the findings of fact as recorded by both the Lower Courts, we see no reason to interfere, and reject the special appeal with costs.

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The 6th September 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Onus probandi—Plea of fraud.**

Case No. 1634 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Shahabad, dated the 29th March 1866, affirming a decision passed by the Sudder Ameen of that District, dated the 8th August 1865.*

Lalla Arbunt Doss (Plaintiff), *Appellant,*

*versus*

Lalla Mothoora Lal and others (Defendants), *Respondents.*

*Baboos Mohesh Chunder Chowdhry* and *Khetturnath Bose* for Appellant.

*Mr. C. Gregory* for Respondents.

**Where a defendant does not specifically allege fraud otherwise than when, generally denying the truth of the plaintiff's allegations, he states the plaintiff's claim to be not true, the *onus probandi* is on the plaintiff.**

THE pleas taken in this special appeal by the pleaders before us are: (1) That in this case the burden of proving the plea of fraud should have been on defendant who urged it, and that there were in this case none of those exceptional circumstances which might shift that burden. (2) That at least the special appellant has a right to a decree against Mothoora who executed the mortgage-bond to plaintiff.

Plaintiff's case is that one Mothoora gave him a mortgage-bond on the 7th March 1864, which was presented for registry on the 8th and registered on the 9th. Under this bond, plaintiff sues to get possession of the mortgaged property.

Mothoora, being made a defendant, files no answer, nor does he defend the case at all.

The case of the other defendant, Fukeer Chand, is that the same Mothoora gave another bond for this same property, on which a decree went and the property was sold, and this defendant purchased it *bond fide* in execution. Whether the sale was on 7th or 8th of that same March is not clear. At the sale, no mention was made of plaintiff's alleged bond or rights at the time of sale.

Both the Lower Courts have found, as a matter of fact, that the plaintiff's transaction was not proved to be a real one by the evidence he adduced, and that it was, in fact, a collusive, fictitious, and fraudulent transaction.

Against this decision, the special appellant appeals on the grounds before noticed.

In our opinion, the pleas in special appeal are as baseless as the plaintiff's claim has been found to be. Defendant did not specially allege fraud, otherwise than when, generally denying the truth of plaintiff's allegations, he stated the claim put forth by plaintiff to be not true, which every defendant may do who denies a claim. There is nothing in this which relieves plaintiff of the ordinary burden of proving his own allegations. We reject his first plea accordingly.

On the second plea, we do not think a plaintiff, coming into Court with what is to be found as a fact by competent Courts to be a false and fictitious claim, has any right to ask for any assistance from the Court. We therefore also reject this plea.

We observe that the two vakeels of the Shahabad Sudder Ameen's Court who deposed in this case seem, by their evidence, to think that, if they are asked or instructed to witness or attest a deed, it may be done after the time of its execution and attestation by others. This irregularity in those who have to advise and protect others in legal affairs does not promise well for the interests of the clients who employ them.

We dismiss the appeal with costs.

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The 7th September 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Jurisdiction—Section 355, Act VIII. of 1859—Filing of additional exhibits.**

Case No. 1333 of 1866.

*Special Appeal from a decision passed by the Additional Principal Sudder Ameen of East Burdwan, dated the 24th February 1866, affirming a decision passed by the Moonsiff of Kalnah, dated the 28th December 1864.*

Mohesh Chunder Sheet (one of the Defendants), *Appellant,*

*versus*

Shoshee Mookhee Debia (Plaintiff), *Respondent.*

*Baboo Umbika Churn Banerjee* for Appellant.

*Baboos Chunder Madhub Ghose* and *Sreenath Banerjee* for Respondent.

The High Court cannot interfere with the refusal of a Lower Court to comply with an application under Section 355, Act VIII. of 1859, to file additional exhibits.

THE Court in its discretion has refused to allow the appellant to file additional exhibits, upon an application made under Section 355; and with the exercise of that discretion we have no power to interfere.

The appeal is dismissed with costs and interest.

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The 7th September 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Hindoo Law (Mitakshara)—Succession (of maiden daughter)—Paternal uncle.**

Case No. 1227 of 1866.

*Special Appeal from a decision passed by the Officiating Judge of Cuttack, dated the 17th January 1866, reversing a decision passed by the Moonsiff of Pooree, dated the 31st July 1865.*

Mussamut Toolsee (Plaintiff), *Appellant,*

*versus*

Mohadeb Raot and others (Defendants), *Respondents.*

*Baboo Bama Churn Banerjee* for Appellant.

*Baboos Mohendro Lal Shome* and *Taruck-nath Sein* for Respondents.

According to the Mitakshara Law, a maiden daughter does not succeed to her father in preference to her paternal uncle.

We concur with the Judge.

The family, it is admitted, were joint in food and estate, and the Mitakshara Law governs the case.

A maiden daughter does not succeed to the estate of her father in preference to her paternal uncle. (*See* page 22, Volume I., and page 46, Volume II., Macnaghten's Hindoo Law.)

The law quoted by the pleader for the special appellant applies to families who are separate in estate.

The appeal is dismissed with costs and interest.

The 7th September 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Suit—Ghatwalee lands—Assessment.**

Case No. 1359 of 1866.

*Special Appeal from a decision passed by Lieutenant-Colonel J. S. Davies, Judicial Commissioner of Chota Nagpore, dated the 27th January 1866, affirming a decision passed by Mr. B. C. Money, Deputy Commissioner of Maunbhoom, dated the 14th November 1865.*

Rajah Jugo Jewan Lal (Plaintiff), *Appellant,*

*versus*

Roghoonath Kopat and others (Defendants), *Respondents.*

*Baboo Bungsheedhur Sein* for Appellant.

No one for Respondents.

A suit will lie to assess lands occupied by ghatwals in excess of the area recorded in their isumnovisee.

This was not a suit to enhance the rent of the ghatwals, but to assess the lands in their occupation in excess of the area recorded in the isumnovisee filed by the ghatwals. Such a suit will clearly lie.

Remanded accordingly for trial.

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The 7th September 1866.

*Present:*

The Hon'ble G. Loch and J. P. Norman, *Judges.*

**Estoppel—Purchaser in execution of decree—Admission by, or decree against, judgment-debtor.**

Case No. 1523 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 13th March 1866, reversing a decision passed by the Moonsiff of Bacoondah, dated the 6th September 1865.*

Rungo Monee Debia (one of the Defendants), *Appellant,*

*versus*

Raj Coomaree Bibee and another (Plaintiffs), *Respondents.*

*Baboos Juggodanund Mookerjee* and *Bungsheedhur Sein* for Appellant.

*Baboo Nil Madhub Sein* for Respondents.

A purchaser in execution of a decree of a Civil or Revenue Court is not bound by any admission made by his execution-debtor, nor ordinarily by a decree against such person.

THE plaintiff in this case is a widow, a member of a joint Hindoo family, who, by an agreement between herself and the other members of the family, was to receive in lieu of property to which she was entitled as heiress of her husband certain monthly payments, it being declared that, if the parties failed to pay her, she might sue for arrears. A portion of the property in which she would have had an interest but for this contract was sold to a person named Gudadhur Banerjee in execution of a decree. The plaintiff subsequently brought a suit against Gudadhur, and obtained a decree against him for a proportion of her maintenance-allowance, as if it were a charge on the property purchased by him. The decree was dated the 6th of October 1863. On the 28th of April 1865, the property of Gudadhur was sold under the provisions of Sections 13 and 14 of Act XI. of 1859, and the purchaser admittedly acquired such interest as would be given him by Section 54 of that Act.

Now, Section 54 enacts as follows:—

"When a share or shares of an estate may "be sold under the provisions of Section 13, "or Section 14, the purchaser shall acquire "the share or shares subject to all encum-"brances, and shall not acquire any rights "which were not possessed by the previous "owner or owners."

On the 9th of August 1865, the now-plaintiff brought a suit against the purchaser seeking to have a declaration that her right to maintenance under the original agreement was a charge on the property purchased by him, and she has obtained a decree in the Lower Appellate Court.

From this decision the defendant appeals.

We are of opinion that it is perfectly clear that, under the original agreement, the maintenance contracted to be paid to plaintiff was not a charge upon the estate, and that, in point of fact, the purchaser acquired the share purchased by him free of any encumbrance in respect of it.

But the Lower Appellate Court was of opinion that the decree against Gudadhur bound his share of the estate, and that the now-defendant was also bound by that decree.

We do not think this agreement well founded. As a matter of fact, as we have said already, the share acquired by the defendant was free from all encumbrances. The defendant, as purchaser at a sale by auction for arrears of revenue, did not come in as privy in estate to Gudadhur, the debtor, nor was he in any degree bound by the judgment which prevented Gudadhur from denying that the share was encumbered. He came in as a stranger by an act-in-law, and we think it clear that a person so coming in as a purchaser in execution of a decree of a Civil or Revenue Court is not bound by any admission made by his execution-debtor nor ordinarily by a decree against such person. The decree did not directly affect or bind the land, but merely bound Gudadhur personally, and prevented him from denying his liability. It is not like the case of a judgment in a boundary-suit against a prior owner, as to which see 2 Weekly Reporter, page 191.

We think, therefore, that the decision of the Lower Court must be reversed, and the plaintiff's suit dismissed with costs and interest.

The order in this case will govern Special Appeal No. 1524, which will also be decreed with costs and interest.

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The 7th September 1866.

*Present:*

The Hon'ble G. Loch and J. P. Norman, *Judges.*

**Ancestral property—Hindoo Widow—Maintenance—Sale of share.**

Case No. 1504 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 9th March 1866, affirming a decision passed by the Moonsiff of Bacoondah, dated the 6th September 1865.*

Paro Bibee (Plaintiff), *Appellant,*

*versus*

Gudadhur Banerjee and another (Defendants), *Respondents.*

*Baboo Nil Madhub Sein* for Appellant.

*Baboo Juggodanund Mookerjee* for Respondents.

Upon a suit by a Hindoo widow against the brother of her deceased husband for her share of the ancestral property, an agreement was come to between the parties by which the widow gave up her right to the land in consideration of her receiving maintenance from the

brothers. Subsequently, the share of one of the brothers having been sold, the widow now sues to have the property so sold charged with her annuity. HELD that her suit could not be maintained.

THIS is a suit by Mussamut Paro, the widow of one Ram Pershad. It appears that Ram Pershad, Kishen Pershad, Sheeb Pershad, and Debee Pershad were four brothers who inherited estates from their father. Afterwards Ram Pershad died, leaving the plaintiff, his widow. Disputes having arisen between them, Mussamut Paro brought a suit against Sheeb Pershad, Kishen Pershad, and Debee Pershad for her share of the property. The disputes were settled by an agreement which recited that, according to a settlement made and the custom of the family which is ruled by the law of Kannoje, the brothers fixed 200 rupees a year as her yearly maintenance, and that Mussamut Paro, as long as she lives, will receive this. "If," they say, "we do not pay, you will realize it from us month by month as a decree." Mussamut Paro agreed to this. The parties remained in possession, paying the amount, for many years, from a period prior to 1831 to the present time. Recently, however, the share of Doorga Pershad, one of the sons of Kishen Pershad, has been sold and purchased by Gudadhur Banerjee. The plaintiff now seeks to have it declared that the property so sold to Gudadhur Banerjee should be charged with the annuity. We think that there is no ground for her contention. It is quite clear that the agreement between the parties was that she gave up her right to the land as the widow of Ram Pershad, and trusted to the surviving brothers *personally* for her maintenance. This suit, therefore, has been properly dismissed by the Court below, and we dismiss the appeal with costs and interest.

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The 8th September 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, L. S. Jackson, and Shumbhoonath Pundit, *Judges*.

**Ghatwalee lands—Resumption of—by Zemindar.**

Case No. 290 of 1865.

*Regular Appeal from a decision passed by Baboo Nurrutun Mullick, Principal Sudder Ameen of Bhaugulpore, dated the 21st June 1865.*

Baboo Koolodeep Narain Singh (Plaintiff), *Appellant*,

*versus*

Mahadeo Singh and others (Defendants), *Respondents*.

*Mr. R. V. Doyne* and *Baboos Unnodapersad Banerjee* and *Dwarkanath Mitter* for Appellant.

*Baboos Kishen Kishore Ghose* and *Juggodanund Mookerjee* for Government Respondent.

*Mr. R. T. Allan* and *Baboos Onookool Chunder Mookerjee* and *Mohendro Lal Shome* for Ghatwal Respondents.

Where a ghatwalee tenure was granted under a valid sunnud from a person representing the then Government in that behalf more than 100 years ago, and had been allowed to change hands by descent or purchase without question, the zemindar was held incompetent of his mere motion, without the assent and against the will of the Government, to put an end to the ghatwalee, to deprive the ghatwals, and to treat them as common trespassers.

*This case was referred to a Full Bench by L. S. Jackson and Markby, JJ., under the following orders :—*

*Jackson, J.*—IT seems to me more convenient that this argument should not proceed further at present, because, although there are certain points of dissimilarity between this case and the case in which Justices Trevor and Campbell recorded their judgment in June last year (3 Weekly Reporter, p. 84), still the leading point in the case, namely, as to the nature of ghatwalee tenure founded upon a sunnud such as that produced by the defendant in this case, is undoubtedly the same, and the leading point would have to be decided. But, speaking for myself, I am not, as far as I am at present advised, prepared to concur in the judgment in that case; and, looking at the extreme importance of the case, it appears to me that this case ought to be referred for the decision of a Full Bench.

I therefore propose that the case be referred for the decision of a Full Bench.

*Markby, J.*—I entirely concur in the propriety of referring this case to the decision of a Full Bench. Upon the case itself, I express no opinion.

*Full Bench Judgments.*

*Peacock, C.J.*—The plaintiff in this case seeks to recover possession with mesne-profits of certain mouzahs in Bhaugulpore.

The plaintiff rests his title upon a purchase under a sale by auction for arrears of revenue of the zemindary under which the mouzahs are held.

The defendants contend that the lands are held by them under a hereditary ghatwalee tenure. In his written statement, the plaintiff says: "The sunnud was granted on "condition of ghatwalee service, the performance of which in behalf of the defendants "has been dispensed with for a long time, "nor is there any necessity for the service. "Your petitioner is entitled to take possession of the disputed mouzahs in consequence "of the same having been comprised in the "property purchased by him, and of the "service of ghatwalee, which was a condition "of the grant, having been dispensed with."

It is contended, on the part of the plaintiff, that, as the services are no longer required and have been dispensed with, he is entitled to put an end to the tenure, and to recover possession of the lands. It does not appear that the services have ever been expressly dispensed with by the plaintiff or his predecessors, or that any distinct notice was given to the defendants, before he commenced this action, that the services were no longer required, and that the plaintiff intended to treat the defendants as trespassers. The Collector appeared on behalf of Government, and put in a written statement to the effect that the Government had not renounced its claim to demand ghatwalee services, and that it would enforce the demand when necessary. The Principal Sudder Ameen dismissed the claim. He says: "As this case is analogous with that decided "by the High Court, I have no alternative but to dismiss it. As in the case "decided by the High Court, so in this, a "sunnud by Mahomed Sadiq bearing date "1150, as well as a decision of the Bhaugulpore Court by Mr. Fronbel of 1796, are "produced. In the latter, mention is made "of sunnuds by Mahomed Sadiq of 1150, and "by Alla Koolee Khan in the fourth year of "his reign, and of perwannahs by Messrs. "Cleveland and James Grant, dated 1198 "and 1791 respectively. It further appears "from it that this tenure was resumed by "Government in 1186, but was subsequently "released, and that it has been paying a "small quit-rent since its release.

"Plaintiff's pleader has made an attempt "to change his cause of action by saying "that the tenure is a common one, and therefore liable to cancelment under a provision "of the Sale Law; but the plaintiff cannot be "allowed to do so at the last stage of his case. "Besides, as the tenure has been held at a "fixed rent from before the Permanent "Settlement, it is likewise protected under "Section 37 of Act XI. of 1859. It is, "therefore, ordered that the case be dismissed "with costs."

It appears to me that the Principal Sudder Ameen was right in dismissing the case, *1st*, upon the ground that the defendants had a right in this tenure, which it was not in the power of the zemindar to destroy; and, *2ndly*, that the plaintiff acquired no right to cancel the tenure by reason of his purchase under the auction-sale for arrears of revenue, and that he stood in no better position than the zemindar with whom the Permanent Settlement was entered into.

From the deed which we have before us it appears that, as far back as 1150 Fuslee, which corresponds with 1743, about 22 years before the East India Company obtained the Dewanny, a grant was made to Mahadeo of this tenure as a ghatwalee tenure.

It appears, further, that before the Permanent Settlement Mahadeo died, and his son succeeded to the ghatwalee tenure; for we find that a suit was brought in 1796, not against Mahadeo, but against his son, for the rent for 4 years from 1792, which was prior to the date of the Permanent Settlement. In that suit it was held that the plaintiff could not recover more than 61 rupees a year—the rate at which rent had been paid up to that time. Thus, we find that the estate was, in point of fact, in the possession of Mahadeo's heir-at-law before the date of the Permanent Settlement. I have had the sunnud translated. It recited "that, whereas the service of ghatwalee of "Tuppeh Dakhilgunge pertaining to the "said pergunnah (Bhaugulpore) and Mouzahs "Khotul, &c., appertaining to the said Tuppeh "as ghatwalee tenure, were conferred upon "Mahadeo before" (so that this was a confirmation, not the first grant, of the ghatwalee tenure), "and whereas at present also "he has been confirmed as per detail" (in the detail the two mouzahs, the subject of the present suit, are included) "in his "post as before, it is therefore incumbent "that, in the performance of the duties attached to the said service, he should guard "and protect the roads, and watch over the "tuppeh with great diligence, and should "take care of the ghats or passes, so that "travellers may travel without fear, and no "thieves, highway robbers, nor murderers by "night, may obtain shelter within the said "limits. If the property or cattle of any "person be stolen or plundered, or murder be "committed by night, he shall find out the "actual thieves with the property, and transmit them to the Huzoor with proper care "and precaution. Should he fail to trace "out the property or cattle, he shall be answerable for value thereof, together with "fine to the Sircar. He should bring under "cultivation the mouzahs aforesaid by proper

"efforts, and enjoy the produce thereof, season "after season and year after year, in lieu of "ghatwalee service."

It is said that the sunnud contains no words of inheritance, and that the sunnud contained merely a life-grant to Mahadeo. It is unnecessary to say what would have been the construction of this sunnud in the absence of usage, for it appears clear, from long uninterrupted usage, that these lands have passed from ancestor to heir, *i.e.*, from father to son, for two or three generations, and that it had passed, without objection on the part of the British Government, before the date of the Permanent Settlement, to the heirs of Mahadeo. In Mahomedan grants, it seems that words of inheritance are not necessary. *See* Baillie on Land Law of India, Introduction, page 47, in which a distinction is drawn between such grants and jagheers, or mere orders for payments out of the kheraj or revenue to a particular person. But, however this may be, I apprehend that, if there is no clear authority to show that a grant in lieu of services authorizing the grantee to bring the lands into cultivation and to enjoy the produce thereof, season after season and year after year, would not create a hereditary right, such a grant, coupled with long usage such as that which has prevailed in the present case in which the tenure has passed from ancestor to heir without objection for several generations, would be sufficient to show that the grant was a grant of inheritance. But, even if that were not so, speaking for myself alone, I should say that, when I find that there has been a grant which is not forthcoming, and the grantee has been confirmed in that grant with words such as those used in the sunnud of 1150, long usage may be given in evidence for the purpose of explaining what would be the effect of the original grant if it had been produced, taken in conjunction with the grant of confirmation. The sunnud of 1150 refers to something which had taken place before. What that was is not precisely stated, but it is clear that it was intended to confirm Mahadeo in that which had been granted before. Surely when he was confirmed in what had been granted before by a very old grant, and the former grant is not forthcoming, usage is admissible for the purpose of explaining what that former grant was, and of showing that, whether under the sunnud by itself the party would or would not have been entitled to a tenure of inheritance, still he might be entitled to a heritable right by virtue of the sunnud, coupled with the former grant in which he was confirmed, as explained by the usage. There is no express law that a ghatwalee tenure is not inheritable, and that it is a mere life-grant; nor is it even unreasonable to suppose that a ghatwalee tenure may have been granted to a man and his heirs, because we have it expressly stated in the Bengal Regulation XXIX. of 1814, with regard to the Beerbhoom ghatwals, "that there is reason to believe that they held their tenures from generation to generation." That is a distinct recognition on the part of the Legislature that a ghatwalee tenure may be an inheritable tenure.

6 Moore's Ind. Ap., p. 101*

A case in the Privy Council was referred to in the course of argument, in which it was held that a ghatwalee tenure was a tenure of inheritance, not by the general heirs according to the Hindoo Law, but by the eldest son alone. The marginal note of the case says that, "upon the death of the ghat-"wal last seised, the lands descend entire "to a male heir as ghatwal;" but I do not find that the note is borne out to the full extent by the judgment. The right of the eldest son to inherit was laid down with reference only to the particular case under consideration, but it was not the intention, as I understand the judgment, to lay down that the rule of primogeniture was applicable to all ghatwalee tenures. The case was one of a Beerbhoom ghatwalee, but the present case relates to a tenure in Bhaugulpore. What Lord Kingsdown said was this: "With "respect to the ghatwalee tenures in Beer-"bhoom, it is stated in a Regulation passed "with respect to them in 1814 (Regulation "XXIX. of that year), that the class of "persons called ghatwals in the district of "Beerbhoom form a peculiar tenure, and "that every ground exists to believe that, "according to former usages and constitution "of the country, this class of persons are "entitled to hold their lands generation after "generation in perpetuity; subject, never-"theless, to the payment of a fixed and "established rent to the zemindar of Beer-"bhoom, and to the performance of certain "duties for the maintenance of the public "peace and support of the police.

"This description is confined in terms to "the District of Beerbhoom; but in the case "of Hurloll Sing *versus* Jorawan Singh "(6 Sudder Dewanny Reports 170), which "occurred in 1837, a question arose as to the "nature of these tenures generally, the point "for decision being whether they were "divisible on the death of a ghatwal or

* See 4 Weekly Reporter, p. 77.

descended to his eldest son. One of the "Judges states that these tenures are very "common in the Nerbudda territory for the "protection of the ghats. Another of the "Judges seems to consider them as chackeran "lands; and the Court was of opinion that, "the lands being held conditionally on the "performance of certain defined duties, they "were not divisible on the death of the "ghatwal, but descended to the eldest son."

The principle was there recognized that lands of this description were held by tenures created long before the East India Company acquired any dominion over the country, and that the nature and extent of the rights of ghatwals probably differed in different districts and in different families; that the services were not merely for the maintenance of thannah or police establishments; and that, although they would include the performance of duties of police, they were quite as much, in their origin, of a Military as of a Civil character (pp. 124, 125).

Even if the tenure created by the sunnud of 1150 terminated on the death of Mahadeo, we still find that Munoruth Singh, his son, was in possession before the time of the Permanent Settlement; and, if necessary, it might be presumed, from the subsequent usage of more than half a century, that the tenure of Munoruth Singh has a legal origin, and may have been created by grant made since 1150 which has been lost by time and accident, and is not forthcoming, but which, from the fact of Munoruth's having held from a time prior to the Permanent Settlement, as shown by the suit for the rent of 1792 and three following years, must have existed before the Permanent Settlement. If a new tenure was created by the zemindar subsequently to the Permanent Settlement, it would not be binding upon a purchaser for arrears of revenue; but, if Munoruth Singh came in under a new tenure, and not under the sunnud of 1150, it could not have been under a grant since the date of the Permanent Settlement, but must have been created anterior to it, inasmuch as Munoruth was in possession of the tenure in 1792. It may be remarked here that the sunnud of 1150 was not merely a grant by the zemindar for the time being, but it appears to have been a grant by the Government of the time. We find that the tenure was created as far back as 1150, corresponding with 1743, and that that was merely a confirmation of a still earlier grant; that it was never disputed by the British Government, and that the heir of Mahadeo, who was the person holding the ghatwalee tenure in 1150, was never objected to by the British Government, or by the zemindar with whom the Permanent Settlement was made. In point of fact, this ghatwalee tenure existed long prior to the time of the grant of the Dewanny to the East India Company, and even the sunnud of 1150 did not create an inheritable tenure. Mahadeo's heirs have in fact been holding from a period prior to the time of the Permanent Settlement to the present time.

I think, therefore, that the evidence is sufficient to prove that the defendants have been holding under a valid tenure of inheritance upon ghatwalee service and a quit-rent of 61 rupees a year.

It was contended that the lands comprised in this tenure were assessed at the time of the Permanent Settlement. There is no doubt that they were so assessed, and were included in the mâl lands of the zemindary. Previously to the Permanent Settlement, there had been a quit-rent of 61 rupees a year paid for these lands in addition to the ghatwalee services. This rent has continued to be paid from the time of the Permanent Settlement, and no other rent has been paid for the lands from that date to the present time. In assessing the amount of revenue to be paid by the zemindar to the Government, the amount in respect of these lands was fixed at the same amount as that which was payable by the holders of the tenure, *viz.*, 61 rupees a year. If, at the time of the Permanent Settlement, the lands were held at 61 rupees a year, in addition to the ghatwalee services, and it was considered that the ghatwalee services might be dispensed with, and the lands resumed by the zemindar, whenever he might think proper to do so, it is not very likely that, in fixing the assessment for the zemindary, the value of the lands in question should have been taken at only 61 rupees a year. In estimating the lands at 61 rupees a year in fixing the total assessment for the zemindary, the Government must have considered that the tenure was a permanent one descendible to heirs, and that the holders of the ghatwalee tenure would continue bound to perform the services. If the tenure was a valid hereditary tenure at the time of the Permanent Settlement, and if the British Government could not have ousted the ghatwalee tenants from the tenure which had been created by the Native Government, the zemindar had no right, notwithstanding the lands were permanently settled with him by the Government, to do more than the Government themselves could have done.

It is stated, on behalf of the plaintiff, that if he recover possession of these lands—and

be allowed to turn the defendants out of possession, he will perform the ghatwalee services if the Government require the performance. But what security have the Government that the plaintiff will perform the services? If the lands are held subject to the services, why should the plaintiff be allowed to resume them and turn out those who hold by the ghatwalee service? The lands are subject to the service; the defendants are entitled to the tenure; the plaintiff is entitled to the quit-rent, and the Government to the revenue; the services are public, and for the benefit of the public, and not private, for the benefit of the plaintiff alone. The plaintiff's offer shows that he does not look upon the services as mere private services. But it is contended on his behalf that the whole zemindary of the plaintiff of which these lands form part is a ghatwalee zemindary. I confess that I do not perceive any force in the argumeut. If the whole of this zemindary, when it was assessed at the time of the Permanent Settlement, had been rendered subject to the performance of ghatwalee services, then it might be called a ghatwalee zemindary; but it is not, because some lands in a zemindary are held upon a ghatwalee tenure, and are subject to ghatwalee services, that the whole zemindary is ghatwalee. But, if the zemindary was subject to ghatwalee service, I should expect to find it distinctly recorded in the settlement that the zemindary was granted, not merely subject to certain revenue, but also subject to the performance by the zemindar of those services. The Government would certainly not have left out of the records of the settlement such an important provision as that the zemindary was settled upon condition of the zemindar's performing certain ghatwalee services in addition to the payment of the revenue assessed. I am not aware that any such revenue-settlement was ever made; but, even if it was, it could not destroy the rights of those to whom valid tenures had been previously granted, either by the British Government, or by the Native Government which preceded it.

Some cases were cited to show that, even assuming these lands to be subject to a ghatwalee tenure, the zemindar has a right, whenever he pleases, to dispense with the ghatwalee services, and to take back the lands. Now, I must say that this is the first time I have ever heard such a contention as that a landlord can dispense with the services upon which lands are held whenever he pleases, and take back the estate. It is not because the services are released or dispensed with, or become unnecessary, that the estate can be resumed. If a grantor release the services, or a portion of the services, upon which lands are holden, the tenant may hold the land free of the services; but the landlord cannot put an end to the tenure and resume the lands. Many services upon which very valuable estates are held are of little value now. The estates may be very valuable, and the services almost valueless. But some large landed proprietors would be somewhat astonished if they were told that the services have been dispensed with, and their estates are liable to be resumed. It might as well be contended that, if lands were granted at a small quit-rent, the landlord might relinquish or dispense with the payment of the rent and take back the lands.

It is said, in the plaintiff's written statement, that the sunnud was granted upon condition of rendering services. But, even if it were so, the person to whom the condition is to be performed cannot, by dispensing with the performance of the condition, put an end to the grant. If lands were granted upon condition of paying a certain rent, the grantor or his representatives would have no right to say, when the lands are very valuable, "I will "dispense with the performance of the condi-"tion. I will exempt you from the payment "of the rent, and I will take back the estate." If he could not do so in the case of rent, why should he be able to do so in the case of services? But, even if the plaintiff could dispense with the services, how is it possible for him to treat the defendants as trespassers and turn them out of possession, when a rent of Rs. 61 a year has been paid for them for a period commencing prior to the Permanent Settlement? It appears to me that the defendants have as good a right and title to the lands, subject to the rent and service, as the Government itself has to the revenue; and the plaintiff, as an auction-purchaser, cannot be in a better position than the Government was at the time when the zemindary of which the lands are held was permanently settled.

A case was cited from the Sudder Dewanny Adawlut Reports for 1857, p. 1812, in support of the doctrine that the grantor of ghatwalee services could relinquish the services whenever he pleased and take back the estate. In that case, it appears that the estate was forfeited because the ghatwalee holders refused to attend on the auction-purchaser. It is true that the late Sudder Court went farther. They said: "But admitting, for argu-"ment's sake, that the defendants were in "possession from 1185, this fact would not

"entitle them to hold the lands at a fixed "jumma, or retain possession of them after "they had ceased to perform the duties for "which those lands were assigned to them." They say further: "The condition on which "the ghatwals held their lands is the per-"formance of certain services. The rent paid "by them is fixed with the object of preserv-"ing the connection between the ghatwalee "tenure and the parent estate, to show that "the former is part and parcel of the assessed "lands of the latter, let out to certain par-"ties at a nominal rent, on condition of the "performance of certain services in lieu of "the full rent." And again: "Further, as "the ghatwalee lands are given as remu-"neration for services, when that service "ceases, or is no longer required to be per-"formed, the title of the ghatwal ceases "also, and the zemindar who has never "given up his right to the lands has the "right to resume possession of them."

All this, however, was a mere *dictum* of the Court; and in a late case, No. 299 of 1864, decided on the 17th June 1865 (3 Weekly Reporter, p. 84), Mr. Justice Trevor (who was one of the Judges in the case decided by the late Sudder Court in 1857 which I have just read) said: "As to the case decided by the late Sudder Court on the 11th December 1857, that was one in which the ground of resumption was the default of the ghatwal. That being proved, the resumption was valid. To that extent the case is an authority, but all the remarks beyond that point are *obiter*, and consequently not binding upon us in the present case;" and the Court held that the ghatwals of Kurruckpore held a perpetual hereditary tenure at a fixed jumma, in money and service, and that, except for misconduct on their part, they could not be evicted.

In the case cited from the Privy Council, it was held that the Government was not entitled to resume the ghatwalee tenure; therefore that decision is not one which bears on the present case. It is clear that, in this case, the Government are not suing to resume the lands. The zemindar is asking to recover possession of the lands, on the ground that he no longer requires the services, though the Government, through the Collector, refuses to dispense with them.

The case No. 275 of 1865, decided by Justices Kemp and Louis Jackson (5 Weekly Reporter, p. 292), was cited. The marginal note says that, in the absence of express words to the contrary, ghatwalee lands held under a lease which neither confirms nor recognizes the pre-existing *status* of the ghatwals, nor confers on them any right other than that of holding the lands at a fixed rate as long as ghatwal service is required from them, are resumable by the zemindar when that service is no longer required.

In that case, the Government no longer required the services to be performed, and, therefore, it differs very materially from the present. But Mr. Justice Kemp does say, in delivering his judgment: "The contract was clearly one for service. Lands were given in lieu of wages, the jumma was fixed, and was payable as long as service was rendered; and, in the absence of distinct words to the contrary, the employer, the zemindar, is, we think, at liberty to determine the tenure, the services of the employé no longer being required."

I cannot agree in that view of the case. If, as stated in that case, the lands were granted to be held at a fixed rent so long as ghatwal services should be required, the rent might possibly be enhanced when the services were not required.

But, in this case, the sunnud expressly recites that a ghatwalee tenure of the mouzahs in question had been conferred upon Mahadeo before; and that tenure has, according to long usage, descended from father to son without objection. Therefore, even if the Government had dispensed with the services, I should hold that the lands were not liable to be resumed, and the tenants turned out of possession.

Clearly, the zemindar had no right to dispense with those services, which had been reserved by the former Government for the public benefit. Suppose the former Government had granted land for services of a religious nature to be performed. The British Government would not require those services, but that would be no reason for determining the tenure of the person who held the lands upon those services, as long as he is willing to perform them. The tenure is not to be determined merely at the will or caprice of the landlord, when the land has become valuable probably by the exertions and the expenditure of capital by the tenant.

But, whatever may be the case as regards the ghatwal services, it appears to me that the plaintiff, as auction-purchaser, is not entitled to avoid the tenure altogether and to eject the defendants.

The rent of 61 rupees has been paid for a period commencing prior to the Permanent Settlement. The case falls within Section 37, Act XI. of 1859, which is as follows: "The "purchaser of an entire estate in the perma-"nently-settled districts of Bengal, Behar, and "Orissa, sold under this Act for the recovery "of arrears due on account of the same, shall

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"acquire the estate free from all encum-"brances which may have been imposed upon "it after the time of settlement." The tenure, from what has been shown, is not an encumbrance imposed upon the estate after the time of settlement, but it is an encumbrance arising out of a grant made even before the East India Company acquired the Dewanny. The Section goes on: "and shall be entitled "to avoid and annul all under-tenures, and "forthwith to eject all under-tenants with "the following exceptions: *First*, Istemraree "or Mokurruree tenures which have been "held at a fixed rent from the time of the "Permanent Settlement."

Now, it is clear that, as regards rent, the holders of these lands have never paid any higher rent, since the time of the Permanent Settlement, than 61 rupees. They have therefore been holding at a fixed rent, though subject also to the performance of ghatwalee services. It never could have been intended that, if a man held at a fixed rent and ghatwalee services under a tenure created before the time of the Permanent Settlement, and long before the East India Company came to the Dewanny, that he could be turned out of possession, merely because the auction-purchaser thinks fit to dispense with the performance of the services.

It is contended for the plaintiff that, because the land was held at a fixed rent and subject to the performance of certain services, the holder of the tenure might be ousted by an auction-purchaser. I should say that a holding at a fixed rent and other services would fall within the Clause to which I have referred, and that, if the other services are performed, or the holder of the tenure is willing to perform them, an auction-purchaser could not treat the tenure as an encumbrance which he was at liberty to set aside, notwithstanding that the previous holder of the zemindary could not have set it aside. The object of the Sale Law was to protect the Government revenue. It was to take care that zemindars should not create encumbrances that would make the estate not worth the revenue assessed upon it. If a zemindar creates encumbrances after the date of the Permanent Settlement, as against an auction-purchaser, those encumbrances, with certain exceptions, are void.

The next exception in the Section is: "*Secondly*, tenures existing at the time of "settlement which have not been held at a "fixed rent."

It is said that, in the present case, the tenure has been held at a fixed rent and something more. Still it is a tenure existing at the time of the Permanent Settlement. The case clearly falls within the first or second exception, and is one of those intended to be protected. The Section says that an auction-purchaser shall acquire the estate free from encumbrances which have been imposed upon it after the time of settlement. The Section then goes on: "and shall be entitled to avoid and annul all under-tenures, and *forthwith to eject all under-tenants, with the following exceptions*." If the case falls within either of the exceptions, the tenants are not liable to be ejected.

This suit, as already pointed out, is for possession and mesne-profits. It is not necessary to consider the question whether, if the Government chose to dispense with the ghatwalee services, and to exempt the tenants from the performance of those services, the rent of the land might be enhanced to the extent of the value of the services dispensed with.

The only question now before us is whether the zemindar has a right to treat the owner of this tenure as a trespasser, and to say that he has been a trespasser, and liable to mesne-profits from the date of the auction sale. It appears to me that he has no such right, and, consequently, that this action cannot be maintained, and that the judgment of the Lower Court must be affirmed with costs.

*Trevor, J.*—I entirely concur with the conclusion at which the learned Chief Justice has arrived.

The plaintiff in this case, who happens to be an auction-purchaser at a sale for arrears of revenue, which took place in April 1863, brings the present suit to eject the defendant from his ghatwalee tenure, inasmuch as the services for the performance of which the tenure was granted have been dispensed with for a long time, and there is no necessity for the service. He also sues for mesne-profits from the date of his purchase.

The defendants allege that the grant under which they hold is dated 1150 or 1743; that, though words of inheritance are not expressly inserted in it, yet, as it has always been treated as one descendible to him by the former zemindars of Dustpore, that plaintiff has no right to eject him; and that, if he, defendant, is not entitled by virtue of his grant to hold at a fixed rate, still, on the ground of long possession, it is not competent to the plaintiff to resume the tenure.

The Government appeared for the purpose of asserting its rights, and its intention, when necessary, to demand the services of the ghatwal.

On these statements, the question before us is whether or not the plaintiff has the right to treat the defendant, the ghatwal, as a trespasser, and to eject him from his tenure simply on the ground that the performance of the ghatwalee service has been dispensed with for a long time, and that in his, plaintiff's opinion, there was no necessity for the service.

In order to make good his claim, the argument of the learned Counsel, Mr. Doyne, on plaintiff's behalf, was somewhat to the following effect; that the relationship which existed between the grantor of the defendant's grant in 1150 or 1743, and the ghatwal, was simply that of master and servant under a contract, the latter receiving land instead of money for his services; that, such as the relation was then, such it remains now; that as there are no words in the grant of a hereditary nature, and nothing fixing the grant, even to the grantee's life, it remains competent to the grantor to determine the services whenever he thinks fit to dispense with them; that he is the zemindar, under the Decennial Settlement, who has succeeded to the rights of the original grantor, and that, consequently, he can act as that party could have done; that the responsibility to Government to keep up the ghatwals was in old time with the zemindar; and that the notion that any particular lands were set aside for that purpose, which purpose must be respected at the present day, is erroneous; that that responsibility of zemindars was continued at the Decennial Settlement, and the zemindary estate became security for the due performance of the duties; that, consequently, whether Government requires the services of the ghatwals or not, he, plaintiff, is at liberty to eject defendant from his land at pleasure, as being a mere tenant-at-will, holding himself responsible for the due performance of the duties of ghatwal to Government.

The contention of the learned Counsel seems to be altogether opposed to the view which the Privy Coucil took as to the nature of the Kurrukpore ghatwalee tenures in the case of Rajah Lelanund Singh *vs.* the Bengal Government; * and as the ghatwalee villages in suit are situated in a Pergunnah adjoining to Kurrukpore, in the same tract of country, and within the same Zillah, the reasoning which applies to the latter will apply legitimately to the former, especially as it has not been suggested to us that any difference exists between the tenures in the two Pergunnahs.

* Moore's Indian Appeals, Vol. 6, pages 101 to 133.

Their Lordships, in the course of that judgment, after entering into the mode in which these Provinces were administered in 1765, and subsequent years anterior to the Decennial Settlement, and after remarking that many of the greater zemindars within their respective zemindaries were entrusted with rights and charged with duties which properly belonged to the Government, and describing what arrangements were made for the payment of public officers of the zemindary for the police, and for the chowkeedars and others, proceed as follows: "Besides the disorder which prevailed generally through the Provinces, "particular districts were exposed to "ravages of a different description. The "mountain or hill districts of India were "at this time inhabited by lawless tribes "asserting a wild independence, often of "a different race and different religions "from the inhabitants of the plains, who "were frequently subject to marauding "expeditions by their more warlike "neighbours. To prevent these incursions, "it was necessary to guard and watch "the ghats or mountain passes, through "which these hostile descents were made, "and the Mahomedan rulers established a "tenure called ghatwalee tenure by "which lands were granted to individuals "often of high family at a low rent, or "without rent, on condition of their performing those duties, and protecting and preserving order in the neighbouring districts;" and again, in another part of their judgment, alluding to land held by ghatwals, their Lordships observe: "That they were held by "a tenure created long before the East "India Company acquired dominion over "the country; and though the nature and "extent of the right of the ghatwal in "the ghatwalee villages may be doubtful, "and probably different in different districts and in different families, there "clearly was some ancient law or usage "by which these lands were appropriated "to reward the services of ghatwals; "services which, although they would "include the performance of duties of "police, were quite as much in their origin "of a Military as of a Civil character, and "which required the appointment of a "very different class of persons from ordinary police officers."

Such being the general nature of a ghatwalee tenure in Bhaugulpore, as laid down by the Privy Council in a judgment in which an examination of the nature of tenure was necessary to enable their

Lordships to determine the immediate point before them, namely, whether these tenures were included in or excluded from the zemindaries of the zemindar at the time of the Decennial Settlement, and liable or not liable to resumption by Government—what do we find in the sunnud filed by the defendant, and dated 1150, or 1743, the genuineness of which is not questioned? It is addressed to the mutusuddees for the time being and to come, the chowdhries and canoongoes of the Pergunnah Bhaugulpore. and recites "that "whereas the office of ghatwal of Tuppeh, "Dabeegunge, pertaining to the said Per-"gunnah, and Mouzah Khuteel Doomria and "Gopalpore, and appertaining to the said "Tuppeh, were assigned to Mahadeo as a "ghatwalee tenure before this, and whereas "he has now also been confirmed, as per "detail below, in his post as before, therefore "it is incumbent that, in the performance of "the duties attached to the said service, he "should guard and protect the roads, and "watch over the Tuppeh with great diligence, "and should take care of the ghats and passes, "so that travellers and passengers may "travel without fear, and no thieves, high-"way robbers, or murderers may obtain shelter "within the said limits, so that, if the property "or cattle of any party be stolen or plundered, "or should a murder be committed by night, "he should find out the actual thieves with "the property, and transmit them to the "Huzoor with proper care and precaution. "Should he fail to trace out the property or "cattle, he will be answerable for the value "thereof, together with a fine to the Sircar. "He should cultivate the villages aforesaid "with proper efforts, and enjoy the produce "thereof, year after year and generation "after generation, in return for his ghatwalee "service."

Now, some of the duties mentioned in this sunnud are of a semi-Military nature, and this sunnud was, it seems clear, granted by the zemindar, acting as an officer of Government and with the consent of higher authority; it consequently takes the nature of a grant by the State to the grantee, on the condition of the performance of certain public services. It is a grant, in its express terms, personal to Mahadeo Singh—a life-grant, in fact; and though it recites that the office of ghatwal and the lands had been assigned to Mahadeo before, it does not appear to me that, even by the light of the subsequent usage as to the grant, that the original grant can be presumed to have been hereditary in terms; but it is, in my opinion, one of those grants which were so common in Mahomedan times, in terms limited to the life of the grantee, but which by usage were considered to convey a hereditary right, with or without the payment of a fine. Moreover, the original grantee died, it seems, before the Decennial Settlement, and at that time his son Munoruth was in possession. Since then the grandson and great-grandson of Mahadeo have succeeded, and, as far as the evidence goes, as a matter of right. Thus, the course of actual succession under it confirms the opinion expressed by me as to the nature of the original grant, and these direct successions have taken place notwithstanding that the estate has been sold three times for arrears of revenue, and the plaintiff is the fourth purchaser.

Under the grant propounded by them, the grantees, therefore, show an uninterrupted possession in direct succession of more than 100 years—even back to a period before the East India Company acquired the Dewanny.

Turning, then, to the title of the plaintiff, it seems to rest on the presumed nature of the contract between the defendant's ancestor and the zemindar in 1743; and the fact that plaintiff is an auction-purchaser is brought forward rather, it would seem, to meet an objection which might have been taken by defendants on the score of 60 years' uninterrupted possession by them, than to justify plaintiff's title which would be equally good on the reasoning of the learned Counsel whether he was or was not an auction-purchaser.

Be that as it may, it seems to me that the claim of plaintiff, as put forth by Mr. Doyne, has no foundation either in reason or in fact.

The zemindar in 1743 was a Government servant, and in that character, as before observed, the grant was made; and whatever character the zemindar may have filled from 1765 to 1790, he only in the last year became the owner, in a strict sense of the term, of the estate of which these lands form a part. There can be no doubt that, before that date, the grantee had paid, as he has paid up to the present time, 61 rupees as rent, though under what circumstances that 61 rupees was originally assessed on his tenure, which originally bore no zemindary rasoom, or rent, does not appear; but bearing that jumma at the Decennial Settlement, the land was included in the plaintiff's zemindary, and it became a dependent tenure therein, burdened with, and appropriated to, the ghatwalee service, and bearing the money-rent which it bore before.

The contention of the learned Counsel as to the effect of the Decennial Settlement on the parties seem to me as erroneous as his contention regarding the original contract between them. The settlement did not make the zemindar directly liable for anything, nor did it make his zemindary generally liable for the retention by him of the ghatwals; it simply gave him the appointment, and, though this is more doubtful, the dismissal for misconduct, of those parties occupying his lands which had been devoted, before his rights accrued, to a particular object, and which were still to be devoted to that object, as long as the Government required it—a requirement which, as far as regards defendant's land, exists up to the present day.

As to any argument to be drawn against plaintiff from Section 37 of Act XI. of 1859, it appears to me that that law looks solely to tenures paying money-rents alone, and is altogether inapplicable to the case of tenures burthened with a condition of service. I therefore forbear to make any further remarks upon it.

Altogether restricting myself to the question which is alone before the Court, and looking to the title of the defendant, and to the claim set up by the plaintiff, I have no hesitation in holding that the plaintiff is not entitled to eject the defendant on his own mere motion, and I would dismiss the plaintiff's claim with costs.

*Loch, J.*—There is a difference between this case and the case reported at page 1812 of the Sudder Dewanny Reports of 1857 which must be noticed. In that case, the ghatwal had been dismissed for misconduct, and the zemindar then sought to take possession of the lands; in attempting to do which he was opposed by the ghatwal. In that case, no opposition was offered by the Government to the proceedings of the zemindar.

The expressions made use of in that judgment, though applicable to that particular case, are perhaps too general, and cannot properly be made to apply to other cases arising under a different set of circumstances. In that judgment, also, no reference was made to the right of Government to insist on the performance of police-duties. But in a subsequent judgment of 1858, reported at page 1471 of the Sudder Decisions, it was held that, so long as the Government claimed the right to have police-duties performed by the ghatwals, the zemindar could not resume the lands.

In the present case, the zemindar seeks to evict the ghatwals and to take possession of their tenures. The ghatwals have not committed any act of misconduct, and have expressed no unwillingness to perform their police duties, and the Government have expressed their intention to preserve their right to the services of the ghatwals. Even if the Government were to give up that right and declare that police-duties were no longer required from the ghatwals, I think that the utmost compensation the zemindar could claim in lieu of the loss of service would be an enhancement of the rent now paid by the ghatwal. He could not oust the ghatwal as a trespasser and take possession of his land. I agree with the Chief Justice in thinking that this case should be dismissed with costs.

*Jackson, J.*—I was one of the Judges who referred this case for the consideration of a Full Bench, and I think it right to state my opinion separately, especially as, though I concur in the conclusion at which the Chief Justice has arrived in this particular case, I cannot concur in all the reasons which have led His Lordship to that conclusion. I need not say that, if I differ from him in any respect, it is with great deference and with extreme reluctance.

It is said that the Principal Sudder Ameen has decided this case upon two points: *1st*, on the ground that the defendants, holding these lands under a tenure which commenced as far back as the year 1150 Fuslee, cannot now be ejected; *2ndly*, because they are protected under the Clauses of Section 37, Act XI. of 1859; and that on both points he was right.

Taking the latter portion of the case first, I must say it appears to me that Section 37 of the present Sale Law does not apply to the case. It cannot be said that these ghatwalee tenures are "encumbrances which have been imposed upon the estate after the time of settlement." In respect to the present tenure, it was one created undeniably before the date of the settlement, and it was the remuneration set aside, apparently by a person having authority in that behalf, for the performance of specific duties.

As to the word "under-tenures" which the auction-purchaser is entitled to "avoid and annul," those, I think, must be rent-paying tenures, where the rent is resumed as a consideration, more or less sufficient, for the use of the land; and this deduction from the zemindar's assets was undoubtedly considered at the time of settlement. I think, therefore,

that neither the power of the auction-purchaser to avoid tenures, nor the protection given by the 1st and 2nd Clauses annexed to that Section, will apply in this case. It appears to me that the power of the original zemindar to assess or enter upon these lands would have been just as extensive and valid as the power of the auction-purchaser.

The question, then, is as to the tenure itself. Now, I may at once say that, when this case was referred for the consideration of a Full Bench, that order was made by myself and my brother Markby almost at the outset of the argument. The facts of the case had not been fully gone into, and it was because this case appeared to raise precisely the point decided by the 2nd Bench in the case cited (3 W. R., p. 84), and because we desired to give an opportunity for considering the correctness of that decision, we thought it advisable to refer the case to a Full Bench. But, when we come to examine it more minutely, the present case appears to differ very materially, both from the case decided by myself and my brother Kemp, and from the former case; and, in fact, it is in holding this case to be on all fours with that in the 3 W. R. that one principal error of the Court below appears to me to consist.

The present suit has for its object to oust from possession, and recover mesne-profits from the defendants who are holding under title which commenced admittedly in 1743—that is to say, more than 20 years before the East India Company was invested with the Dewanny of these Provinces. The grant, moreover, under which the defendants hold was not the mere grant of the zemindar, but it appears very distinctly, both from the wording of the sunnud, and from the successive endorsements of various Departments which it bears, that it was the act of some person who, for that particular purpose at least, exercised the powers of the existing Government. In considering this sunnud, I feel myself bound to depart a little from the views taken by the Chief Justice. And, in the first place, it seems to me desirable to reject all analogies from feudal or other tenures in England. Institutions, tenures, government, and laws in the two cases are widely different, and we shall only, I think, embarrass ourselves if we make use of arguments drawn from one system for the purpose of inferences as to the other. It appears to me that there is a clear distinction between the grant of an estate burdened with a certain service, and the grant of an office the performance of whose duties are remunerated by the use of certain lands. The sunnud before us appears to me most unmistakeably to belong to the latter class. It confers on Mahadeo the *Khidmut-i-ghatwalee*, *i. e.*, the *service* in office of ghatwal, with the mouzahs annexed, as remuneration, exhorts him to diligence in the performance of his duties, and enjoins the cultivation of the lands.

Now, it is said that this is a confirmation of a previous grant. I do not understand that it is in the sense of the recognition and renewal of a full grant previously conferred. On the contrary, there is no reference to any previous grant, and, as far as I can judge, this was the first sunnud to Mahadeo, or to any of his family. I understand that Mahadeo, previous to the granting of this sunnud, was provisionally in the performance of this service, and I understand this confirmation *(vakeel dushtan)* in a sense familiar enough in Indian practice, *i. e.*, to confer in permanence the office at first held temporarily. A person is placed on probation in charge of duties which demand the exercise of particular qualities in order to their efficient discharge; he is found to possess those qualifications, and to perform those duties with efficiency. Upon that he has the *Khidmut* formally conferred upon him with the tenure which is to support it—that is to say, he is confirmed in the office, and declared entitled to hold the land.

Then, is the grantee entitled to hold for ever for himself and his heirs? or was the grant for his life? was it subject to be divested, and under what circumstances? Now, there is a considerable distinction between the positions and the rights of ghatwals in different parts of the country. It appears from the public documents referred to in the decision of the Privy Council (in Rajah Leelanund Singh's case, 6 Moore, p. 101), and from the account given in Harrington's Analysis (Vol. II., page 236, and Vol. III., page 511), that ghatwalee tenures in Bishenpore, Beerbhoom, Burdwan, and Bhaugulpore, may differ in a great degree, both as to extent and importance, and as to the conditions under which they are held—some being expressly declared hereditary, others not so.

It may be worth while to mention that the case referred to by my Lord in his judgment from the 6th Select Reports, page 169 (Hurlal Singh, Appellant), was a Beerbhoom case. In Beerbhoom we know that ghatwalee tenures are hereditary, and in that case it was held that they descend to the eldest son, and not to sons generally.

I do not find that it has been established either in this case or elsewhere that Bhaugulpore ghatwalees were ordinarily descendible. But certainly in this case we cannot but see that lands originally granted to Mahadeo as remuneration for his performing the duties of ghatwal by the sunnud of 1150 have been held in succession by himself, his son, grandson, and descendants to the present day. It appears also that some portion of the rights and interests of his descendants has been sold in execution of a decree, and was purchased by some of the present defendants. This is a circumstance which has not been insisted upon by the plaintiff, but it seems quite opposed to the nature of ghatwalee holdings.

I accept this state of facts as explaining the nature of the sunnud, for it appears to me that the terms of the sunnud are plain in themselves and require no explanation. I cannot say either, without fuller evidence of the facts, that the course of events or usage has made that descendible which was not of itself descendible. I should prefer to accept the explanation, which we find in the report cited in 3 Harrington's Analysis, page 511, which states that, "although the grant "is not expressly hereditary, and the ghat-"wal is removeable from his office and the "lands attached to it, for misconduct, it is "the general usage, on the death of a ghat-"wal who has faithfully executed the trust "committed to him, to appoint his son, if "competent, or some other fit person in his "family, to succeed to the office."

Still, I think it would be a great deal too much to say that, when these defendants are holding as representatives of a former ghatwal, or by right of a person whose tenure commenced under a valid grant of ghatwallee more than 100 years ago, and where it has been allowed since then to change hands by descent or purchase without question, the zemindar should be competent, of his mere motion, without the assent and against the will of the Government, to put an end to the ghatwalee, to deprive the ghatwal, and to treat him as a common trespasser. I am anxious in this case, as in the case that my brother Kemp and myself decided, to avoid entering into larger questions than the case requires. In this present case it appears to me that the plaintiff cannot be entitled to possession of the land. Whether he can sue for the purpose of enhancing or assessing the rent, is another question.

In the case decided by the late Sudder Court in 1857, there was an alleged misconduct on the part of the ghatwal, and he was consequently dismissed from his office. Here there is no allegation of misconduct. The plaintiff simply says: "I, the zemindar, have "no further occasion for ghatwalee service, "and I dispense with your services accord-"ingly." Whether the Government is itself competent to abolish the office, which in the necessity of the times it created, and resume or sanction the resumption of the land which it assigned as a remuneration for that service, is a question which has once been considered, but which I am quite willing and ready to re-consider if the occasion should arise.

Thus, while I fully concur in the dismissal of the plaintiff's suit, I do so for reasons which belong strictly to the particular case, and not upon the wider grounds stated by my Lord, and adopted by the majority of the Court.

*Shumbhoonath Pundit, J.*—The plaintiff, appellant, has not shown that he has any right to terminate the service with condition of which the ghatwalee tenure in dispute was originally given to the ancestors of the defendants long before the Dewanny, and which has since been held by them and their heirs, according to the usage of the country, from generation to generation. Government is entitled to the service, and has the superintendence of it. It does not say that it has dispensed with that service, nor does the appellant plead that Government has terminated the said service.

On the contrary, we have got Government before us, urging their right to claim the service of ghatwalee from the defendants.

In such a state of things, it is sufficient to say that the plaintiff has failed to prove the very ground upon which he is suing to dispossess the defendants.

I have no hesitation in declaring that, even if the termination of the ghatwalee service had been proved, I would not have held that, owing to this determination, plaintiff is entitled to dispossess the defendants of the lands in dispute.

The fact of his being an auction-purchaser gives to the plaintiff no additional rights. It is unnecessary to decide in this case what could have been the proper order if a case for enhancement had been brought by the plaintiff, appellant.

I entirely agree with my seniors in dismissing the claim and the appeal of the plaintiff with costs.

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The 10th September 1866.

*Present:*

The Hon'ble C. B. Trevor, G. Loch, J. P. Norman, and Shumbhoonath Pundit, *Judges.*

Case No. 1553 of 1863.

**Amendment of Plaint—Power of Lower Courts.**

*Special Appeal from a decision passed by Mr. O. Toogood, Judge of Cuttack, dated the 30th January 1863, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 29th May 1862.*

Gobind Mohapattur and others (Defendants), *Appellants,*

*versus*

Madhub Persad Pundit Surborakur on behalf of Boydonath Pundit, Minor (Plaintiff), *Respondent.*

*Baboo Nil Madhub Sein* for Appellants.

*Baboo Kishen Kishore Ghose* for Respondent.

The power of the Lower Courts to amend a plaint extends by a *vivâ voce* examination to the elucidation of what is ambiguous in the claims of the contending parties, to the amendment of what is erroneous, and the supplying what is defective, but not to the conversion of a suit of one character into another inconsistent with and opposed to it—*e.g.*, of a suit for possession with mesne-profits into a suit for resumption.

*Loch, J. (Trevor and Shumbhoonath Pundit, JJ., concurring).*—THIS special appeal came before the Officiating Chief Justice Norman and Mr. Justice Kemp, who referred the case for the decision of a Full Bench in the following words:—

"The case to go before a Full Bench on the question of power of the Lower Courts to amend, this Bench being inclined to think that the view taken by Mr. Justice Trevor and Mr. Justice Macpherson in Nos. 1678 and 1679 unduly limits the power of amendment given by Sections 31 and 141 of Act VIII. of 1859."

The cases alluded to in the above reference are of the same nature, and with the same object as the present suit No. 1553 of 1863. The plaintiff is the same in all the cases, but the defendants are different. The suit, as brought by plaintiff in Nos. 1678 and 1679, was to recover possession with mesne-profits from the defendant, a lakherajdar, of lands the possession of which had been confirmed to the defendants under Act IV. of 1840. "While the suit was pending, the plaintiff "petitioned to have the case converted into "a resumption-proceeding, paying the neces-"sary stamp-duty. This was done, and the "plaintiff obtained a decree. The Judge "admitted the change in the nature of the "suit relying on a precedent of this Court "decided on the 15th July 1852." The judgment passed by this Court was in the following words: "We think the "whole proceedings below highly irregular. "The suit originally was for possession of "certain lands with mesne-profits. It was "converted into a suit in which neither pos-"session nor mesne-profits could be given, "but in which a decree of quite a different "nature must be passed. Again, in the suit "as originally brought—a mere boundary-dis-"pute between two parties—the burden of "proof lay primarily on the plaintiff, whereas, "in the second, the burden lay on the "lakherajdar entirely."

With regard to the point referred for the decision of the Full Bench, we find from Section 26, Act VIII. of 1859, that the plaint is required, among others things, to contain the redress sought, the subject of the claim, the cause of action, and when it accrued. These, we think, must be distinctly specified in the plaint, so that the defendant may perfectly understand the nature of the suit that is brought against him. Section 29 prescribes that, if the plaint do not contain the particulars hereinbefore required to be specified, or if it contain particulars other than those required to be specified, whether relevant to the suit or not, or if the statement of particulars be unnecessarily prolix, or if the plaint be not subscribed and verified, the Court may reject the plaint, or at its discretion may allow the plaint to be amended. By Section 31, the Court may reject the plaint of the plaintiff, if, on being required by the Court to correct an improper valuation, or to supply additional stamped paper, he shall fail to comply with the requisition. Under Section 32, also, plaintiff may be allowed to amend his plaint when upon the face of it, or after examination of the plaintiff, the subject-matter does not constitute a cause of action, or the right of action is barred by lapse of time.

The Sections of the law above quoted clearly indicate the time at which any amendment in the plaint should be ordina-

fily made, and the nature of that amendment, which extends merely to the correction of any error in the plaint—not to an entire alteration of the claim.

Again, Section 139 empowers the Court, on the first hearing of the suit, to enquire and ascertain upon what questions of law or fact the parties are at issue, and thereupon to frame and record the issues of law and fact on which the right decision of the case may depend. The Court may frame the issues from the allegations of facts which it collects from the oral examination of the parties or their pleaders, notwithstanding any difference between such allegations of fact and the allegations of fact contained in the written statements, if any, tendered by the parties or their pleaders. And Section 141 enables the Court, at any time before the decision of the case, to amend the issues or frame additional issues; and all such amendments as may be necessary for the purpose of determining the real question or controversy between the parties shall be so made. These Sections undoubtedly give the Judges, who have to dispose of a case in the first instance, great freedom to enable them to ascertain what is the real question at issue between the parties; but when the Judge, after examination of the parties or their representatives, finds that the real dispute is one altogether at variance with the claim stated in the plaint—if, for instance, as in the case referred, he find the claim as shown in the plaint to be for possession with mesne-profits, and the plaintiff at the first hearing converts this claim into one for resumption—we think that the Judge should not permit such an alteration, and that, if the plaintiff be unable or unwilling to go on with the suit as originally brought, the Judge should dismiss the case with costs. The powers vested in a Judge under the above quoted Sections, though extensive, are still limited by the nature of the suit as brought by the plaintiff. The Judge, on the representation of the plaintiff, cannot alter the nature of the suit, or change the cause of action. This power extends by means of a *vivâ voce* examination to the elucidation of what is ambiguous in the claims of the contending parties, to the amendment of what is erroneous, and the supplying what is defective; but not to the conversion of a suit of one character into another inconsistent with, and that may be opposed to it; and the issues, we apprehend, must be founded on the claim as brought in the plaint, and not on something else which plaintiff at some subsequent period may prefer to consider as his cause of action, but which is altogether at variance with the relief prayed for in the plaint.

*Norman, J.*—In this particular case, it was clearly improper to allow an amendment of the plaint, which was originally one for possession with mesne-profits, by making it a suit for resumption.

The suit was instituted on the 4th of May 1861, just two years after the passing of Act XIV. of 1859. The additional stamp, as in a plaint for resumption, was put into Court on the 25th of April 1862. Whether the amendment would really have had that effect or not, it was probably intended to secure to the plaintiff the benefit of Section 18 of that Act, by exempting the suit for resumption as a suit instituted within two years after the date of the passing of Act XIV. from the operation of Clause 14 of Section 1 of that Act. It is clear that no amendment should ever be allowed which might tend to deprive the opposite party of a right conferred on him by law.

My learned brothers, in quoting Section 32 of Act VIII. of 1859, overlook the words *in any case*. The language is, "provided that the Court *may in any case* allow the plaint to be amended, if it appear proper to do so." Again, by Section 141, at any time before the decision of the case, the Court may amend the issues, or frame additional issues in such times as to it shall seem fit; and *all such amendments* as may be necessary for the purpose of determining the real question or controversy between the parties *shall be so made*.

These are large powers of amendment, and they should be construed, as remedial provisions, liberally. In cases of fraud, especially when practised on infants, by agents in foreign countries, by trustees, or by directors of public companies on their shareholders, it constantly happens that the true facts of the case, the rights of the parties, and the remedies to which the complaining party is entitled, are discovered during the progress of the case, and from the answers and admissions extorted from the adversary. It is notorious to any one acquainted with Courts of equity that in such cases repeated amendments of the bill are necessitated.

The general power of the Court under Act VIII. to amend a plaint in a case where justice requires such an amendment at any time during the progress of the cause has been distinctly asserted by a Full Bench of seven Judges of this Court, in Heera Mone

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Dabee *vs.* Koonj Behary Holdar, 2 Weekly Reporter, page 207, decided since this case was argued. And that decision has since been acted upon in hundreds of cases.

The result of our judgment in the case is that the decision of the Lower Court will be reversed, and the suit will go back for trial as a suit for possession. The appellant will recover the costs of this appeal in this and the Lower Appellate Court, and the costs of the hearing which has already taken place in the first Court.

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The 10th September 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Examination of Witnesses—Plaint and written statement (Subscription and Verification of).**

Case No. 134 of 1866.

*Regular Appeal from a decision passed by Baboo Russick Lall Bose, Principal Sudder Ameen of Rungpore, dated the 5th February 1866.*

Keenoo Singh Roy, for self and as guardian of Luchmun Singh Roy, Minor (Defendant), *Appellant,*

*versus*

Eshan Chunder Roy and others (Plaintiffs), *Respondents.*

*Mr. R. T. Allan* and *Baboo Greeja Sunkur Mojoomdar* for Appellant.

*Baboos Dwarkanath Mitter, Unnoda Pershad Banerjee, Sreenath Doss,* and *Kishen Dyal Roy* for Respondents.

Suit laid at Rupees 25,000.

The plaintiff not having shown any *bonâ fide* intention to examine as witnesses two of the parties to the suit, and not having complained of the refusal of the Court below to add them to the list of witnesses until the arguments on the appeal were concluded and decision was about to be given, the High Court declined to allow the plaintiff to put in fresh evidence at such a stage of the proceedings.

It is incumbent on all Courts, without regard to rank or station, to see that plaints and written statements are subscribed and verified by the parties in person, except when unable to do so by reason of absence or other good cause when they may be allowed to be subscribed and verified by competent persons only.

THIS was a suit brought to obtain possession of 11 mouzahs in the district of Rungpore, claimed under a putnee lease granted by the Rajah of Beerbhoom, dated the 11th of Poos 1271, at a permanent jumma of Rupees 2,206, for a consideration of Rupees 8,000. The defendant claimed under what he described as a mokurruree ijara pottah, dated the 25th Falgoon 1262, at a permanent jumma, of precisely the same amount, for which he paid Rupees 2,000 as a consideration.

The only question was, which of these two alleged leases was to prevail. The plaintiffs admitted that the defendant had been in possession since 1261, but they alleged that he held under a 7 years' lease which expired in 1268, and that, since that time, he had been holding over wrongfully; and the lease now set up they alleged to be a rank forgery.

The defendant produced his lease which was a perpetual lease at the rate above mentioned, and he supported it by seven witnesses, three of whom deposed to having seen the Rajahs execute the document at Beerbhoom where the Rajahs reside. The remainder spoke to having seen the transaction completed at Rungpore where the defendant resides, and they also verified the seals and signatures of the Rajahs.

The defendant also produced dakhilas for the years 1262-68, in some of which the nature of his tenure was described. They were properly stamped and verified by witnesses, and it also appeared that they had been filed in another suit more than a year previous to this suit being commenced.

It was also proved that, in the year 1268-69, a petition to obtain possession of these mouzahs under Act X. of 1859 was filed by one Gooroo Gobind Talookdar, through the mooktear of the Rajahs, against the defendants. Gooroo Gobind in that case claimed to have got a temporary lease of the whole talook, and, in order to oust the defendant, he filed a kubooleut or counterpart of a lease granted by the Rajahs to the defendant, which was the counterpart of a lease in all respects similar to that now set up by the defendant, except that, instead of being perpetual, it was for a term of seven years expiring in 1268.

In consequence of the money not being deposited for service of notice on the defendant, that case was struck off two days afterwards. The matter, however, having come to the ears of the defendant, he filed

a petition alleging that the real lease was a permanent one; that the kubooleut filed by Gooroo Gobind was forged; and praying that it might be impounded in order that criminal proceedings might be taken against Gooroo Gobind.

The document was retained in the Collector's office, but no criminal proceedings were taken. It was produced on this trial, and it is a palpable forgery; the stamp bearing a date long subsequent to that of the granting of the lease.

The principal answer to this case professes to come from the Rajahs themselves. They have been made parties to this suit, and they espouse the cause of the plaintiffs. A statement signed by one Kurar Mamood Sircar was filed on their behalf, in which they admit having granted a temporary lease to the defendant, but deny having granted a permanent one. They allege that in 1266 they granted a lease of the whole talook to Gooroo Gobind, and handed over to him the kubooleut of the temporary lease granted to the defendant; and they say, in general, but not very clear terms, that this kubooleut was secreted by Gooroo Gobind and the defendant, who at that time were in collusion with each other. They also affirm the lease relied on by the plaintiffs.

As to the latter point, the theory suggested by the plaintiff's Counsel is, that Gooroo Gobind and the defendant, having got possession of the *genuine* temporary kubooleut in the manner stated by the Rajahs, destroyed it, and agreed collusively that the abovementioned suit under Act X. should be brought for the express purpose of filing the *forged* temporary kubooleut; and that this was done with the view of enabling the defendant to carry out the fraud which he was then contemplating, of setting up a fictitious permanent lease.

Now, we are far from saying that such a device is beyond the reach of native ingenuity, or that it is in itself violently improbable, but it is idle to rest such a case on mere suggestion, and it rests here on nothing more. The utmost the plaintiff has shewn is, that Gooroo Gobind and the defendant were on friendly terms at some time in the years 1268-69 (whether before or after the suit under Act X. does not appear); and from this he argues that the proceedings under that case must have been collusive. But this is not the sort of reasoning upon which conclusions of fact can be founded in a Court of Law.

The direct evidence adduced by the plaintiff is for the most part absolutely worthless. He called a number of persons, servants of the Rajahs, who state that they neither saw nor heard of any ijara pottah being executed in favor of the defendant; others who stated that they heard the terms of the arrangement, and that it was for a temporary, not a permanent, lease; and one who stated that he saw the genuine lease, and that it was temporary only. But there is in the plaintiff's case this manifest defect, that, whereas the defendant has filed a complete series of dakhilas which have every appearance of being genuine, and which state that he holds under a permanent ijara pottah, the plaintiff has not filed a single chelaun in support of his assertion to the contrary. We have no hesitation in inferring from this that they correspond with the dakhilas, as the plaintiff, being supported by the Rajahs, has, no doubt, access to them, and, had it been otherwise, he would have undoubtedly filed them.

For these reasons, we think that the defendant Keenoo Singh Roy has established his ijara pottah, and that he is entitled to succeed in this case; and we reverse the decision of the Principal Sudder Ameen accordingly. The costs in this Court and the Court below will be paid by the plaintiff and the Rajahs jointly.

It may be as well to notice here that, at the very last moment, the Counsel for the respondents requested us to issue a commission to examine the Rajahs, who are parties to the suit, they being exempt from compulsory appearance in Court; but we thought it right to decline to grant this application. The plaintiff originally filed a list of 105 witnesses, *not* including the Rajahs. On the day before that fixed for the examination of witnesses, a general application to add the Rajahs to this list of witnesses was made by the plaintiff The amlah of the Court, in a report to the Judge, drew his attention to the fact that the points to which the evidence of the additional witnesses was said to relate were not in issue, and the Judge, therefore, refused to grant the application. When the case came to be fully enquired into, it no doubt became apparent that the testimony of the Rajahs was most important; but no application to examine additional witnesses was then made, although the examination of witnesses lasted for five months, and the decision was not given until six months after the application above alluded to. Nor has the refusal of the Judge

to allow witnesses to be added, ever been made a subject of complaint until the moment when the arguments on this appeal were concluded, and our decision was about to be given.

Under these circumstances, we have no doubt whatever that there has never been any *bonâ fide* intention to examine the Rajahs. Had the plaintiff really wished to do so, he would have put this in the very front of his case, and would have insisted at every stage on their evidence being produced; but he has done nothing of the kind, and has only recurred to the subject, as we think, to create an imaginary grievance upon which to dilate.

Even if this were otherwise, we should have great hesitation, in a case like the present, in allowing a party to give fresh evidence at this stage of the proceedings. If the plaintiff wished to give this evidence, he should have given it earlier, when the defendant could have commented on, and, if necessary, contradicted, the testimony of the Rajahs. Why should the plaintiff have the immense advantage of reserving his principal witnesses until the whole case is closed? We see nothing whatever to entitle him to such an advantage, and nothing to justify a course so exceptional as that proposed.

There is another point also which we think requires notice. We cannot refrain from expressing our strong disapprobation of the course which has been pursued in this case, of allowing the Rajahs to file their written statement through an entirely irresponsible person. By Section 123 of Act VIII. of 1859, the written statement of a defendant must be subscribed and verified in the same manner as a plaint by a plaintiff. And it is only when the plaintiff, "by reason of absence or other good cause," is unable to subscribe and verify the plaint himself, that the Court may allow the plaint to be subscribed and verified by a *competent* person on his behalf. We consider it a duty strictly incumbent upon the Court which admits the statement, to see that this provision is strictly complied with, without regard to rank or station, and that a defendant should, in every instance, subscribe and verify the statement himself, unless there be a real and substantial reason for his not doing so. Nothing can be more directly contrary to the spirit of the laws which the Courts of this country are called upon to execute, than that any distinction should be made in the strictness with which parties are bound to obey the provisions of the law. In this case, not only was no reason given for the Rajahs not subscribing and verifying the written statement themselves, but the person substituted for them is an inferior servant who can have no knowledge whatever of the facts which he pretends to verify.

The irregularity of the practice in the Mofussil Courts in this respect was strongly remarked upon in the case of Ram Mohun Mookerjee *versus* Rajah Nursing Deb, reported in the Indian Jurist of November 15th, 1862,* in a judgment of the Chief Justice, Mr. Justice Bayley, and Mr. Justice Kemp; and we hope that the remarks there made have not been without their effect. We regret to observe, however, by the present case, that the vicious practice has not been entirely eradicated.

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The 10th September 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Decree of competent Court (Effect of)—Landlord and tenant—Limitation—Prescription.**

Case No. 910 of 1866.

*Special Appeal from a decision passed by Mr. G. Bright, Judge of the Twenty-four Pergunnahs, dated the 24th March 1866, reversing a decision passed by Baboo Koylash Chunder Deb, Principal Sudder Ameen of that District, dated the 27th May 1865.*

Raj Narain Dutt and others (Plaintiffs), *Appellants,*

*versus*

Gour Monee Dossee and other (Defendants), Respondents.

*Mr. R. V. Doyne* and *Baboo Romesh Chunder Mitter* for Appellants.

*Baboo Gopal Lal Mitter* for Respondents.

The decree of a competent Court must be presumed to be valid and binding on the parties until the party attacking the decree clearly shews that it was improperly obtained by reason of fraud or misrepresentation practised upon the Judge by the party obtaining the decree.

*Quære.*—Whether a title to land can be gained by prescription without adverse possession.

* Also in Sutherland's Full Bench Rulings, p. 54.

THIS was a suit brought by the plaintiff to obtain khas possession of 20 beegahs and 8 cottahs of land situated in Sherbapore.

The plaintiffs admitted that the defendants had formerly held the above lands as their tenant, but they alleged that the defendant had attempted to set up a rent-free tenure, whereby it was contended that the relation of landlord and tenant was destroyed.

The defendant objected, *first*, that she had been in possession for more than 12 years without paying rent; and, *secondly*, she again contended that she was, in fact, entitled to hold the land rent-free, and that the proceeds were devoted to the service of an idol.

The facts of the case are that, in the year 1837, a dispute arose in respect of the same lands between the same parties, or persons through whom they claim, which ended in a decree professing to be founded on a solenamah entered into by the parties, in which it was adjudged that the lands in question were the plaintiff's rent-paying lands, and the rent was declared to be the annual sum therein mentioned.

Notwithstanding this decree, no claim for rent was made by the plaintiffs until the year 1860, that is for 23 years. A suit to recover arrears of rent was then brought, when the defendant set up the same defence as she has done now, namely, that the lands are rent-free lands devoted to the service of the idol.

This is the repudiation of her tenancy upon which the plaintiffs rely as a forfeiture. The defendant admits the repudiation, but calls upon the plaintiffs to prove the existence of any rent-paying tenure.

The plaintiffs in the Court below relied on the decree passed in the year 1837 as proving the rent-paying tenure. The Judge, however, rejected that decree, because he thought it was not proved that the defendant was a consenting party to it. He says, "I think "that it was incumbent upon the plaintiffs "to prove that Gour Monee (defendant) "was a consenting party to the solenamah, "for I find that it is alleged to have been "presented in her behalf; and that she was "cognizant of the suit, or of the subsequent "decree, is not shown." It appears, therefore, that the Judge thought it incumbent on the plaintiffs, who relied on the decree, to prove its validity. But in this we think he was mistaken. The allegation of the defendant was that, though her name appears in the proceedings, she was, in reality, not a party to the suit at all, and that she had no notice whatever of the proceedings, which were carried on fraudulently in her absence. She does not, however, produce a particle of evidence in support of this assertion, but calls on the plaintiffs to prove the contrary. We must presume, however, that the decree of a competent Court is valid and binding on the parties, and, whether made by consent or in litigation, that the Judge who passed it made proper enquiries, and was satisfied that he was legally entitled to do so. And this presumption will remain until the party attacking the decree has shewn, by good and substantial evidence, that, as against him or her, it has been improperly obtained, by reason of some fraud or misrepresentation practised upon the Judge by the party obtaining the decree. The Court below, as the case stood, ought to have accepted this decree without any enquiry as to how it was obtained.

But then comes the question whether, assuming the plaintiff to have established that, in the year 1837, the relation of landlord and tenant existed, the defendant having been in possession for a great number of years without paying rent, and, as the Judge has found, always verbally denying her landlord's title, can set up a claim to hold these lands against the plaintiffs.

Now, it is clear that, so long as the relation of landlord and tenant lasts, no limitation runs against the landlord, under Clause 12, Section 2, Act XIV. of 1859, because there is no cause of action. Nor does the mere denial by the tenant of the landlord's right put an end to the relation of landlord and tenant so as to enable the tenant to treat his possession as adverse to his landlord. So long as the tenant remains in possession, he is estopped from denying the title of the person who put him into possession. The fact that the defendant has ever since 1837 denied the plaintiff's title will, in our opinion, make no difference, so far as the Statutory bar of limitation is concerned.

Whether or not the defendant could set up any right in the nature of prescription, is a question which we are not called upon to determine. It may be worthy of consideration whether the holding of land for a great number of years without payment of rent, or other acknowledgment of tenure, ought not to confer a title even though it may be shewn that the relation of landlord and tenant originally existed, in accordance with a principle acknowledged by most systems of law. But in the present state of the law of this

country, it is clear that, in such a case, no title is, by the mere operation of law, transferred from the landlord to the tenant, nor any absolute bar created to the title of the landlord; at the most, there is only evidence from which a Court, having power to draw inferences of fact, might, under some circumstances, infer that the title had been by some means or other transferred, in analogy to the English law relating to rights of way and other similar easements, but which, by a strange exception, was never extended to the title to land in that country.

The case must therefore be remanded, with directions to the Lower Appellate Court to receive the decree of 1837 as conclusive proof that a rent-paying tenure then existed, unless it be clearly shewn by the defendant, by affirmative evidence, that, by reason of some fraud or misrepresentation, the decree is not binding upon her. Unless she can do this, the plaintiffs will be entitled to a decree in their favor, there being no pretence in this case that the relation of the parties which existed in 1837 has been subsequently changed.

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The 10th September 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Sale of land for arrears of Revenue—Sharer of joint talook—Registration.**

Case No. 171 of 1866.

*Regular Appeal from a decision passed by Mr. A. Abercrombie, Judge of Dacca, dated the 8th March 1865.*

Gour Chunder Goopto (Plaintiff), *Appellant,*

*versus*

Tara Monee and others (Defendants), *Respondents.*

*Baboos Onookool Chunder Mookerjee* and *Upprokash Chunder Mookerjee* for Appellant.

*Baboo Chunder Madhub Ghose* for Respondents.

Suit laid at Rupees 700.

A sharer of a joint talook, whose share consists of a specific portion of land, can obtain protection from a sale for arrears of revenue only under Section 11, Act XI. of 1859. Common registry of the talook, as a shikmee talook under that Act, will not preclude any person, thinking himself wronged by such registry from suing for the cancelment of the same.

In this case, the plaintiff sued to obtain khas possession of one beegah, seven cottahs, and ten chittacks of land which the plaintiff claimed as situated within Talook Romanath Goopto purchased by him at a sale for arrears of Government revenue.

The defendants claimed the land as their shikmee talook. Their case was that two brothers, Joy Chunder Gooho and Kalee Kishore Gooho, originally purchased a portion of the Talook Romanath Goopto, and that it was then agreed that the vendees should pay Rupees 13 as their proportion of the Government revenue direct to the Government. Subsequently, the two brothers purchased, at various times, the whole of the shares in the remainder of the talook. In Kartick 1262 (1856) the brothers made a gift of the portion comprised in their first purchase to their mother, the principal defendant, Tara Monee Chowdhrain.

The property so conveyed to the mother is what she now claims as a shikmee talook. In April 1863, application was made by the mother to the Collector for common registry of the property as a shikmee talook under Act XI. of 1859, and was sanctioned.

The defendant in this case relies on this registration, and contends that it is conclusive; but this cannot be, since Section 48 expressly enacts that a suit may be brought to set it aside, and that is the object of the present suit.

The fact is that the defendant in this case was not proprietor of a shikmee talook at all. She was, if anything, a sharer of a joint talook, whose share consisted of a specific portion of land; and, if she sought protection from a sale for arrears of revenue, she should have obtained it under Section 11 of Act XI. of 1859. This she has not done, and she can, therefore, set up no title against the sweeping rights of the auction-purchaser.

The appeal must, therefore, be decreed, and the decision of the Lower Court reversed with costs.

The 11th September 1866.

*Present:*

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

**Declaratory suit to establish right to land—Limitation—Adverse holding.**

Case No. 1105 of 1866.

*Special Appeal from a decision passed by the Judge of East Burdwan, dated the 17th January 1866, affirming a decision passed by the Sudder Ameen of that District, dated the 30th March 1865.*

Huronath Roy (one of the Defendants), *Appellant,*

*versus*

Jogendur Chunder Roy (Plaintiff) and others (Defendants), *Respondents.*

*Baboo Kedarnath Chatterjee* for Appellant.

*Baboo Juggodanund Mookerjee* and *Moonshee Ameer Ali* for Respondents.

**In a suit to establish a right to land, the cause of action arises when the defendant sets up an adverse holding. The mere non-payment of rent does not constitute an adverse holding; but, if a tenant openly sets up an adverse title and holds adversely, limitation runs.**

PLAINTIFF, having been defeated in a suit for rent, sues in the Civil Court for a declaration of his right to receive rent. Plaintiff is himself an under-tenant, and asserts that defendant is a tenant under him. Defendant asserts that he is a lakherajdar, and pleads limitation.

The first Court found that he had paid rent within 12 years, and decided against him. On appeal, the Judge passes over the question of limitation by saying that rent is a recurring cause of action, and, finding that defendant was once the tenant, decrees for plaintiff on that ground. Defendant appeals specially, on the ground that he is entitled to a decision on the point of limitation. This is not a suit for rent, but a suit to establish right to land. It must be brought within 12 years of the cause of action. The cause of action only arises when the defendant sets up an adverse holding. The mere non-payment of rent does not constitute an adverse holding, but, if a tenant openly sets up an adverse title and holds adversely, limitation runs. We think, therefore, that there must be a decision on the question of limitation. If defendant has held adversely for more than 12 years—if he has set up a title of lakheraj or the like before that time—the suit is barred; if not, as the facts are found, the decree will stand. Remand accordingly.

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The 11th September 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Limitation—Settlement (Regulation VII., 1822)—Decision on merits.**

Case No. 1553 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 17th March 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 8th August 1865.*

Shibo Doorga Chowdhrain and others (Plaintiffs), *Appellants,*

*versus*

Syud Hossein Ali Chowdhry and others (Defendants), *Respondents.*

*Baboos Kalee Mohun Doss* and *Doorga Doss Dutt* for Appellants.

*Mr. R. E. Twidale* for Respondents.

**A plaintiff, who seeks in the Civil Court to establish a right to settlement under Regulation VII., 1822, and to reverse the orders of the Revenue Authorities in the defendant's favor, must sue within 12 years.**

**A Court deciding a case on limitation ought also to go into the merits.**

THE grounds taken in this special appeal are—

I.—That the cause of action has been wrongly held by the Lower Appellate Court to have accrued to plaintiff on 13th March 1849, when the Collector ordered the money to remain in deposit, and referred the parties to a civil suit. The cause of action only arose on the 26th September 1863, when it was ordered to be paid away; and therefore the Lower Appellate Court has wrongly applied the Law of Limitation.

II.—That, when the Lower Appellate Court decided the case on limitation, it should not have gone into the merits at all, but

certainly not in the most avowedly superficial manner it has done.

III.—That no sufficient legal reasons are given by the Lower Appellate Court as required by law for its decision.

IV.—That the decision of 9th August 1830, relied on by the Lower Appellate Court, is no legal evidence of title, but merely a decision ordering the transfer of the case from the Civil Court for trial in that of the Special Commissioner.

This was a suit by plaintiffs to recover a share of malikana paid over by the Collector to defendants.

It is admitted by all parties that the plaintiffs and defendants held separate landed properties; that a chur near them was resumed; that the defendants obtained the temporary settlement, and that plaintiffs, special appellants, did not; and that the Collector, in 1849, ordered that the malikana should be held in deposit till plaintiffs and defendants settled their disputes amicably, or plaintiffs or others interested might establish their claim to settlement by civil suit as provided by Regulation VII. of 1822.

The plaintiff's claim to settlement had been rejected on the ground of defendants being in possession and, therefore, entitled to settlement.

Plaintiffs, it is not disputed, did not sue within 12 years of the date of such order of 1849.

After hearing the arguments of Counsel, we think, on the *first* plea, that the Lower Appellate Court has decided rightly. The Revenue Authorities considered defendants, and not plaintiffs, entitled to settlement under the provisions of Regulation VII. of 1822, and other Settlement Laws.

It was this decision which deprived plaintiff of settlement and also of malikana, which is merely a thing representing part of the benefits and rights to settlement. It was obviously the plaintiff's duty, under the provisions of Regulation VII. of 1822, to obtain such settlement by the aid of the Civil Courts, together with the reversal of the orders of the Revenue Courts in defendant's favor within the time allowed by law, *viz.*, 12 years; and, as he has not done this, we think plaintiff has been properly held to be barred by the Law of Limitation. In this view of the case, it is not necessary to go into the further pleas taken by special appellant; but we would observe, for the information of the Lower Appellate Court, that the objection of the special appellant, to the effect that, when a case is decided on limitation, the Court *cannot* go into the merits, is incorrect. There may be cases, especially such as are appealable to Her Majesty in Council, where it is most right that the merits should also be gone into, so that the Lords of Her Majesty in Council may be in a position, if they overrule the decision on *limitation*, to hear at once the appeal on the *merits*, and so save the parties the trouble and expense of remands to this country. The same principle will more or less apply, according to the circumstances of the case, to all appealed cases. But, at the same time, the investigation should be full, complete, and judicial, and not, as here, "briefly noticed" (to use the Lower Appellate Court's words) as a kind of decision by way of surplusage.

On the whole, then, seeing no reason to interfere with the decision of the Lower Appellate Court, we dismiss this special appeal with costs.

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The 11th September 1866.

*Present:*

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

**Joint Hindoo Family—Separation—Double share.**

Case No. 138 of 1866.

*Regular Appeal from a decision passed by the Principal Sudder Ameen of Midnapore, dated the 12th March 1866.*

Sree Narain Berah (one of the Defendants), *Appellant,*

*versus*

Gooro Pershad Berah (Plaintiff) and others (Defendants), *Respondents.*

*Messrs. R. V. Doyne* and *R. T. Allan*, and *Baboos Dwarkanath Mitter* and *Hem Chunder Banerjee* for Appellant.

*Baboos Sreenath Doss* and *Kishen Succa Mookerjee* for Respondents.

Suit laid at Rupees 14,961-12-1-2.

Where, with small aid from paternal property, separate and distinct properties are acquired principally through the exertions of particular members of a joint Hindoo family, such members are entitled to a double share upon separation.

THIS is a suit by a member of a Hindoo family for his share of the family estate.

He alleges that the family was altogether joint, but that, on separation, defendants have forced on him, as his separate property, a smaller portion standing in his name, and have themselves taken possession of a larger portion standing in their own names.

It is admitted that the family was joint in mess till they separated in 1269. But defendants allege that there was no ancestral property, and that the different members made separate acquisitions on their own behalf.

Plaintiff was examined in this Court, and did not very satisfactorily account for the absence of the books of the last years during which he was manager of the family, nor altogether acquit himself very well in the witness-box. But he has given a tolerable amount of proof to show actual joint enjoyment of the whole property by the whole family. Books are produced of the years 1263 to 1266, the genuineness of which seems hardly to be disputed, and some parts of which the defendant Sree Narain admits to be in his own handwriting. These show the receipts and payments of revenue on account of many talooks held in the name of different members of the family, all credited and debited as if to a common stock, and also many payments for expenses of various members of the family. We do not think these are, in any way, shown to be consistent with separate holdings. Plaintiff has also produced from his own custody the revenue receipts of the talooks for a long series of years, has shown that bonds in favor of one member of the family were paid to other members, and given other proofs.

Not only do some of the witnesses state that the common ancestors had some property, but, in a document proffered by defendants, and, therefore, conclusive against them, there is a distinct recital of the existence of small "*Pytrick*" or ancestral property held by the family in common.

The *onus*, then, of showing separate acquisitions and holdings is wholly on the defendants, and they have given very little direct proof. It is clear enough that great part of the increase of the family was due to the labors of two of that branch, Ram Sunkur and Ram Pershad, who made money as lawyers at Midnapore; but there are no accounts or other satisfactory proof of separate holding and no good explanation of the absence of such proof.

The principal reliance of the defence was on an alleged will of Ram Sunkur, bearing on it the signature and acquiescence of the plaintiff's father. But this will, upwards of 30 years old, seems never to have seen the light till it was produced in the present case; and we think that the Court below has very properly rejected it. The two witnesses who support it do so with a minuteness of detail which, after such a lapse of time, is simply ridiculous and impossible. The contents of the will, also, too exactly fit the defendants' case; and the difficulties regarding the date of the stamp, and in other particulars pointed out by the Principal Sudder Ameen, are of much weight.

Rejecting, then, this document, the defendants have, we think, on the evidence, scarcely any case beyond the large contributions of their ancestors above noted. There is no proof of separate holding; on the contrary, we think that the holding was joint, and we reject the appeal on this point.

It is further argued for the appellants that, even supposing that the property was held jointly, and that a small ancestral property aided in its acquisition, still the Hindoo Law allows those who have contributed the largest share to the subsequent acquisitions, to receive in the distribution a double share, and a double share is claimed for them on that ground. Several cases are quoted which are clear on the point—decisions both of the Supreme and Sudder Courts. (*See* Fulton's Reports, Supreme Court Cases of March 1843, Golab Chand *vs.* Goluk Monee Dossee; and Select Cases, Sudder Dewanny Adawlut, Volume I., pages 8 and 335, and Volume V., page 335.) The law is clearly laid down in the Dyabhaga, page 111, and Mitakshara, page 275. In the Supreme Court case, it seems to be laid down that, if all the acquisitions are intermingled in a common stock, so that they cannot be distinguished, *e. g.*, a heap of corn or a heap of rupees, the rule will not apply; but that, if, with small aid from paternal property, separate and distinct properties are acquired principally by labor of particular members of the family, then the rule *will* apply.

The rule seems to be well established, and the Counsel for respondents do not dispute it; but they point out that Ram Sunkur and Ram Pershad were not the only working members of the family; that the evidence shows that Becharam, of plaintiff's branch, was also a lawyer at Midnapore, and made money; and that plaintiff's father had agricultural and commercial dealings. This is so; and, though it seems probable that the members of defendants' branch of

the family may have contributed a greater share of the earnings, still, seeing the line of defence taken by defendants, that they have failed to show in any satisfactory way how much was contributed by their ancestors, and how much by plaintiff's ancestors, we do not think that the case is one in which, with so little information, we can award a double share to any members of the family. The appeal is dismissed with costs.

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The 11th September 1866.*

*Present :*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Case No. 1585 of 1866.

**Hindoo Law of Inheritance—Pregnancy—Adoption.**

*Special Appeal from a decision passed by the Principal Sudder Ameen of Fureedpore, in Dacca, dated the 24th March 1866, affirming a decision passed by the Moonsiff of Bhaugah, dated the 20th November 1865.*

Dukhina Dossee (one of the Defendants), *Appellant,*

*versus*

Rash Beharee Mojoomdar and others (Plaintiffs), *Respondents.*

*Baboo Mohinee Mohun Roy* for Appellant.

*Baboos Kalee Mohun Doss* and *Bungsheedhur Sein* for Respondents.

According to Hindoo Law the right of inheritance is not suspended by pregnancy or until adoption.

THE special appellant contends that the Lower Courts have wrongly decided against him that Ram Ruttun did not leave a son, and that Parus Monee, the daughter of Ram Ruttun, succeeded to, and held as heir, the property of her father, without taking steps to procure the attendance of his witness Bhugwan, and without allowing his pleader to examine Ram Chunder Bagish, the priest of both the parties. It is further pleaded that the Lower Appellate Court should have allowed the special appellant to retain the property for the adopted son whom she is authorized to adopt, and who, on being adopted, would be entitled to succeed as a nearer heir than the plaintiff.

The adopted son, if he had been in existence at the time of the death of Ram Ruttun, or of his widow, or of his daughter, would have been the nearer heir to the deceased Ram Ruttun than the plaintiff; but the Hindoo Law does not appear to us to require that inheritance can be kept suspended either because the special appellant had been left pregnant by her husband till she brings forth, or kept suspended till the defendant may adopt or lose her right to adopt by non-exercise of the right for more than 12 years, because she may, as is argued here, have obtained a power to adopt.

In some cases of pregnancy, the inheritance remains suspended, but not in a case like this, even if the appellant had been left pregnant by her husband.

As to the *first* objection of the special appellant, he cannot show anything regarding the priest; and, as far as the other witness is concerned, the Court of first instance refused to take out further steps, because it said that it had already attached the property of the witness 4 months before, and the special appellant, instead of following this by an immediate application to take further steps as regards the witness, allowed a long time to elapse, and then, just as the case was ready to be heard, the application was made by the special appellant to fine the said witness. The Court of first instance rightly refused this application; and the Lower Appellate Court does not, in such a case, err in law so as to affect the decision on the merits, when it does not notice a complaint of form against this proceeding of the first Court, though the special appellant took objection against it in his reasons of appeal.

On the whole, then, we see no reason to interfere, and reject the special appeal with costs.

* NOTE.—This is not intended to disturb any decision holding the necessity of a suspension in Bengal during the pregnancy of the deceased's sister.

The 11th September 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Sale by Hindoo Widow—Suit by reversioner—Cause of action.**

Case No. 1586 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Fureedpore, in Dacca, dated the 22nd March 1866, reversing a decision passed by the Moonsiff of Bhaugah, dated the 17th November 1865.*

Haradhun Naug (Plaintiff), *Appellant,*

*versus*

Issur Chunder Bose (Defendant), *Respondent.*

*Baboo Bungsheedhur Sein* for Appellant.

*Baboo Romesh Chunder Mitter* for Respondent.

A reversioner cannot sue to dispossess a widow or a purchaser holding under her, though he is entitled to sue for a declaration that a sale by the widow is invalid against him on his proving that the sale was made without legal necessity.

In such cases the cause of action by the reversioner does not arise from the day of the sale asked to be set aside, but from the time that he himself, by the subsequent death of another intervening party, becomes the reversioner to the husband of the widow.

THE special respondent takes objection to the decision of the Lower Appellate Court refusing to apply the Law of Limitation to the plaintiff's suit.

The special respondent contends that, in this case instituted by a reversioner to set aside a sale made by the aunt of the plaintiff to the special respondent in the year 1255, the limitation should count from the time of the sale (*vide* page 273, Volume II. of Sutherland's Weekly Reporter, Civil Rulings).

The plaintiff, special appellant, is the son of the brother of the husband of the widow who executed the kobalah in dispute; and, as the plaintiff's uncle died leaving a daughter, the special appellant rightly contends that he only became a reversioner after the death of this daughter, and so his cause of action must arise to him, not from the date of the deed in dispute, but of his being entitled to sue as a reversioner on the death of the daughter of his uncle For the present, we hold that there is no limitation to the plaintiff's claim, because he is in time from his cause of action if he can sue during the lifetime of the widow.

The Lower Appellate Court has held that the special appellant cannot sue during the lifetime of the widow.

The claim of the plaintiff is for setting aside the deed of sale, as well as for recovery of possession; and, so far as this last relief is concerned, the special appellant undoubtedly has no right to dispossess the widow, or the purchaser holding under her, during the lifetime of the said widow.

But, as far as the right of the special appellant is confined to his obtaining a declaration that the sale is invalid against him, on his establishing that the sale was made without the necessity recognized by the Hindoo Law, we think (*vide* page 165 of the Special Number of Sutherland's Weekly Reporter) that the plaintiff, special appellant, is entitled to sue for only that specific relief.

We, accordingly, remand the case to the Lower Appellate Court to try the case with reference to the above remarks.

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The 11th September 1866.

*Present:*

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

**Right of way.**

Case No. 1098 of 1866.

*Special Appeal from a decision passed by the Second Principal Sudder Ameen of Hooghly, dated the 25th January 1866, affirming a decision passed by the Moonsiff of Pundooah, dated the 19th August 1865.*

Sham Bagdee (one of the Defendants), *Appellant,*

*versus*

Fukeer Chand Bagdee (Plaintiff) and others (Defendants), *Respondents.*

*Baboo Womesh Chunder Banerjee* for Appellant.

*Baboo Mohendro Lal Seal* for Respondents.

Whether in India or England, time and user create a right of easement over the property of others. *A's* right of way over *B's* homestead is not affected by the fact of there being another pathway by which access to the main road may be obtained by *A*.

PLAINTIFF sues to have a wall of the defendant removed by which his right of way, which he has exercised immemorially, has been disturbed.

The defendant pleads that the plaintiff had no such right as that claimed by him; that he has been accustomed on sufferance to pass over his homestead, but this passing gives plaintiff no right. Moreover, plaintiff has a right of way to the main road by another path.

The Lower Courts have both found that plaintiff has exercised the right claimed by him from time immemorial; that defendant cannot now interfere with that right; and that consequently the wall must be removed.

Defendant now appeals specially, urging that a custom arising on sufferance in this country never by any length of time grows into a right; that consequently the permission or sufferance to pass over his, defendant's, homestead, can give plaintiff no right of way such as is claimed in the present case—and this the more that there is another pathway by which access to the main road is obtained from plaintiff's house.

We cannot interfere with the finding of the Lower Courts. Whether in India or England, time and user together create right of easement over the property of others; and, as they have created a right in the present instance, the defendant cannot now, however inconvenient the exercise of it may be to him, put an end to it. The fact of there being a pathway in any other place does not, we think, touch the present matter in dispute. We reject the application with costs.

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The 11th September 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Sale in execution.**

Case No. 1648 of 1866.

*Special Appeal from a decision passed by Mr. R. J. Richardson, Judge of Behar, dated the 24th April 1866, modifying a decision passed by the Principal Sudder Ameen of that District, dated the 12th June 1865.*

Ram Onoogroho Singh and others (Plaintiffs), *Appellants,*

*versus*

Mussamut Montorun and others (Defendants), *Respondents.*

*Baboo Kishen Succa Mookerjee* for Appellants.

*Baboo Onookool Chunder Mookerjee, Nil Madhub Sein, Mohesh Chunder Chowdry,* and *Khetturnath Bose* for Respondents.

Property not attached and not advertised for sale cannot be sold in execution of a decree. The quantity and nature of rights and interests existing in the debtor at the time of attachment and advertisement alone pass by the sale in execution.

It is necessary, for the proper consideration of this case, to state in detail the position and relation to each other of the several members of the family mixed up in this litigation.

Jeebun Singh had two sons, Abhiram and Anunt Narain. Abhiram had two sons, Heit Narain and Oodit Narain. Oodit left a widow named Dilbas Koonwar. Heit Narain (plaintiff) had two sons, Ram Onoogroho (another plaintiff) and Sheo Onoogroho (the third plaintiff). The latter claims to be the adopted son of Anunt Singh, the uncle of his father.

The Lower Appellate Court has found against this adoption.

Heit Narain was indebted under a decree, and his rights and interests in the property in dispute held by the family as joint property were sold in execution of that decree, and purchased by the special respondent.

By Hindoo Law, in the estate left by Jeebun, Anunt would have had eight annas, and Heit Narain and Oodit Narain four annas each.

The special appellants had sued for possession of the whole of the property, alleging that no sale of *any rights of Heit Narain* had taken place.

That there was a sale of Heit Narain's rights is now found as a fact, and, as far as his own one-fourth share is concerned, the plaintiffs' (special appellants') suit and appeal must therefore fail in special appeal.

Now, it is also found as a fact below that Oodit died, and thus Heit Narain succeeded him *before* the rights of the latter were attached and advertised for sale in execution of the decree. This is sufficient to bar the rights of the plaintiff to the extent of the one-fourth share of Oodit also. It is also found that Anunt was alive when the rights of Heit Narain were advertised for sale, but that the former person died afterwards, but before the sale in which the special respondents became the purchasers of the rights of Heit Narain. If Anunt left no legal son, he would be undoubtedly succeeded by Heit Narain. It is therefore clear that the only question remaining to be decided for the special appellant is *whether, under the sale of Heit Narain's rights and interests made under the circumstances noticed above, the purchaser by that sale acquired a right to take possession only to*

*the extent of the property held by Heit Narain when his rights were attached and advertised for sale, or also of the rights subsequently acquired by Heit Narain from the result of the death of Anunt.*

The Lower Appellate Court has also decreed these rights to the auction-purchaser.

The special respondent argues that he is entitled to take also the rights acquired by Heit Narain by the death of Anunt, because they were already held by Heit Narain at the time of the sale; that, when a sale takes place of the rights and interests of a debtor, the position and property of the debtor *at the time of sale*, but *not at the time of attachment and advertisement*, fix the exact extent of the rights and interests which pass by the sale; that, for instance, if by the operation of law and superior authority from the rights of a debtor, as they stand at the time of the attachment and advertisement before the sale, any portion is *detached*, the purchaser can get only the quantity *so reduced;* and thus, if, by chance, the extent of the rights of the debtor advertised for sale become anyhow *increased* before the *sale*, though subsequent to the attachment and advertisement, the purchaser is entitled to obtain these increased assets; that both co-partners, while alive, held the joint property jointly, *with the right of survivorship;* and accordingly, on the death of one of the two joint shareholders, the entire property becomes the property of the surviving co-partner by that "*right of survivorship*," and not by any right of *inheritance*.

We do not see that any case of reduction can be assumed in which *fixed* and *specified* rights of a debtor can be first attached and advertised for sale, and in which afterwards those fixed rights in any specified quantity of property may be reduced before the sale. The two cases urged by the pleaders of the special respondent do not prove his case for the illustration of such a reduction.

Now, the rights of the only son *left* by a father may first be attached, and, if afterwards a posthumous son be born to the father deceased, the attachment or advertisement in such a case can never be of the entire property, *viz.*, the fixed and determined *property* of the said first son. The fact of the father having left a widow pregnant might, under the Hindoo Law, operate as a bar to the extent of the rights of inheritance of the first son being fixed and determined. The first son's right of inheritance in such a case may be considered as remaining suspended till the result of the pregnancy is known. Upon this event taking place, the extent of the first son's right becomes fixed and determined; and if this happens *before* the sale, the fact will not become any legal argument in support of the contention raised by the special respondent.

As to the reduction of the extent of the rights of a debtor advertised for sale by a subsequent decree of a Court of Justice passed before the sale, we find that in this case also there is no question of reduction. What could in such a case be advertised to be sold would be the extent of the rights liable to be determined and fixed after the determination of the law-suit pending at the time of the original attachment and advertisement under which these processes took place, and not the entire property. The decree simply determines that, after and before the attachment and the advertisement, the debtor had no more rights than what are left to him after the decree.

Even if it be possible to assume any case of reduction, it will not follow as a matter of course that, because in such a case the purchaser will get only the quantity so reduced, that increase to the property, as it stood when advertised for sale, should go to the purchaser in execution of a decree. It is only that which is attached and advertised which passes.

The legality of a sale (in execution) of the rights and interests in a joint property held by a debtor, who may be a member of a joint family, can be assumed only on the consideration that the debtor whose rights are sold had a right with his co-parceners to hold some separate or specific share in the joint property as recognized amongst themselves.

Whether one joint shareholder succeeds another under the old designation of "*heir*," or gets possession of the rights held by the deceased under the novel term of "the right of survivorship," it cannot be denied that, in a case like the present, the rights of a joint co-parcener, who may be the debtor, as held at the time of the advertisement, are quite different from the additional interests subsequently acquired by him (owing to the death of his co-partner), though the latter property may be held along with the former rights at the time of sale.

In short, having now answered in detail the ingenious but not correct arguments of the special respondent's Counsel, we state it as our clear opinion that property not attached and not advertised for sale cannot be sold in execution of a decree; and it follows from

this that the quantity and the nature of rights and interests *existing in the debtor at the time of advertisement and attachment can alone pass by the sale in execution.*

We may add that the special respondent's pleader cannot show any precedent in support of his arguments.

We may further notice that, if the principle contended for by the special respondent is allowed in this case, it is clear it must necessarily be extended to a case in which, after the attachment and advertisement of the rights of a debtor as existing at the time, the debtor may have, by purchase or gift, another share in the property, the rights of the debtor in which are advertised for sale.

If it be said that a purchase or a gift, being different kinds of rights from the right under which the other attached property was held by the debtor, and so the right of the purchaser in execution, will not extend to the share subsequently obtained either by purchase or gift, the result would be that, in a sale in execution in such cases, *all kinds* of interests held by the debtor *under different rights*, existing in him at the time of sale in the property advertised to be sold, do *not* pass to the purchaser, but only the special interests and rights existing in the debtor at the time of attachment and advertisement.

Now, if there is to be a distinction in the different interests held by the special respondent under separate rights under which different portions of property may be held by a debtor, why should not that distinction be held to operate in all cases alike, and therefore in the present? It cannot easily be denied that the interests held by Heit Narain before the death of Anunt were quite different from the rights and interests which the debtor acquired after the death of Anunt.

If this difference is not to be respected in this case, because both the portions are to be considered as held under *one class of rights*, why should it not be said that the purchaser acquired the right to succeed also to any other share which, after the sale, might in any form come to the debtor, owing to the death of any other co-parcener, if he has any other whom he may succeed to survive?

We accordingly agree with the special appellant that the Lower Appellate Court was not right in dismissing the suit of the special appellant to the extent of the 8 annas obtained by Heit Narain through Anunt Singh.

We see that, as regards Sheo Onoogroho Singh, plaintiff, the Lower Appellate Court has decided that he has failed to prove that he is (as he alleges himself to be) the *adopted* son of Anunt. If he had succeeded in proving that he was the legal heir of Anunt, the contention noticed above would not arise. The facts, as found in the case by the Courts below, do not prevent the claim of this plaintiff being tried together with the claims of the other two plaintiffs, because the said plaintiff, like his brother, is, as member of the joint family, entitled to succeed his natural father, Heit Narain.

We accordingly reverse, with costs, the decree of the Lower Appellate Court; and, in modification of the decree passed by the first Court, we decree with proportionate costs the claim of the special appellant to the extent of 8 annas out of the entire property claimed.

The costs of the appeal to this Court are to be given to the special appellant only to the extent of the half-share of the stamp-fees of the petition—the special respondent not being entitled, in our view, to recover any costs from the special appellant.

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The 12th September 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, L. S. Jackson, and A. G. Macpherson, *Judges.*

**Mortgage—Conditional Tender.**

Case No. 153 of 1866.

*Special Appeal from a decision passed by Baboo Govind Chunder Chowdry, Principal Sudder Ameen of Beerbhoom, dated the 31st October 1865, affirming a decision passed by Baboo Bhooputty Roy, Moonsiff of that District, dated the 23rd March 1865.*

Abdoor Ruhman (Defendant), *Appellant,*

*versus*

Kisto Lal Ghose (Plaintiff), *Respondent.*

*Mr. C. Gregory* and *Baboo Kishen Kishore Ghose* for Appellant.

*Baboos Dwarkanath Mitter* and *Sreenath Doss* for Respondent.

If a mortgagor deposits money in Court without placing any actual restriction on its being paid over to the mortgagee, but with express notice that the mortgagor denies the existence of any mortgage, and intends to sue to recover back the money so deposited—HELD that this is not such a deposit, within the meaning of Regulations I., 1798, and XVII., 1806, as will save the right of redemption.

*This case was referred to a Full Bench by Seton-Karr and Macpherson, JJ., under the following orders:—*

*Macpherson, J.*—As it appears that the money due under the mortgage was paid into Court within a year from the date of issue of the notice of foreclosure, I think there is no doubt that the deposit was made in time (*see* S. D. A. Rep., 1854, p. 281; 1855, p. 8).

The only other question is, whether the deposit was made in such a manner as to preserve the right of redemption. The appellant contends that it was; the mortgagee, that it was not. The money was paid into Court without any actual restriction being placed on its being paid to the mortgagee. But, in his petition to the Court on making the deposit, the mortgagor used words to the following effect:—

"I have shown the mortgage to be false "and fraudulent; and, to set aside that false "*kobalah*, and to get the money back, I "will hereafter institute a regular suit."

The Lower Appellate Court has held this deposit to be bad, on account of the mortgagor having given this notice of his intention to bring a regular suit, to set aside the *kobalah*, and to get the money back; and, in so holding, the Court has, as it appears to me, strictly followed the ruling of the Privy Council in the case of Prannath Roy Chowdhry *versus* Rookea Begum, 7 Moore's Privy Council Cases 352. The appellant, however, relies on the case of Hethan Singh *versus* Lokraj Singh, 3 Weekly Reporter 184, in which a Divisional Court subsequently held that a deposit made under similar circumstances was good, and saved the right to redeem—the ruling of the Privy Council in Prannath Roy Chowdhry's case being declared to have been with reference only to the special circumstances connected with the position of the person by whom the deposit was made, and not to have laid down any general rule to be accepted and acted on by this Court.

While I should certainly, but for the case of Prannath Roy Chowdhry, have been prepared to agree with the Divisional Court in considering such a deposit to be sufficient, as being in fact unconditional, it appears to me that, in Prannath Roy's case, the Privy Council have expressly ruled to the contrary, and that this Court is bound to follow that ruling. Reading the judgment of their Lordships of the Privy Council with utmost care, I am unable to see that it turned on the special position of the person who made the deposit. His position is treated as a further and distinct reason why the mortgagee was not bound to accept the money which had been deposited; but, quite independently of this, their Lordships seem to me to decide that the deposit was bad on account of the expressed intention to sue to recover back the money tendered, which could not reasonably be regarded as idle words. There is, I think, a direct conflict between the decision of the Privy Council and the subsequent decision of this Court in Hethan Singh's case. I therefore am of opinion that this case should be referred to a Full Bench on the question whether the deposit was, or was not, such as to save the right of redemption.

*Seton-Karr, J.*—The facts out of which this appeal arises are as follows:—

The plaintiff, who is mortgagee of a certain property, sued the mortgagor, Mumtaz Hossein, to obtain possession of the same under notice of foreclosure. The special appellant, who intervened, was made a defendant, as he claimed the property, partly under a sale, and partly under a mortgage from the original defendant subsequent to the first mortgage to the plaintiff. The main contention was, on the appellant's part, that the plaintiff should have taken the money, which, on notice of foreclosure, was duly deposited by Mumtaz Hossein, and that, not having done so, the plaintiff had lost his rights altogether.

Both Courts decided the case against the special appellant, holding, apparently, that the deposit by Mumtaz Hossein was clogged with an allegation or protest which rendered it no tender or deposit at all.

In appeal the case has been fully argued on the law-point as to the sufficiency and legality of the tender. A question was also raised as to the date when the money was tendered, and as to whether the tender was within the year of grace. It is clear to me, however, that the date of notice must be taken to be, not that of the Judge's perwannah to the Nazir, but that of the actual issue of the notice. This was on the 13th of August 1862. The money paid to save the equity of redemption was deposited on the 11th of August 1863, or two days within the year. The pleader for the respondent gives up this point, and confines himself to the other and the main contention.

The tender of the money was, it appears, made with a condition to the following effect: "I have shown the mortgage to be false and fraudulent, and to set aside that

false kobalah, and to get the money back, I will hereafter institute a regular suit."

The pleader for the special appellant contends that the above expressions do not nullify the tender, and he relies on a judgment of a Divisional Bench (Justices Steer and Phear), reported at page 184, Civil Rulings, Vol. III. of the Weekly Reporter, in support of this view, that the money might and ought to have been taken away.

The respondents, on the other hand, rely on the judgment of the Privy Council in Prannath Chowdhry *versus* Ramrutton Roy, reported at Vol. VII. of Moore's Reports, page 352, as well as in Sudder Dewanny Adawlut Reports for 1848, page 897, Roscoe's Digest of Nisi Prius, p. 483, and on the alleged intent and scope of the law as to mortgages, and as to the meaning of tenders to stay or defeat foreclosure. It is urged by Baboo Dwarkanath Mitter that the tender, in order to be accepted, must be unconditional, and not clogged with any threat such as this was; and that the intention of their Lordships, in the Privy Council judgment quoted, was clearly that such tenders, threatening a re-commencement of litigation, were not legal and valid, and were not in conformity to the law.

It is urged against this, that, in the case before the Privy Council, there were some peculiar circumstances in the litigation. In that case the very title of Ramrutton, the opponent of Prannath Chowdhry, to redeem the property was denied, and was not made out.

In the suit before us, the money, after remaining some months in deposit, was withdrawn, but no suit was ever brought to annul the mortgage.

After much careful consideration and discussion of the question with my learned colleague, I have arrived at the same conclusion as he has, *viz.*, that this is precisely a case which ought to be referred to a Full Bench.

I would put the point thus:—

Is not the ruling of the Privy Council a general ruling, applicable to all cases? Does it not say that a deposit clogged with a condition like this is no deposit within the meaning of the law, and is not the High Court bound to follow this ruling?

*The judgment of the Full Bench was delivered by—*

*Peacock, C.J.*—The question submitted for the opinion of a Full Bench is whether the payment into Court by a person alleged to be the mortgagor of certain property was, or was not, a sufficient tender to prevent foreclosure.

The money was paid into Court without any actual restriction being placed on its being paid over to the alleged mortgagee; but the payment was made with a notice in words to the following effect:—

"I have shown the mortgage to be false "and fraudulent, and, to set aside the ko-"balah and to get back the money, I shall "hereafter institute a regular suit."

It appears to me that both Regulations I. of 1798 and XVII. of 1806 contemplate cases in which the relationship of mortgagor and mortgagee is undisputed, and that Section 7 of the latter Regulation was not intended to apply to a case in which an alleged mortgagor makes, under protest, a tender of money claimed upon a mortgage which he disputes upon the ground that the deed is false and fraudulent, with notice that he intends to institute a suit to set aside the deed, and to recover back the money tendered or paid into Court, if accepted by the person claiming as mortgagee.

But, whatever might be our own view of this case if it were *res integra*, it appears to me that we are bound by the ruling of the Privy Council in the case of Prannath Chowdhry *vs.* Ramruttun Roy, reported at page 323, 7 Moore's Indian Appeals. In that case, two reasons were given why the payment into Court was not sufficient. Lord Kingsdown, in delivering judgment, says at page 358: "The remaining objection relates "to the payment into Court, in the nature "of a tender which was made by the defend-"ant Ramruttun Roy. Ramruttun Roy "directed the money to be paid out to the "appellant, but, at the same time, in his pe-"tition to the Court, he disputed the vali-"dity of the appellant's title to foreclosure, "and expressed an intention, amounting to "a notice, to sue the appellant to recover "back the very money which he was ten-"dering.

"The meaning of the direction that the "money may be paid into Court clearly is, "that the mortgagor may have adequate "and lasting evidence of that which is put "in place of a tender, and the mortgagee "the security and advantage of a deposit "in acknowledgment of the title. The mort-"gagee would have little inducement to "take the money, waiving his lien by its "acceptance, if litigation on the very same "subject were to re-commence upon the ac-"ceptance of the money; and, though mere

"words, in the form of a protest. which may "accompany a tender, will not defeat, where "they can reasonably be regarded as idle "words, their Lordships think that the pro-"ceedings of Ramruttun Roy, with respect "to the mortgagee's title to foreclosure, for-"bid such an interpretation of his language "and his act."

It is true that his Lordship went on to say that, independently of the objection to the payment, another and a graver reason (which he afterwards explained) existed for holding it not to be such a payment as the Regulations contemplated. But it is clear that the foreclosure was upheld for both the reasons given by the Lords of the Judicial Committee.

It was urged that, as two reasons were given, and one of them was said to be graver than the other, the graver one must be treated as the grounds of the judgment, and the weaker one as an *obiter dictum*. When two reasons are given for a decision, we cannot say that one is *obiter* any more than the other. They were both directly to the point, and were the reasons upon which the judgment was given.

The case will go back to the Division Bench which referred it, with this expression of our opinion.

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The 12th September 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley, J. P. Norman, Shumbhoonath Pundit, and G. Campbell, *Judges*.

**Ejectment—Buildings erected bona fide on lands of another.**

Case No. 108 of 1865.

*Application for review of judgment passed by Bayley and Macpherson, JJ., on 26th January 1865, in Special Appeal No. 2500 of 1864.*

Thakoor Chunder Poramanick and others (Defendants), *Petitioners*,

*versus*

Ramdhone Bhuttacharjee (Plaintiff), *Opposite Party*.

*Mr. W. A. Montriou* and *Baboo Bamachurn Banerjee* for Petitioner.

*Baboos Kally Prosonno Dutt, Tarucknath Sen*, and *Romanath Bose* for Opposite Party.

Buildings and other such improvements made on land in the mofussil do not, by the mere accident of their attachment to the soil, become the property of the owner of the soil. If he who makes the improvement is not a mere trespasser, but is in possession under any *bonâ fide* title or claim of title, he is entitled either to remove the materials or to obtain compensation for the value of the building, at the option of the owner.

*This case was referred to a Full Bench by Bayley and Macpherson, JJ., under the following order:—*

*Referring order.*—THERE is a conflict between our decision and the decision of another Division Court on this point, in respect of which the above order was passed, the question involved being whether a person, who, being in possession of land as proprietor, erects *pucka* buildings (of brick, &c.) thereon, has a right, on being subsequently ejected from the land as having no title, to pull down those buildings and remove the materials. In the present case, we decided that he has no such right. Since we so decided, it appears that another Division Bench (consisting of Trevor and Campbell, *JJ.*) have, in the case of Gobind Poramanick *vs.* Gooroo Churn Dutt, 3 Weekly Reporter 71, decided to the contrary effect. We, therefore, refer the question for decision by a Full Bench.

The notice calling on the other side to shew cause before us on this occasion has not been duly served. This has arisen from a mistake on the part of the pleader employed, and we direct that a fresh notice be issued, calling upon the parties to shew cause before a Full Bench.

*Judgment of the Full Bench.*—The plaintiff is the heir of one Manick Chunder, whose widow Bhobosoondery sold a portion of her husband's estate to one Gungadhur, from whom the defendant purchased. After the death of Bhobosoondery, the plaintiff sued the defendant, alleging that the sale to Gungadhur was void as having been improperly made by the widow—the alleged object of the sale being to pay for the *shrad* of Manick Chunder's mother. The plaintiff got a decree, and the question on this reference is whether he is entitled to certain buildings erected on the land by the defendant during the lifetime of Bhobosoondery, or whether the defendant should be allowed to remove them.

We have not been able to find in the laws or customs of this country any traces of the existence of an absolute rule of law that whatever is affixed or built on the soil be-

comes a part of it, and is subjected to the same rights of property as the soil itself.

Looking to the ancient Hindoo Law, we find it laid down that "he who dwells in a "house which he built on the ground of "another man, and for which he pays rent, "shall take with him, when he leaves it, "the thatch, the wood, and the bricks. But "if he live, without paying rent, on the "ground of another without the owner's "assent, he shall by no means, when he "quits it, take away the thatch and the "timber." (Nareda, Colebrooke's Digest, Book 3, Chapter 2, para. 99, Volume 2, page 398. Edition of 1798).

Looking at the Mahomedan Law, we find in the Hedaya (Hamilton's Translation, Vol. 3, page 325) it is said: "If a person hire "unoccupied land for the purpose of build-"ing or planting, it is lawful,* since these "are purposes to which land is applied. After-"wards, however, upon the term of the "lease expiring, it is incumbent on the lessee "to remove the buildings or trees, and to "restore the land to the lessor in such a "state as may leave him no claim upon it, &c. "* * * It is incumbent on the lessee to remove "his trees or houses from the land, unless the "proprietor of the soil agrees to pay him an "equivalent, *in which case the right of pro-"perty in them devolves to him* (still, how-"ever, this cannot be without the consent "of the owner of the houses or trees, except "where the land is liable to sustain an injury "from the removal, in which case the pro-"prietor of the land is at liberty to give an "equivalent, and appropriate the trees or "houses without the lessee's consent), or "unless the proprietor of the land assents to "the trees or houses remaining there, in "which case they continue to appertain to "the lessee, and the land to the landlord, "&c." (*See* also *Ibid*, page 284.)

In the case of Khoderam Sherma *vs.* Trilochun, 1 Select Reports, p. 35, we find it laid down that, "if a member of a joint "Hindoo family build a brick house on "ancestral land with separate funds of his "own, such house would not be a property "in which shares might be claimed by his "co-parceners. Co-parceners in the land "would only have a claim on him for other "similar land equal to their respective "shares." That the maxim *qui quid plantatur solo toto cedit* does not apply in such cases, was recognized by the late Sudder Court in the case of Jankee Sing *versus* Burhooree Singh, S. D. A. Rep., 28th August 1856, p. 761.

That was a suit for the demolition of buildings erected on joint property by a member of a joint Hindoo family without the consent of his co-sharers.

In the S. D. A. Rep. 1858, p. 1517, 21st September; Sudder Dewanny Adawlut, N. W. P., 25th November 1863, p. 418; and 5 Weekly Reporter, p. 108, are similar cases.* They shew at least that the English rule above alluded to does not prevail in this country.

By Act XI. of 1855 the Legislature made provision for mitigating the rigour of the English Law on this subject, by securing to persons holding *bonâ fide*, under defective titles, the value of improvements made by them in cases to which English Law is applicable. But by Section 3, it was enacted that nothing in that Act should extend to any case in which English Law was not applicable.

According to the Civil Law, if a person, building on the land of another, used his own materials not knowing that the land was not his own when the building was destroyed, he could reclaim the materials, or if he was in possession of the building, could refuse to deliver it to the owner unless he was indemnified for his expenses, at least so far as they had been incurred profitably to the owner of the soil. (*See* Justinian's Institutes by Sanders, Book 2, Tit. 1, para. 30.)

We think it clear that, according to the usages and customs of this country, buildings and other such improvements made on land do not, by the mere accident of their attachment to the soil, become the property of the owner of the soil; and we think it should be laid down as a general rule that, if he who makes the improvement is not a mere trespasser, but is in possession under any *bonâ fide* title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil—the option of taking to the building, or allowing the

* Apparently meaning, though no mention is made in the contract, the use to be made of the land.

* We are not prepared to accept as law the rule laid down in these cases, that every co-proprietor has a right of veto to forbid anything being done to the common property without his consent.

removal of the material, remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess.

With these observations, we remand the case to the Division Court which will pass such orders as may be necessary on the review.

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The 12th September 1866.

*Present:*

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

**Mesne-profits—Execution of decree against Government and a Farmer.**

Case No. 1078 of 1866.

*Special Appeal from a decision passed by the Judge of Rungpore, dated the 29th January 1866, modifying a decision passed by the Sudder Ameen of Bograh, dated the 30th June 1864.*

The Collector of Bograh on behalf of Government (one of the Defendants), *Appellant,*

*versus*

Shama Shunkur Mojoomdar and others (Plaintiffs) and others (Defendants), *Respondents.*

*Baboos Kishen Kishore Ghose* and *Juggodanund Mookerjee* for Appellant.

*Baboos Dwarkanath Mitter* and *Kishen Dyal Roy* for Respondents.

Where the Government and a farmer were both jointly liable for mesne-profits as joint wrong-doers, it was ordered that they should, in the first instance, be severally charged with the amount of mesne-profits which each had realized.

THE plaintiff has recovered a judgment for possession with mesne-profits against the Government and a farmer. The Government and the farmer appear to be liable for the mesne-profits, the Government having granted a lease to the farmer under which rents have been realized.

We are of opinion that both parties are jointly liable to the plaintiff for the entire amount of the mesne-profits realized from the land. They are joint wrong-doers, and are therefore both jointly liable. But, according to the prevailing ruling of this Court, we think that, in the first instance, Government and the farmer should be severally charged with the amounts which each may have received. We think that we ought to follow the order passed in Regular Appeal No. 207 of 1865, which was decided by Mr. Justice Trevor and Mr. Justice Campbell on the 4th of January 1866.

An order in this form leaves it open to the parties to contest their several responsibilities. If there were an order simply making the Government and the farmer jointly liable, if the Government were chiefly in fault, the farmer might have a remedy over against the Government under the contract contained in the lease. But if the farmer were chiefly in fault the Government would probable have no remedy over against the farmer, there being no contribution as between wrong-doers. The order will be that the Government and the farmer are both jointly liable to the plaintiff, who will, in the first instance, recover from Government whatever profits the Government has realized from the lands; and, in the second instance, from the farmer whatever profits the farmer has realized.

Plaintiff will get all his costs of the appeal from the appellant; the appellant and respondent defendant will respectively bear their own costs.

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The 12th September 1866.

*Present:*

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

**Sale—Rights of purchaser—Mortgage—Notice of Foreclosure (to purchaser of Mortgagor's equity of redemption).**

Case No. 30 of 1866.

*Special Appeal from a decision passed by the Judge of Midnapore, dated the 18th September 1865, affirming a decision passed by the Sudder Ameen of that District, dated the 12th July 1865.*

Bissonath Singh (Plaintiff), *Appellant,*

*versus*

Brojonath Doss and others (Defendants), *Respondents.*

*Baboos Nubo Kishen Mookerjee* and *Luckhee Churn Bose* for Appellant.

*Baboos Romesh Chunder Mitter* and *Huree Narain Roy* for Respondents.

Nothing subsequently done or suffered by a vendor can affect the rights acquired by the purchaser at the time of the sale.

In what cases notice of foreclosure should be given to the purchaser of a mortgagor's equity of redemption.

THIS is a suit for the redemption of 12 annas of Talook Bunkattee by payment of the amount due on the mortgage.

The plaintiff Bissonath purchased the talook of one Raj Chunder Roy on the 5th of September 1859.

In March 1858, Raj Chunder had borrowed 200 rupees from one Chundrabuttee on a bond pledging this property. On the 2nd of April 1860, the defendants, the heirs of Chundrabuttee, sued Raj Chunder for the money due on the bond. They obtained a decree, and in execution the talook was sold to them.

Bissonath sued to set aside the mortgage-bond and this sale on the ground of fraud; but, failing to prove that the mortgage was collusive, his suit was dismissed. He now sues to redeem on payment of the amount due on the mortgage. His suit has been dismissed by the Lower Appellate Court, on the ground that this remedy is not now left to his vendors; and, as they could not set aside the sale in execution, so neither can the plaintiff do so.

The plaintiff appeals. It is clear that the rights acquired by the plaintiff by his purchase were those which his vendor Raj Chunder possessed at the date of the sale to him, *viz.*, in November 1859. Nothing subsequently done or suffered by Raj Chunder could affect the rights he then acquired. By the sale in execution of the decree, which was an ordinary money-decree in a civil suit against Raj Chunder, *the rights and interest of Raj Chunder* were sold. But, as Raj Chunder had ceased to have any interest, nothing passed by that sale to the mortgagee, who was the purchaser.

The right of the plaintiff to redeem acquired by his purchase in 1859 was not affected by it in any way, and no foreclosure had taken place. The decision of the Civil Court must, therefore, be reversed, and it must be declared that the plaintiff is entitled to a decree; that, on payment of the amount due for principal and interest on the mortgage-debt, he is entitled to possession of the property in dispute.

We desire to observe that, even if the heirs of Chundrabuttee had sued to foreclose or to establish their lien on the lands, it is clear that no step which they could have taken against Raj Chunder alone would have had the effect of barring the present plaintiff as a *purchaser* of the rights of the mortgagor. (*See* S. D. A. Rep., 1853, p. 859; and the judgment of Phear, J., 3 Weekly Reporter 230) They could not conclude and bar him without giving him an opportunity of asserting and protecting his rights. The general principles applicable to the subject will be found in Story on Equity Pleading, Section 193, and Note 1, page 213.

We do not mean to suggest that, in foreclosure-proceedings, and suits to establish the lien of a mortgagee and to bring the property to sale in satisfaction of the mortgage, which are somewhat in the nature of proceedings *in rem*, it is in all cases necessary to serve subsequent incumbrancers, not in actual possession of the property, with notice, or to make them parties. But we are disposed to think that, in some of the cases which have come before this Court and the late Sudder Court, sufficient consideration may not have been given to their rights.

The plaintiff will get his costs in all the Courts.

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The 13th September 1866.

*Present:*

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

**Witnesses (Attendance and examination of).**

Case No. 1161 of 1866.

*Special Appeal from a decision passed by the Judge of Rajshahye, dated the 20th February 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 2nd August 1865.*

Morno Moyee Debee and another (Plaintiffs), *Appellants,*

*versus*

Bheem Coomar Chowdhry (Defendant), *Respondent.*

*Baboo Nubo Kishen Mookerjee* for Appellants.

*Baboo Issur Chunder Chuckerbutty* for Respondent.

It is not the business of a Court to determine what witnesses shall be examined. The parties must select their own witnesses and call upon the Court to examine such of them as they may offer for examination; and

it is their own fault if they do not take the necessary steps to have the witnesses examined or to compel them to be present for examination at the proper time.

THERE are no grounds whatever for this special appeal. The appellant objected before the Judge that *the first Court did not take the deposition of his remaining witnesses.* Before this Court, he objects that *the Lower Court committed an error in not issuing processes under Section 159 of Act VIII. of 1859.*

*Firstly*, the appellant is not in a position to show us that he took the necessary steps or requested the Court to issue such processes as he speaks of here in his appeal before us.

*Secondly*, he did not point out to the Judge that the first Court either refused to examine any witness tendered to it, or to issue process against any recusant witness, nor did he, in fact, point out any error committed by the first Court; it being quite consistent with his grounds of appeal to the Judge, and being, indeed, the real meaning of his grounds of appeal, that the witnesses referred to were not present in Court or in attendance at the time when they could have been examined.

Now, it is not the business of the Court to determine what witnesses shall be examined; the parties must select their own witnesses and call upon the Court to examine such of them as they may offer for examination. If they do not take the necessary steps to have the witnesses examined, or to compel them to be present for examination at the proper time, it is not the fault of the Court. If it had been shown that the first Court had refused to examine a witness who was present and tendered for examination, it would have been a different matter. We dismiss this appeal with costs and interest.

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The 13th September 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Evidence—Judgments in former suits.**

Cases Nos. 1194 and 1195 of 1866.

*Special Appeals from a decision passed by Mr. C. E. Lance, Judge of Backergunge, dated the 20th January 1866, reversing a decision passed by Mr. H. S. Thompson, Principal Sudder Ameen of that District, dated the 14th June 1865.*

Doorga Doss Roy Chowdry (one of the Defendants), *Appellant,*

*versus*

Nurendro Coomar Dutt Chowdhry and others (Plaintiffs), *Respondents.*

*Baboos Kalee Mohun Doss* and *Pearee Lal Roy* for Appellant.

*Mr. J. Cochrane* and *Baboo Dwarkanath Mitter* for Respondents.

Remarks on the admissibility in evidence of judgments in previous suits, and on the inapplicability in all its strictness to the Courts of this country of the English rule that, except in matters of general interest or public rights, a verdict in a previous suit, to be admissible, must be between the same parties or parties through whom the parties actually in litigation claim.

*Markby J.*—THIS was a suit brought to establish the plaintiff's title to a certain bheel known as Bheel Gaugnee.

At the same time, another suit was brought to establish the plaintiff's title to two plots of land situated north of the Bheel.

It appeared that the plaintiffs and defendants were neighbouring zemindars, and they had had constant disputes as to their respective boundaries, the defendants always claiming the bheel which ran in a direction nearly east and west, and also asserting that the bheel was their southern boundary; whereas the plaintiffs also claimed the bheel, and, though the major part of their zemindary lay to the south of it, yet they claimed certain plots of land on the north.

The evidence in the Courts below consisted almost entirely of decrees in prior suits said to relate to disputes about these and neighbouring lands, and the question before us is whether or not the Judge of the Lower Appellate Court has done rightly in, on the one hand, rejecting, and, on the other hand, receiving, these decrees as evidence.

The plaintiffs tendered in evidence, in the first place, a decree, dated the 7th of April 1798, in a suit brought by Kasheenath Dutt and others *versus* Shib Narain and others. In that suit there were no boundaries stated, but the Judge has satisfied himself that the land in dispute was the same as that now in suit, though we do not quite understand how he has done so. Nor does it appear from the judgment in what relation the parties to that suit stood to the parties to the present suit, or what the precise point in dispute was upon which a decree was given. The Judge, however, appears to think that it is some evidence in favor of the plaintiffs, because it is referred to in the next pro-

ceedings on which the plaintiffs rely, and which are as follows :—

In the year 1821, a suit was brought in which Ram Buddoo Mitter, a ryot of the present plaintiff, was plaintiff, and Kisto Chunder Roy and others described as *talookdars* of Shapore (the present defendants' zemindary) were defendants. The suit was for trespass by the defendants in having cut certain crops, and it appeared that the defendants justified their having cut the crops because they were growing on land which they asserted to be within their talook, asserting that, as the land was north of the Bheel, it belonged to them as part of Shapore. The Judge finds, as a fact, that the defendants in the present suit derive their title from the defendants in that suit, notwithstanding that in the former suit the defendants were styled "talookdars." He also considers that the plaintiff in that suit being a ryot of the plaintiffs in the present suit, it is the same thing as if the present plaintiffs had been a party to the former suit also.

The next decree relied on was under Regulation XV. of 1824, but, as this was provisional only, and it was followed by a regular suit brought expressly to ascertain the rights of the parties, it can, if admissible, have no possible weight, and I therefore pass it over.

The regular suit to set aside this decree was brought in the year 1859, and was tried by my honorable colleague, Mr. Justice Kemp, at that time Judge of Backergunge. In that suit, Bishessur Roy was plaintiff, and the defendants were the same as in the present suit. Bishessur Roy is not a party to the present suit, nor were the present plaintiffs parties to that suit. Bishessur Roy was, in fact, the owner of one-third share of the zemindary Koorooria, of which the plaintiffs are the owners, or represent the owners, of the other two-thirds, and the boundaries of which are in dispute. The piece of land in respect of which that suit was brought was to the north of the Bheel and abutting thereon, and adjoining on the east the piece of land in dispute in the present suit between these parties.

Of these decrees, that in 1798 and that in 1821 were received in evidence; that in 1859 was rejected. Both the first decrees were in favor of the view insisted on by the present plaintiffs; that in 1859 was in favor of the case of the present defendants.

The principal discussion has been as to the admissibility of the decree passed in 1859, and I will consider that case first.

The ground relied upon by the plaintiffs, who sought to exclude this decision, was the rule of English Law as laid down in most of the English treatises on evidence, that, except in matters of general interest or public rights, a verdict in a previous suit, to be *admissible*, must be between the same parties, or parties through whom the parties actually in litigation claim. Now, without entering into the question whether the boundaries of a zemindary is or is not a matter of general interest, so as to make evidence of reputation admissible, and to bring the case within the acknowledged exception to the English rule, I must decline to apply the rule itself in all its strictness to the Courts of this country. It is somewhat remarkable that the rule of evidence in question has never been discussed at all by English Judges or Commentators as a separate rule of evidence, but has been assumed either as falling within the broader rule which excludes (so-called) hearsay evidence, or else as resting upon the same grounds as the rule which requires identity of parties when a previous judgment is relied on as concluding the question in dispute, and as a bar to all further enquiry. It is scarcely necessary to point out how widely the considerations applicable to the admissibility of the evidence now under consideration differ from those relating to the admissibility of hearsay evidence on the one hand, and the finality of a *res judicata* on the other. There is no pretence here of making the earlier judgment conclusive in a later litigation; and the technical considerations by which the rule as to *res judicata* is narrowed, lose all their force when we come to consider whether the judgment may be used, not as a bar, but as evidence. Nor is there any comparison between the probative force of a solemn enquiry followed by the decree of a competent Judge, and such evidence as usually passes under the name of hearsay.

All rules of evidence are, in fact, rules which exclude evidence, and they ought to be founded on the consideration either that the *probandum* is irrelevant, or that the *probans* is so weak that, in the majority of cases, the time of the Court would be wasted in receiving it. Every rule which excludes evidence on any other ground than this is simply an evil, as being a refusal to receive the light which the parties are desirous to throw on the case in litigation.

Now, I do not presume to lay down the exact extent to which decrees in previous suits may be received in this country. All

that it is necessary to say in this case is, that the decree in the suit of 1859 ought to have been received. It related to the boundary between these very estates in a part contiguous to that now in litigation. The course of the enquiry was such that the Judge had to determine whether or not the bheel was the general boundary between the two estates. To a great extent the same evidence was presented as in the present case. The question was carefully and elaborately investigated, not only by the Judge who determined the suit, but by this Court, where upon regular appeal the decree was affirmed. I, therefore, think that the result of that enquiry is not only evidence, but very strong evidence, in support of the defendant's case. I, by no means, say that it is conclusive, or that full discretion in dealing with it ought not to be left to the Judge who tries the present suit; but I think he ought to receive it, and to attach to it the full weight which the decision of a competent Court affirmed on appeal must always deserve. It is possible that further enquiry and more strenuous efforts on the part of the litigants may throw greater light on the matter in dispute in the second trial than the first. On the other hand, it must be remembered that time is a great destroyer of evidence, and in a vast number of cases the earlier Judge enjoys advantages in ascertaining the truth, to which the later Judge can never attain.

For the same reasons that I think the Judge was wrong in excluding this decree, I think he was right in accepting the decree of 1821. With regard to the decree of 1798, I do not think it was available in evidence, unless it was clearly shown to what lands it related, so that the Judge may be able to estimate to what extent it bears upon the question now in dispute. I think the Judge ought to enquire into this, and to receive this decree also in evidence, if it appears to him to be in any way an adjudication upon the matter now in dispute, or upon questions involved therein.

With these directions, I think the case should be sent back to be re-heard.

*Kemp, J.*—I concur in this judgment.

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The 13th September 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby.
*Judges.*

**Ejectment—Lease—Damages.**

Case No. 1532 of 1866.

*Special Appeal from a decision passed by the Judge of East Burdwan, dated the 18th January 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 10th April 1865.*

Mookta Ram Paul (Plaintiff), *Appellant.*

*versus*

Kalee Komul Roy and another (Defendants), *Respondents.*

*Baboo Toolsee Doss Seal* for Appellant.

*Baboo Romanath Bose* for Respondents.

*A* cannot be summarily evicted and deprived of his title under a mokurruree lease duly made in his favor, by reason of a previous arrangement between his lessor and *B* which never went beyond the lessor's receipt of earnest-money from *B*, and of which *A* had no notice.

*Quære.*—Whether *B* can sue the lessor for damages.

It appears that Kalee Komul, who has been made a party to this suit, took Rs. 3 from the special appellant, as earnest-money, under a promise to execute within 10 days a mokurruree lease in his favor at a jumma of Rs. 14 per annum, receiving a bonus of Rs. 150 *minus* the sum received as earnest-money.

Subsequently, Kalee Komul executed a mokurruree lease to Modoosoodun, who has been made a party to the suit on his application under Section 73 of the Code. This party was already in possession, and has been declared to have a right of occupancy which has now ripened into a more permanent tenancy under the mokurruree lease.

Modoosoodun, having no notice of the previous arrangement between Kalee Komul and the special appellant, which never went beyond Kalee Komul's receiving and pocketing the earnest-money, cannot be summarily evicted and deprived of his title under the mokurruree lease which has been duly made in his favor.

The special appellant may, or may not, have his remedy in an action for damages against Kalee Komul, who has apparently cheated him out of his earnest-money and broken his promise. (*See* Weekly Reporter, Volume III., pages 64 and 65, Civil Rulings, 29th May 1865.)

Appeal dismissed with costs and interest.

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The 13th September 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Estoppel—Ryot not bound by act of zemindar—Proclamation against absent witnesses.**

Case No. 1144 of 1866.

*Special Appeal from a decision passed by the Judge of Hooghly, dated the 20th January 1866, reversing a decision passed by the Moonsiff of Hureepal, dated the 20th November 1863.*

Bhoobun Moyee Dossee (Plaintiff), *Appellant,*

*versus*

Kishoree Dossee and others (Defendants), *Respondents.*

*Baboo Bykuntnath Paul* for Appellant.

*Baboo Nil Madhub Bose* for Respondents.

In a suit by the purchaser of *A's* jote against the zemindar and *B* to whom the zemindar had given a new lease of the same land, the zemindar having come to a compromise—HELD that *B* was not bound by the zemindar's act, and that he could contest the plaintiff's purchase notwithstanding the zemindar's withdrawal from the contest.

A Court is not bound to issue a proclamation against absent witnesses in a case where it was not satisfied that the witnesses were material, or that they had really absconded to avoid attendance.

THE special appellant purchased certain rights of one Gopal, who held a tenure under the zemindar. The zemindar, denying the right of Gopal to sell the jote, gave a lease of it to another person. Special appellant sued all these three parties.

This Court remanded the case to try whether the rights of Gopal were transferable.

After remand, the zemindar filed a compromise, and the Lower Appellate Court still tried the case of the special appellant as against the other ryot who was in actual possession through the said zemindar.

The special appellant argues that the compromise by the zemindar entitled the special appellant to obtain a decree; that the other ryot is bound by the acts of the landlord; that the compromise made by the landlord further distinctly shews that there is a custom to sell such tenures as held by the vendor of the special appellant; and that the Lower Appellate Court refused to issue a proclamation against the witnesses of the special appellant who had not attended on summons.

The zemindar, after giving a lease to the other ryot, cannot, by any act prejudicial to the rights of that ryot, bind him. The acts or admissions of the zemindar cannot injure the rights of the said ryot, and he was empowered to contest the purchase of the special appellant upon the rights of his landlord, though that landlord may have afterwards withdrawn from the contest.

The Court below was not bound to issue proclamation, as in this case it was not satisfied that the witnesses were material, and that they had really absconded to avoid attendance. In this view, we see no reason to interfere, and reject the special appeal with costs.

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The 13th September 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Sale—Fraud.**

Case No. 1594 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 13th March 1866, affirming a decision passed by the Moonsiff of Radhanuggur, dated the 18th September 1865.*

Kishen Dhun Surmah and others (Plaintiffs), *Appellants,*

*versus*

Ram Dhun Chatterjee and others (Defendants), *Respondents.*

*Baboo Bungsheedhur Sein* for Appellants.

*Baboo Nil Madhub Sein* for Respondents.

The mere non-payment of a debt does not necessarily prove collusion between the debtor and his vendor to defraud the creditor. Fraud must not be presumed without good and probable grounds.

THE special appellants contend that the Lower Courts have taken no notice of the fact that the decree of the defendants was only for 7 rupees; that it was passed *ex parte* and against seven persons; that, accordingly, the debt due under it was not worth any collusive transaction being entered into to defeat it; that the Lower Appellate

Court has not taken notice of the important fact that the special appellant had filed several bonds to show that the vendor of the special appellant was, before the sale, indebted to the special appellant, and had mortgaged to him the property afterwards sold to him in consideration of a further sum (in addition to the old debt); that the Lower Appellate Court has also not taken proper notice of the important fact that, before the sale, in a case brought by the vendor of the special appellant for some other portion of his property not sold to the plaintiff, the defendant intervened to protect some other property alleged to have been purchased by the defendant from the vendor of the special appellant (separate from the property in dispute which the said defendant purchased afterwards in execution); that, though this intervention in such a case may not bind the defendant as purchaser of the property in dispute from questioning the validity of the sale set up by the plaintiff, the fact may still be regarded as showing that up to this time the defendant, who had already obtained the decree for 7 rupees, had no occasion to suspect that one of his debtors was colluding with the special appellant to set up a fraudulent sale at a considerable expense, only with a view to deprive the said defendant of the chance of recovering his dues under the decree; and that the Lower Courts have not taken notice of the fact that the sale set up by the special appellant was not only for the property in dispute purchased by the defendant, but also for other properties of the said vendor.

It is further argued that the smallness of the sum due to the defendant (especially in the absence of any suggestion that the vendor of the plaintiff was indebted to any other person) is a strong fact which, if properly considered, might have been found by both the Lower Courts to be sufficient to establish the truth and *bona fides* of the plaintiff's purchase.

After fully hearing Counsel on both sides, we hold that this case has not been properly decided and investigated by both the Lower Courts.

It is not, however, for us to decide the facts of the case, or to hold that the Lower Courts may not ultimately be found to be right, if they, after the investigation hereby ordered, come again to the same conclusion as they have now done. There cannot be any doubt in this, that their present judgments are not based on correct reasoning upon the facts disclosed before them and noticed by them, nor on a proper consideration of all the circumstances connected with this case.

We think it proper to remand the case to the first Court for a new trial with reference to the pleas of the special appellant, and also with reference to the defects in the investigation of this case by both the Lower Courts which we proceed to refer to.

We have no *data* from which we can learn the precise value of the properties purchased by the special appellant, or of those purchased by the defendant, but it is nowhere said that the price alleged to have been paid by the special appellant for what he alleges he purchased, does not represent the market-value of the property. On the contrary, the special appellant argues that the property in dispute is worth more than 10 rupees, for which sum it has been purchased by the defendant in execution of his decree. We have no information whether it was at all pleaded or shewn below that, besides this debt for 7 rupees, the vendor of the plaintiff had any other debt due from him, or had even any other occasion to resort to the expedient of a benamee in the name of the special appellant with whom no connection sufficient to justify any inference of collusion has been shewn to exist. Now, if the existence of any other debt or a cause to make a benamee is not suggested, we apprehend that possibly fraud has been recklessly or mischievously suggested with a view to prejudice the minds of the Judges, and that, owing to such a suggestion, all the evidence produced by the special appellant has been regarded without first finding any reasonable and probable grounds and motives for the alleged fraud, and without taking into consideration that, in order to carry out this fraud on all its facts, an expense equal to the entire value of the property alleged to have been purchased by the special appellant must have been incurred in paying for the stamp of the deed in the name of the plaintiff and for carrying out all the litigation-proceedings which are assumed by the Lower Appellate Court to have been merely collusive and in fraud, and all this to save the property from a debt of 7 rupees. To justify a Court in believing such proceedings to be in fraud, it should be satisfied that something worth the trouble and obvious expenses likely to be incurred was to be secured by the fraud.

As to the argument of the Court of first instance with reference to the questions why special appellant's deed of sale was not registered, or why it was not attested by better witnesses available, when it was executed in

consideration of a *considerable sum of money*, it may appear, on further investigation, to be correct or otherwise.

If the vendor of the plaintiff was indebted to him—if the two jotes held by the former were already, for previous debts, mortgaged to the latter—and if the house stands upon a portion of one of these jotes—it would be worth while to consider whether, if the vendor of the plaintiff had desired and wished to sell only a portion of these jotes to pay the debt due to the special appellant, it was as easy to do so as it is to say, why did he not do so, instead of selling the whole; and to consider whether a purchaser could be found willing to purchase merely a portion of the property without the consent of the plaintiff, and whether, if the vendor had proposed this, the plaintiff would have found it convenient to take only a portion, and whether, if the said vendor was in want of money, not only to pay the debts due to the special appellant, but also to himself, he could have got all this without selling the whole, either to the special appellant or to any other person, with or without the consent of the special appellant.

The Lower Appellate Court appears to have considered the sale to be fraudulent upon the ground, among others, of the sale being of all the properties of the vendor, including his residence. If, however, the circumstances noticed above had been taken into consideration, and the case viewed in that light, the fact of the sale of the dwelling-house might not appear improbable, and the facts relied upon by the special appellant in proof of his purchase and possession, *viz.*, the taking of a kubooleut from the ryot vendor, the payments of the rent to, and the obtaining rent-receipts from, the landlord of the ryotee lands in dispute, might appear to be natural and consistent with a true case. The concluding portion of the judgment of the Court of first instance shews that it was of opinion that the kobalah was forged by the special appellant to protect himself from any loss that he might suffer when the defendant should execute his decree against the property in dispute. Now, this view of the case does not admit the possibility of a collusion between the special appellant and his vendor, but only of the fraud of the former. The remaining portions of the judgment of the first Court can only be correct, in our opinion, on the assumption of a collusion. As to the argument of that Court based on the supposition of a forgery by the special appellant, it seems a fallacious one, because, if the properties of his subsequent vendor were mortgaged to the special appellant, he could not be afraid of any loss by a decree for 7 rupees or 7,000 rupees being executed against some portion of the properties attached by the defendant, or even if the whole of what was mortgaged to him was put up for sale, because the purchaser could only get the portion sold encumbered with the dues of the special appellant.

Next, we have to notice that the rent-receipts of the landlord are pronounced forgeries by the Court of first instance with reference to their appearance. The Courts below have a right to decide on this ground regarding the genuineness or otherwise of documents; but, as the necessity to forge would reasonably arise only in case of the proof of the existence of some probable and sufficient motive for collusion between the vendor of the special appellant, the special appellant, and the zemindar, the matter of receipts of rents seems but a small one in this case.

An incorrect argument of the pleader of the special appellant before the first Court, in answer to the objection of the Court regarding the want of registry, has given rise to another argument of that Court against the plaintiff's case.

The pleader of the special appellant is reported by the first Court to have said before it that the special appellant did not press for the registry, because the purchase was admittedly by the vendor in a case instituted by him against the special appellant. If any such meaningless argument was used by the pleader, it was properly answered by the first Court that that case was instituted about two years after the purchase; and so the argument of the pleader was not any answer to the objection of the Court of first instance.

But this mistake of the pleader, or the remarks of the Court of first instance with reference to this matter, do not anyhow prove the special appellant's purchase to be collusive. The first Court, with regard to this case, says that the vendor of the plaintiff admitted the sale by instituting this case, but afterwards denied it, as well as the institution of the case itself. Now, if the kobalah produced by the special appellant is a forgery, even against his alleged vendor, the argument has some little force; but, as a proof of collusion between him and his vendor, this argument is not of any force. On the contrary, the facts relied upon in this argument by the first Court suggest rather a collusion between the defendant and the vendor of the plaintiff. It is

not improbable that, after instituting a *bonâ-fide* case, the said vendor may have found it proper to abandon it in order to complete the line of conduct he is charged by the special appellant to have adopted, through the assistance of the defendant, in order to cheat the special appellant.

The Lower Appellate Court is said not to be right in asserting that this case was brought after the attachment made in execution by the defendant. We do not know whether the Court was right or wrong in this assertion; but, whether the case was brought before or after the attachment, it would not make any difference as regards the admission by the vendor of the plaintiff, because it can be justly construed to be fraudulent only when a necessity for a fraud is shewn. As regards the fact of the defendant's intervention in that case—a fact not noticed by both the Lower Courts—the previous attachment by the said defendant might shew the futility of the argument of the Lower Court as regards the facts connected with this case.

In ordinary cases, it is not proper or necessary to try the case of the defendant before the case of the plaintiff is somewhat proved; but in this case, merely to find out whether the case of the plaintiff, which is supported by direct evidence, is a true one, or, in other words, to decide whether his evidence is credible or not entitled to any credit, as it is got up to support a fraud and collusion, it is necessary to examine also the case of the defendant. If fraud be unmistakeably discovered in the defendant's case, and the collusion found to exist between the defendant and the vendor of the special appellant, all the objections taken against the case of the latter must disappear, and stand fully explained in his favor.

The Court of first instance says that the report of the Ameen shews that the kobalah of the plaintiff was not known of in the mofussil, and the special appellant urges that the Lower Courts have not taken notice of the fact that the Ameen reported that (of late) his vendor had removed himself to the house of his father-in-law in another village, which the special appellant says he had long since determined to do. Such a report of the Ameen may be confirmatory evidence of fraud; but, before deciding the following question of fact, whether plaintiff was in actual possession from the time of sale, or whether only the defendant was in possession, and really the special appellant only nominally, it was necessary first to find some fair motives for fraud and collusion; and, without doing so, it would not be proper to pass over the oral and documentary evidence, only upon the report of an Ameen, which report, on a proper investigation of the case, might be found to be more as an opinion than a report of any legal evidence taken before that officer.

That the appellant had objected in the execution-case of the defendant in which the property in dispute was sold, is a significant fact. Much light may be thrown upon the real nature of the purchase by the special appellant by following that fact, and by tracing out all other facts connected with it. The Court of first instance suggests that, as the plaintiff had failed to produce his kobalah in that case, and as he had not even given the date of it in his claim, it is to be presumed that the kobalah was not in existence when the claim was urged. But we observe that the case instituted by the vendor of the special appellant, in which it is said the defendant had intervened, was brought before this execution-case was or could be instituted. It is held by the Lower Courts that this case was instituted to establish a collusive sale to the special appellant. It is not proper to assume that it was so brought, without first creating the deed intended to be supported by this false suit.

There may not have been any necessity to disclose the date of this kobalah by the plaintiff in that first case, and, for aught we know or are shewn, may have been specified on the record of that case, as well as on the record of the subsequent claim-case; but, anyhow, the want of such a specification of the date of the deed would not be a sufficient ground to suppose that the plaintiff's kobalah was not in existence at the time of the claim being preferred.

Both the Courts, when treating of the case instituted by the vendor of the plaintiff, appear to hold that he did so, to support a benamee sale of all the properties of the vendor of the special appellant.

It may truly be said that, if the purchase by the special appellant was a genuine one, when he knew of the sale required by the defendant, the plaintiff might have found it more convenient to pay off the 7 rupees due to the defendant than incur all this litigation; but, if we are to suppose that all this was done only to defraud the defendant, we cannot see how the omission of the special appellant to do so would support the case of fraud charged against him.

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The defendant, perhaps, could not get payment accepted and thereby prevent the sale, and was therefore obliged to sue; or, relying upon his rights, he may have adopted the course he has done; but the non-payment of the debt due to the defendant will not of itself necessarily establish any collusion between the plaintiff and his vendor to defraud the defendant. Fraud may be reasonably inferred from this fact of non-payment if it be proved that, besides the defendant, there were other creditors holding decrees or claims against the vendor of the special appellant.

The Court of first instance, in support of its own views, remarks that the special appellant in that claim had stated that, after his purchase, he held khas, and had not said that, after his purchase, the lands, or any portion of them, were *re-let* to the ryot as he now says. We do not know whether the special appellant distinctly pleaded in the claim-case that he had not re-let. Such an omission itself cannot, however, be sufficient ground to believe that the documents now set up to prove the alleged re-letting and receipt of rent from the said vendor by suits must be the result of an *after-thought*. The dates of the cases under Act X. indicate that they were not passed after defendant's attachment; and in these cases, this re-letting and the kubooleut, even if fabricated, must have necessarily been alluded to.

The Lower Appellate Court has not noticed these arguments of the Court of first instance.

To do justice, however, in this case, it appears to us obviously necessary that the facts noticed by the Court of first instance should be fully and carefully gone into also by the Lower Appellate Court. Fraud must not be assumed without good and probable grounds for such fraud; nor is all the evidence that can be fairly expected to be produced to be disbelieved only on assumptions.

We accordingly reverse the order of both the Courts, and remand the case to the Court of first instance to re-try this case with reference to the aforesaid remarks. We further direct that, if, after the decision of the case by the Court of first instance, the case is appealed to a Lower Appellate Court, that Court shall take into its consideration all the facts noticed in this order of remand. A copy of this order to be sent to the Lower Appellate Court.

Remand accordingly.

The 14th September 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Execution of decree—Inconsistent claims.**

Case No. 1582 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 21st March 1866, modifying a decision passed by the Moonsiff of Naraingunge, dated the 22nd December 1865.*

Mohima Chunder Biswas (one of the Defendants), *Appellant,*

*versus*

Nil Komul Ghose (Plaintiff) and others (Defendants), *Respondents.*

*Baboos Chunder Madhub Ghose* and *Kalee Mohun Doss* for Appellant.

*Baboo Romesh Chunder Mitter* for Respondents,

A person holding several decrees against the same debtor may attempt to enforce them all against the same property, notwithstanding that he may have failed on one.

Where a person, claiming attached property under a bill of sale, once sets up that two of the judgment-debtors are not minors, and it is found that they are minors, he cannot afterwards be allowed to set up an opposite case and claim the shares of the minors, on the ground that the sale to him was to satisfy an ancestral debt.

In this case, a decree-holder caused the property of a joint family to be attached. The defendants in this case intervened, and claimed the property under a bill of sale executed in their favor prior to the attachment and were successful, and the attachment was set aside accordingly. The auction-purchaser took no steps to set aside this decision, but, holding another decree against the same debtors, caused the same property to be again attached and sold under that decree. The defendants, purchasers under the bill of sale, did not in that case prefer any claim under Section 246 or Section 256, but, when the auction-purchaser took proceedings to obtain possession, he was opposed by the defendants, and the auction-

purchaser thereupon applied to the Court under Section 267, when the defendants again set up their bill of sale, and an order was made in the Execution Department in favor of the defendants.

The auction-purchaser now sues to set aside this order and establish his right, and the first point taken by the defendants is, that the auction-purchaser has no *locus standi* in this suit; that the proceedings on the second attachment were a nullity; and that the decree-holder was bound, if he wished to question the propriety of the decision on the first execution-sale, to have brought a regular suit.

We are, however, of opinion that a person holding several decrees against the same debtor may attempt to enforce them all against the same property. If the opposition to his claim is well founded, he cannot do this successfully, and there is a short and simple mode by which the attachment may be set aside under Section 246; and, if the decree-holder acts vexatiously, the Court can punish him by compelling him to pay the costs of the applicant.

We therefore agree with the Lower Court on this point, but the rest of our decison is based on grounds which differ from those taken by the Principal Sudder Ameen.

The next point raised by the appellant is, that he is entitled under the bill of sale to the shares of the three judgment-debtors, Krishto Coomar, Nund Coomar, and Hur Coomar. Of these, Krishto Coomar was of age at the time of the sale to the appellant, and to his share the defendant (the purchaser under the bill of sale) is clearly entitled. The other two were minors, and their shares, therefore, did not pass by the bill of sale; and to these the defendant is not entitled.

At the last moment, the appellant set up a claim that the shares of the minors passed because the sale was to satisfy an ancestral debt. But this is an entirely new case, in contradiction to that set up below, which was that Hur Coomar and Nund Coomar were not minors at all, and that they had executed the deed through the pen of another person, not being themselves able to read and write. This was found to be false; and, having once set up this case, the appellant must stand or fall by it. The decree, therefore, will be amended by decreeing the share of Krishto Coomar to the defendant, and the shares of Hur Coomar and Nund Coomar to the plaintiff.

The 17th September 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, L. S. Jackson, and A. G. Macpherson, *Judges*.

**Mortgage—Redemption—Account—Mesne-profits.**

*Regular Appeals from decisions passed by the Principal Sudder Ameen of Monghyr, dated the 6th September 1864.*

Case No. 443 of 1864.

Maharanee Wuzuroonissa (Plaintiff), *Appellant*,

*versus*

Bebee Saeedun and others (Defendants), *Respondents*.

*Messrs. R. V. Doyne*, *W. E. Peacock*, and *C. Gregory*, and *Baboo Onookool Chunder Mookerjee* for Appellant.

*Baboos Dwarka Nath Mitter*, *Ashootosh Dhur*, and *Tarrucknath Sein*, and *Moonshee Ameer Ali* for Respondents.

Case No. 449 of 1864.

Rajah Joymungul Sing (Plaintiff), *Appellant*,

*versus*

Beebee Saeedun and others (Defendants), *Respondents*.

*Baboos Kishen Succa Mookerjee* and *Unnoda Persad Banerjee* for Appellant.

*Baboos Ashootosh Dhur* and *Tarrucknath Sein*, and *Monshee Ameer Ali* for Respondents.

The estate in dispute was mortgaged to the defendant in the form of a zur-i-peshgee lease to continue so long as the mortgage-money remained unpaid. The mortgagee, having been evicted by the mortgagor, sued and obtained a decree for possession and wasilat (the latter to be assessed in execution). He never obtained possession under the decree, but recovered wasilat by execution. Two persons (the plaintiffs in these suits) claiming separate shares in the entire estate by purchase from the mortgagor subsequent to the mortgage, sued separately each to redeem his own share upon payment of a proportional share of the mortgage-money.

HELD that the plaintiffs, as representing the original mortgagor, were entitled to redeem, but that, as the mortgage was of an entire estate, neither of them could redeem upon payment of less than the full amount of the mortgage-money.

HELD also that the defendant, having been wrongfully dispossessed, was not bound to account for the wasilat recovered under his decree, the wasilat or damages so recovered being different from the usufruct enjoyed by a mortgagee.

*These cases were originally heard before Morgan and Shumbhoonath Pundit, JJ., by whom the following minutes were recorded:—*

*Shumbhoonath Pundit, J.*—In these two cases, two plaintiffs sue for the redemption of the mortgage of a property now held by them in 4 annas and 12 annas respectively. The mortgage was created by the former proprietor from whom one plaintiff purchased one-fourth, and in a sale of rights and interest in an execution-case, the other plaintiff purchased the three fourth share. The mortgage was given on the 25th March 1844 for Rs. 10,001, and the deed of zur-i-peshgee drawn on the occasion represented in words the transaction to be a lease for 9 years, with power to hold over until the advance is paid, if not paid at the end of the term. The lease further provides for a payment of a fixed rent annually to the mortgagor, and for the payment of the Government revenue by the mortgagee. It is nothing but the ordinary zur-i-peshgee leases so often in use in the Upper Provinces, and which have repeatedly been held to be mere usufructuary mortgages, in all which, executed before the passing of the law of 1855, setting aside the Usury Law of 1793, the mortgagee is not entitled to recover more than the principal and 12 per cent. interest, if no lower rate is provided for in the deed, and which are to be considered as redeemed if the principal and interest be paid anyhow before or after the term of the lease. It appears that, immediately after the execution of the lease and making over of the property, the mortgagor dispossessed the mortgagee. After the transfers of the property in two separate portions, as mentioned above, to the plaintiffs of these two cases, the mortgagee sued the original mortgagors and these two plaintiffs for recovery of possession, and obtained a decree for possession and costs against all the three, and an order for mesne-profits during dispossession against the mortgagor alone up to the date of the first transfer of the 12 annas portion, and from the date of the sale from the plaintiff holding the 12-annas share in proportion of 12 annas, and the remainder from the original mortgagor. The decree for possession passed on the 10th May 1852 does not appear to have been executed until 1862, though the order for mesne-profits has been executed from time to time. The sum of Rs. 10,001 of the principal offered by the two plaintiffs is said to have been taken away by the mortgagee in execution of this order for mesne-profits. The two plaintiffs, after instituting these suits, have caused the execution of the said decree to be postponed on their giving a security to the extent of Rs. 40,000.

Though the nine years mentioned in the lease have passed, it is not denied that, as long as the debt is not paid off, the mortgagee is entitled to hold; but, when the principal sum borrowed has now been offered, notwithstanding the decree for possession, the plaintiffs are clearly, in my opinion, entitled to sue for redemption, and to ask for accounts being taken from the mortgagee of the proceeds of the property. As, however, the said mortgagee has not been in actual possession except for a time in which he says he had collected only Rs. 500, it does not appear proper all at once to assume that the mortgagee is in possession, when in fact, he has not been; but the negligence of the mortgagee to take or ask for possession until 1862 suggests the fairness of considering the execution of that decree as quite separate from this case. For the purpose of this suit, the mortgagor may therefore be considered to be actually in possession. For the wrong done to him by the act of dispossession full and ample relief has been granted by the order for mesne-profits passed in the decree. This decree does not, however, give to the mortgagee a right to hold in any way inconsistent with the rights created by the lease. A case to redeem and set aside the deed on payment, or proof of payment, of the mortgage-debt due, cannot necessarily be a suit against the former decision.

The Lower Court has dismissed the claim of the plaintiff simply on the ground that the claim now made is opposed to the decree passed in favor of the mortgagee. It is to be borne in mind that, for the sake of redemption, both these two suits are to be considered as one, as the mortgage was one transaction, and the whole mortgage alone can be redeemed and not in parts. Before considering these cases to be a plaint asking for accounts, with reference to the special circumstances of the case, I think it proper first to propose a more simple relief for both the parties.

I would decree that the plaintiffs are entitled to obtain an order for redemption, on both or one of them paying the ten thousand rupees of the principal, together with simple interest upon the same from the date of the zur-i-peshgee up to the time of the payment of the principal. From this sum is to be deducted in favor of the plaintiffs the principal that they may have deposited before, and

Rs. 500 which the mortgagee says had been collected by him before his dispossession, as well as anything which he may have realized besides in execution of his decree for mesne-profits from any one of the defendants liable to pay the same. The property is to be pronounced as redeemed, and the mortgagee is to be considered as relieved from giving any accounts, as well as from all liability to pay any surplus collection.

The mortgagee is also to forfeit all claims to any mesne-profits decreed as against any party liable under the decree.

The costs of the decree for possession will, however, be allowed to be realized by the mortgagee, as well as all the costs of these two cases for both the Courts from both the plaintiffs, appellants. This decree is, however, conditional, one being limited to the contingency of the plaintiffs paying the sums required above within two months from this date. The payment by any one of the plaintiffs will entitle both of them to the decree recorded above.

If money is not paid as directed above the Lower Court will then withdraw the injunction passed by it for staying the execution of the former decree, and proceed to try this as a case for redemption, and call upon the mortgagee for accounts, on the basis, however, of the mesne-profit account adopted in the execution-case, and to settle thereby what, after deduction of the sum to be realized hereafter by the mortgagee, or already realized before, is due in the account of principal and interest at 12 per cent. from the date of the mortgage, up to the date of the deposit below of the principal by the plaintiff. If a surplus is proved due to the plaintiffs, it may not be decreed to be realized unless the mesne-profits are paid off and realized, but may be deducted from the same debt to the extent not realized. The costs of these cases, in such a state of things, are to be dealt with according to the result of the trial. If any sum be still found due to the mortgagee, the case of the plaintiffs should be dismissed, unless they, by paying the sum due, redeem the mortgage. In this latter case, the plaintiffs must pay all costs of these suits of both the Courts. No decree should be drawn up here, according to the first portion of the order, but, in order to enable the Lower Court to receive the payment provided for there, or to carry out the second part of the order, the case is to be remanded to the Lower Court. That Court will record any decree necessary to be entered with all proper orders for costs as directed above.

*Morgan, J.*—The defendant, having held for a few months the land given in zur-i-peshgee, was dispossessed by the mortgagor, who subsequently sold a portion (4 annas) of the property to Rajah Joymungul Singh, the plaintiff in one of the present suits, and the remaining portion to the plaintiff in the other suit.

The mortgagee sued for the recovery of the lands from which he had been dispossessed, and obtained a decree against the mortgagor and the persons to whom the mortgagor had sold. By the decree the mortgagor (the defendant) is entitled to recover possession of the property, and is also entitled to wasilat and costs in the proportion and mode mentioned in the decree. If the defendant is proceeding improperly in the execution of the decree which he has thus obtained, the proper remedy for this is by application to the Court whose duty it is to execute the decree.

The two suits now before us in appeal are separately brought by the purchasers from the mortgagor, who conceive themselves entitled to the ordinary relief which the law gives in cases of redemption of usufructuary mortgage. The plaintiff in each suit has deposited in Court the amount which he supposes to represent his portion of the mortgage-debt, and seeks to have the property discharged from the mortgage.

I think the Court below was right in dismissing both suits, and that the plaintiffs have no right, either separately or together, by deposit of the principal sum, to free the property from the mortgage. The defendant is not a mortgagee in possession; on the contrary, he was dispossessed by the mortgagor under whom these plaintiffs claim. The decree which he holds unsatisfied, except as to some portion of the mesne-profits, does not place him in the position of a mortgagee in possession.

On the other hand, the plaintiffs are no ordinary mortgagors; each of them has a share of the mortgaged property, but he holds it with this defect, that he (or his vendor) acquired it by the illegal dispossession of the mortgagee.

I would affirm the decree in both cases, and dismiss the appeals with costs.

*In consequence of a difference of opinion between the learned Judges, the cases came to be argued before the Chief Justice as a*

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*third Judge, and the following minute was recorded by—*

*Peacock, C. J.*—These two appeals, and the original suits out of which they arose, were heard together. The two learned Judges of this Court differed in opinion from each other. It appears that the owner of the estate, through whom the plaintiffs in the two suits claim separate shares by purchase, had, before the sales to the plaintiffs, mortgaged the estate to the defendants. The mortgage was in the form of a zur-i-peshgee lease for a fixed term of years, and was to continue after the expiration of the term, so long as the mortgage-money should remain unpaid. Shortly after the mortgage, the mortgagee was evicted from the estate by the mortgagor. He subsequently brought a suit for possession and wasilat, in which he obtained a decree, the wasilat to be assessed in execution. The defendant has never obtained possession under the decree, and it does not appear that he has ever attempted to do so, but he has recovered wasilat by execution. The term of the lease has expired, and the plaintiffs each bring a suit to redeem his own share of the estate upon payment of a proportion of the mortgage-money equal to the portion of the estate which he has purchased; one of the plaintiffs being a 4-annas and the other a 12-annas shareholder. The mortgage was prior to the repeal of the Usury Law in 1855, and the principal has been deposited in Court by the two plaintiffs in separate proportions. One of the plaintiffs, *viz.*, the 4-annas shareholder, claims to redeem his portion of the estate with costs; the other, the 12-annas shareholder, claims to have an account of what the defendant has received under the lease; and it has been contended on his behalf that, as the defendant has received wasilat in lieu of the usufruct from which he was evicted, he is bound to account for the amount received, and to return all that is in excess of 12 per cent. interest.

Mr. Justice Morgan thinks that, as the defendant is not a mortgagee in possession, the plaintiffs have no right to redeem. Mr. Justice Shumbhoonath Pundit thinks that they have a right to redeem, and that the defendant is bound to account, and is not entitled to more than the principal and 12 per cent. interest. In consequence of this difference of opinion, the case has been referred to a third Judge, but the point of law upon which the opinion of the third Judge is required has not been stated in pursuance of Section 23, Act XXIII. of 1861.

I concur with Mr. Justice Shumbhoonath Pundit in thinking that the plaintiffs, as representing the original mortgagor, are entitled to redeem their respective portions of the estate; but, as the mortgage was a mortgage of the entire estate, neither of the plaintiffs can redeem upon payment of anything less than the full amount of the mortgage-money. Perhaps, in strictness, the suit should have been a joint one; and upon the whole mortgage-money being brought into Court by the two plaintiffs, in whatever portions they might think fit to pay it, each might ask to redeem his own share of the estates. But, as the whole mortgage-money has, in fact, been brought into Court, I think that the Principal Sudder Ameen was entitled to hear the two suits together, and to give each plaintiff the same relief which he would have been entitled to in a joint suit. The defendant, having got a decree for possession, may enforce it at any time unless the estate is redeemed, and the lease will not be at an end until the mortgage-money is paid off. The plaintiffs have, therefore, in my opinion, a right to redeem, and to maintain a suit for redemption; but, as neither plaintiff was entitled to redeem his portion of the estate upon payment of his proportion of the mortgage-money, it appears to me that neither of the plaintiffs ought to be allowed his costs of suit, inasmuch as each of them claimed to redeem on payment of his own proportion; and I rather think that each should pay the defendant's costs in the suit below, for, if only one of the suits had been brought, and the plaintiff in that suit had paid into Court only his proportion of the mortgage-money, his suit must have failed.

I do not concur with Mr. Justice Shumbhoonath Pundit in thinking that defendant is bound to account for the wasilat decreed to him. Wasilat and usufruct are not necessarily the same; and it appears to me that Regulation I. of 1798 must be construed strictly, and, as the defendant was evicted, plaintiffs are simply entitled to redeem upon payment of the principal, and not to an account of the wasilat.

As no point of law was expressly reserved for the opinion of a third Judge, and as I do not concur entirely with the view taken by Mr. Justice Shumbhoonath Pundit, I cannot finally determine the case. Under all the circumstances, it appears to me that the proper course is to refer the case for decision by a Full Bench of three Judges.

It was contended in the course of argument that, as the lease was granted at an

actual rent which was considerable in amount, the case would not fall at all within Regulation I. of 1798, unless it were found as a fact that the lease was granted as a device to avoid the Usury Law, and that the transaction must be considered as one creating the relation of landlord and tenant, and not the relation of mortgagor and mortgagee. The case of Syed Altum Ally *versus* Rajah Nawab Lall, 5 S. D. A. Rep., was referred to as an authority; but it appears to me to be clear that the case was one of mortgage, inasmuch as it was expressly stipulated that the lease should continue until the loan should be repaid.

I was not aware of the case in the Sudder Reports, 1859, page 1181, when I referred these cases to three Judges. They had better go at once to a Full Bench of five Judges.

*The cases were then fully argued before a Full Bench, when the judgment of the Court was delivered by—*

*Peacock, C. J.*—The plaintiffs in this case sued to redeem the mortgage, and one of them sought to compel the defendants to account for the *usufruct*. The Principal Sudder Ameen decided the suit against the plaintiffs, and held that they were not entitled to redeem. In that respect we think that the Principal Sudder Ameen was wrong, and therefore that his decision must be reversed. But, considering that the mortgage-money was paid into Court in two separate amounts, and that two separate suits were brought for redemption of the estate; that one of the plaintiffs sought to have an account of the wasilat which the defendants had recovered under their decree; and that we reverse the decision of the Principal Sudder Ameen altogether, we think that the plaintiffs must severally pay the costs of the suits below, and also the costs of these appeals.

We think that the plaintiffs are entitled to redeem the mortgage upon payment of the principal sum of money which is due. It does not appear to be very clear whether the money which was brought into Court by the plaintiffs still remains there. If it has been paid out of Court to the defendants, it must be deemed to have been received by them from the plaintiffs in satisfaction of the mortgage-debt. If it remains in Court, it will be paid out of Court in satisfaction of the mortgage-debt.

The only question now remaining is whether the defendants were bound to account for the wasilat.

With reference to the whole case, I do not think that I can add anything to that which I recorded when the case came before me as a third Judge.

There is a wide distinction between *usufruct* collected by a mortgagee in possession, and damages which are awarded to a mortgagee in a suit brought by him against the mortgagor for evicting him.

We think that the defendants were not bound, under the words or the spirit of Regulation XV. of 1793, or Regulation I. of 1798, to account for the wasilat or damages which they have received under the decree in the suit brought by them against the mortgagor for possession. If a mortgagor wrongfully turns a mortgagee out of possession, it is his own fault, and the mortgagee is entitled to retain any wasilat which he may recover against the mortgagor, and is not bound to account for it. To prevent an evasion of the Usury Laws, the Regulation compelled the mortgagee to account for the *usufruct*; if that exceeded interest at 12 per cent., the balance was to be accounted for. We think that a Regulation of this kind must be construed strictly, and that we ought not so to construe it as to substitute wasilat recovered by a decree of Court for *usufruct* enjoyed by a mortgagee. The case of Chutterdharee Kowar *vs.* Ramdoolun Kowar, Sudder Decisions of 1859, p. 1181, is a case very much in point, though the question arose in a different form.

I should add that the defendants will be prevented by this decree from executing their decree for wasilat for any period subsequent to the date on which they might have received the principal. If they have taken the money out of Court, they must be deemed to have taken the principal out of Court; and, having had the principal in their hands from that time, they will be restrained from executing the decree for wasilat for any period subsequent to the date on which they received the money out of Court. But, on the other hand, if the money remains in Court, they will be entitled to proceed to execution under that decree up to the date of this decree, when the mortgage must be considered to have been substantially redeemed, and the defendants entitled to take the money out of Court.

The 19th September 1866.

*Present :*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Defamation—Damages—Bona fide Criminal prosecution.**

Case No. 1735 of 1866.

*Special Appeal from a decision passed by the Second Principal Sudder Ameen of Hooghly, dated the 13th April 1866, modifying a decision passed by the Moonsiff of that District, dated the 8th November 1865.*

Mohendronath Dutt and another (Defendants), *Appellants,*

*versus*

Koylash Chunder Dutt (Plaintiff), *Respondent.*

*Baboos Kalee Mohun Doss* and *Hem Chunder Banerjee* for Appellants.

*Baboo Nubo Kishen Mookerjee* for Respondent.

If *A*, having reasonable grounds for believing that *B* has stolen his property, prosecutes him for theft, the acquittal of *B* is no ground for recovering damages in a civil suit against *A*.

We are not satisfied with the decision in this case. It is true that the Principal Sudder Ameen states that "the malicious "motive of the defendant, and his intention "of putting the plaintiff into difficulties, are "clear," but he says that this is shewn by the decision of the Civil Court. We do not, however, find anything in the decision of the Civil Court which justifies that inference: the judgment of that Court proceeds entirely on the failure of identification. But, when the defendant instituted the prosecution, he was apparently acting on the statement of the fishwomen who identified the jewels; and, unless it is shewn that he had then good grounds for disbelieving their statement, so far as this point is concerned, his *bona fides* is established.

But there is the further question whether, assuming the defendant to have *bonâ fide* believed that these jewels were the same that he had lost, he had, when he instituted criminal proceedings against the plaintiff, fair and reasonable grounds for believing that the plaintiff was concerned in the theft. This will depend on all the surrounding circumstances—the nature of the articles stolen, the place where they were found, the conduct of the plaintiff, the length of time which has elapsed since the robbery, and so forth. If the defendant had reasonable grounds for believing that the plaintiff was concerned in the theft he was performing a public duty in prosecuting the plaintiff, and the acquittal of the plaintiff is no ground whatever for recovering damages against him. If, on the other hand, he had no reasonable grounds for such a belief, then he is bound to indemnify the plaintiff for the injury done to him. The case, therefore, is remanded to the Principal Sudder Ameen to be re-tried with reference to these remarks. We suggest that the case should be sent to the Judge for trial.

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The 19th September 1866.

*Present :*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Gift by Hindoo—Seisin—Doomraon Family.**

Case No. 199 of 1866.

*Regular Appeal from a decision passed by the Principal Sudder Ameen of Shahabad, dated the 20th March 1866.*

Maharajah Moheshur Buksh Singh Bahadoor (Defendant), *Appellant,*

*versus*

Mussamut Gunoon Koonwar (Plaintiff), *Respondent.*

*Baboos Dwarkanath Mitter* and *Mohesh Chunder Chowdhry* for Appellant.

*Mr. R. T. Allan* and *Baboo Unnoda Pershad Banerjee* for Respondent.

Suit laid at Rupees 7,400.

The absence of seisin is no objection to the validity of a gift by a Hindoo.

Where a cadet member of the Doomraon family gave, for the support of his illegitimate sons, certain properties which he purchased out of the savings and profits of his appanage, even admitting that he was in possession of such properties during his lifetime, his possession would be that of a trustee for his illegitimate sons.

This was a suit for possession of a brick-built house, stable, orchard, and premises, also of a bungalow and premises both situated in the Sudder Station of Arrah, Zillah Shahabad; the house, &c., valued at Rupees 7,000, with damages assessed at Rupees

1,400—altogether Rupees 8,400. The claim is based on a deed of gift, dated the 29th December 1861, executed by Baboo Rameshur Buksh Singh, deceased, the father of the two minors who are his natural sons. and who are represented for the purposes of this suit by their mother, the plaintiff, who was the mistress of the late Baboo Rameshur Buksh Singh. The allegation of the plaint is that, after the decease of Baboo Rameshur Buksh Singh, the plaintiff, as guardian of her minor sons, was in peaceful enjoyment of the rents and profits of the aforesaid properties up to 18th Bowar 1272 Fuslee, when her occupancy was forcibly disturbed by the Raja of Doomraon, the defendant in this suit.

The deed of gift, which is the basis of this claim, was filed with the plaint.

The defendant did not put in a written statement, but his pleader was examined. He stated that the late Baboo Rameshur Buksh Singh was the son of his client's paternal uncle; that, according to the usage which obtains in the family of the Rajahs of Doomraon, certain estates were made over to the aforesaid Baboo, a cadet member of the family, as an appanage, from the profits of which the houses, the subject of this suit, were erected by the said Baboo; that, as he died without legitimate issue, the said houses and premises have been held in right of inheritance by his client; that the deed of gift propounded by the plaintiff was a collusive document, and is of date subsequent to a registered bond executed by the aforesaid Baboo in favor of his client hypothecating certain properties, which bond is dated the 30th December 1861, though the deed of gift purports to be of prior date to the said bond; that the allegations of the plaintiff in the matter of her peaceable occupation of the disputed premises until evicted by his client are unfounded.

The Principal Sudder Ameen of Shahabad, in a decision dated the 20th March 1866, held that it was satisfactorily proved that the disputed houses and premises were owned and held by the late Baboo Rameshur Buksh Singh; that the said Baboo acknowledged the deed of gift to his minor sons and placed the donees in possession of the properties through their guardian and mother during his lifetime; that the plea of collusion set up by the defendant was wholly without foundation in truth: that the donor was competent to execute the deed; that, with regard to the plea of collusion, had such charge been founded in truth, the defendant would not have shrunk from making it in a verified written statement, instead of leaving it to be orally pleaded by his advocate who was doubtless prompted by some unscrupulous mookhtear. The possession of the plaintiff and her forcible ouster were considered to be satisfactorily established, but her claim to damages was not admitted. The suit was decreed, the plaintiff in execution to be put in possession, on behalf of her minor sons, of the disputed properties as per boundaries annexed to the plaint. The plaintiff to recover from the defendant such rent, from date of ouster to date of re-entry, as the houses may be found, after due investigation, to have been capable of yielding.

In appeal, it is contended that the deed of gift is not proved; that the donor was indebted at the time of the gift; that the donor was not competent to make any such right; and, lastly, that the plaintiff has not proved that she was ever in possession.

The pleader for the appellant, Baboo Dwarkanath Mitter, in his able address admitted that he was not prepared to question the *factum* of the deed of gift, or that the donor in his lifetime had repeatedly admitted its execution. His main contention was that, at the time it was executed, the donor was much indebted to his client, the Rajah of Doomraon; that the very fact that the deed of gift conveyed, during the lifetime of the donor, his household furniture, his carriages—in short, all the comforts and luxuries of life which a native nobleman does not willingly part with—shews that no seisin was ever made or contemplated, and that the whole transaction was a sham and savoured of fraud.

With reference to the competence of the donor to make such a gift, the learned pleader contends that the estates which were given to Baboo Rameshur Buksh Singh as an appanage reverted, on his death without legitimate male issue, to the head of the family, his client, by a special family custom; that all increments to the *corpus* of those estates, whether acquired by the savings of the grantor or from other sources, followed the *corpus*, and became by Hindoo Law and family usage vested absolutely in his client.

We find that Baboo Rameshur Buksh Singh was indebted in a very large sum (upwards of 6 lakhs of rupees) to the head of the family of the Rajah of Doomraon. The bond is dated the 13th December 1861, and the amount due is payable by instalments in 14 years from the above date. Ample security has been given, and amongst the properties

hypothecated, the small and comparatively insignificant properties, the subject of this suit, are not to be found. The gift of the properties to Rameshur Buksh Singh by the predecessor of the present Rajah for his maintenance was absolute, and under no circumstances would these properties revert to the Rajah unless the donee died without heirs. The deed of mortgage executed by the Baboo, and accepted by the Rajah as security for the money advanced by him, recites that the Baboo had more than a simple life-interest, and the properties have admittedly descended to the widow of the Baboo who has, under the Hindoo Law, a life-interest in the same. Out of the savings of the properties which were given to the Baboo for his maintenance, he purchased, or otherwise created, the small properties in dispute which he has given for the support of his illegitimate sons. Had he left them totally unprovided for, the Rajah could not with decency have left them to starve—nay, he would have been bound to maintain them. Where, then, are the badges of fraud which the learned pleader insinuates, rather than establishes?

As to the alleged absence of seisin, we are not dealing with a gift by a Mahomedan. The possession of the father, even admitting it—and there is evidence to shew that the plaintiff, as guardian of her minor sons, was in possession—was that of a trustee for his illegitimate sons. The debt due to the Rajah is, large as it is, amply secured; and the defence in this suit comes with a bad grace from a man of his unbounded wealth, and is, we regret to observe, not in accordance with our experience of the liberality which generally characterizes the dealings of Hindoo princes in matters of this description. The conduct of the Rajah appears to us to have been paltry in the extreme, and anything but creditable to him. It is pleasing, in contrast to such conduct, to record that the lawful widow of the donor does not attempt to question her husband's gift, whereby he makes a very small provision for his two natural children.

As to any alleged custom in the family by which it is alleged that any and every little property which, by dint of economy, a cadet member of the family may acquire out of the savings from the pittance granted to him as maintenance is inalienable, we observe that the pleader for the appellant has wholly failed to show or prove the existence of any such custom. Taking these views of the case, it is not without satisfaction that we dismiss this appeal, which is a most vexatious one, with costs and interest payable by the Rajah, defendant, appellant in this Court.

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The 19th September 1866.

*Present:*

The Hon'ble. F. B. Kemp and W. Markby, *Judges.*

**Section 170, Act VIII. of 1859—Dismissal of suit for default.**

Case No. 212 of 1866.

*Regular Appeal from a decision passed by Baboo Koylash Chunder Deb, Principal Sudder Ameen of the 24-Pergunnahs, dated the 2nd April 1866.*

Data Hurukman Singh (Plaintiff), *Appellant,*

*versus*

Oodoy Chand Pyne and others (Defendants), *Respondents.*

*Mr. R. V. Doyne* and *Baboo Onookool Chunder Mookerjee* for Appellant.

*Mr. G. C. Paul* and *Baboos Dwarkanath Mitter* and *Bama Churn Banerjee* for Respondents.

Suit laid at Rupees 31,500.

The stringent provisions of Section 170, Act VIII. of 1859, ought to be applied only in the case of contumacious litigants, and not to plaintiffs on whose part there is no proof of cognizance of the issue of a commission for their examination, or no proof of wilful default.

THIS was a suit instituted by the plaintiff styling himself the head Gomastah of Baboo Dhurm Narain Sahoo, for the recovery of Rupees 31,500, being the alleged value of 1,260 logs of wood, said to have been forcibly appropriated by the defendants. The plaintiff was permitted to verify the plaint on behalf of his principal, doubtless under the provisions of Section 28 of Act VIII. of 1859.

The Principal Sudder Ameen of the 24-Pergunnahs, without entering into the merits of the case, though the evidence was complete, has thought fit to dismiss the suit without reservation and with costs and interest, under the provisions of Section 170 of the aforesaid Act.

There can, we think, be no reasonable doubt that the real plaintiff in this case is Baboo Dhurm Narain Sahoo, though the suit might well have proceeded to a trial and determination *ex parte* as far as the real

plaintiff is concerned, in the presence of his recognized agent, the nominal plaintiff Data Hurukman Singh, he being the recognized agent contemplated by Clause 2, Section 17 of the Code of Civil Procedure.

Under Section 166, the Principal Sudder Ameen was competent to summon the real plaintiff at any stage of the suit, and to examine him either in open Court, or in such other manner as he might think fit to direct; it is also clear that, if a plaintiff, when ordered to attend to give evidence, shall, without lawful excuse, fail to comply with such order, the Court "may" either pass judgment against such party, or make such other order in relation to the suit as the Court may deem proper in the circumstances; but this power, which is tantamount to the infliction of a penalty, and a very severe one, ought to be exercised with tenderness and discretion, and not arbitrarily and without due discrimination. In the present case, after hearing the learned Counsel on both sides, and taking into consideration the whole circumstances of the case, we have no doubt whatever that the Principal Sudder Ameen has not exercised a sound discretion in dismissing, without trial, the plaintiff's suit.

The plaintiff is a man having mercantile transactions of considerable magnitude all over British India; his houses of agency are scattered over the face of the land, and his affairs are managed through confidential agents, such as the nominal plaintiff in the present suit. When the Principal Sudder Ameen thought it necessary for the ends of justice to examine the plaintiff, he was residing in Nepal, and a commission was issued for the purpose of subjecting the plaintiff to an examination in answer to set interrogatories through the agency of the Nepal British Resident. That officer reported that the plaintiff was then absent on a hunting excursion in the Terai, in company with Sir Jung Bahadoor. The case, at the suggestion of the Resident, was postponed for two months, but the ultimate result was that the plaintiff was not examined, partly because the Nepal Government objected to sending its subjects within the precincts of the Residency to be examined by the Resident, and partly because the plaintiff was travelling in the British territory, and his whereabouts were uncertain. Be this as it may, we are fully satisfied that there is no proof of cognizance on the part of the plaintiff of the order of the Court, or of wilful default on his part, and that the very stringent provisions of Section 170, which ought to be applied only in the cases of contumacious litigants, are not applicable to his case. We, therefore, remand the case to the Principal Sudder Ameen, who will dispose of it on the evidence on the record, and, if necessary, take legal and proper steps for ensuring the attendance of the plaintiff, giving him a reasonable time for that purpose.

The order of the Principal Sudder Ameen is reversed, and this appeal decreed; but, as the fault was that of the Court below, each party will pay its own costs in this Court.

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The 19th September 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Review of Judgment.**

Case No. 1739 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 9th April 1866, affirming a decision passed by the Moonsiff of that District, dated the 17th May 1865.*

Islam Khan (one of the Defendants), *Appellant,*

*versus*

Musst. Saboo Khanum (Plaintiff), *Respondent.*

*Baboo Roopnath Banerjee* for Appellant.

No one for Respondent.

An application for a review of judgment need not be founded solely on the ground of fresh evidence, but may be for "any other good and sufficient reason."

THE appellant contends that the Principal Sudder Ameen had no power to admit this review, because no fresh evidence was tendered. But this is not necessary; Section 376 of the Civil Code providing that an application for a review may be founded on this "or any other good and sufficient reason." The Principal Sudder Ameen having admitted the review, we must presume that he considered there was good and sufficient reason for doing so, and that the review was requisite for the ends of justice within the meaning of Section 378. We entirely concur in the observations of the Chief Justice at page 96 of the 4th Volume of the Weekly Reporter, but we are not at liberty to say that the Principal Sudder Ameen has acted illegally in admitting this review.

The appeal is dismissed, but without costs: the respondent not being present.

The 20th September 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Alluvial lands.**

Case No. 1538 of 1866.

*Special Appeal from a decision passed by the Judge of Dacca, dated the 10th April 1866, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 31st August 1865.*

Kazee Torabooddeen and others (Plaintiffs), *Appellants,*

*versus*

Sham Kant Banerjee and others (Defendants), *Respondents.*

*Baboos Chunder Madhub Ghose* and *Hem Chunder Banerjee* for Appellants.

*Baboo Kalee Mohun Doss* for Respondents.

Under the law of accretions, no decree can be given merely on the ground of reformations on old sites; but the party, to whose land the new accretions are attached, is entitled to them.

THE special appellant complains that plot No. 2 was found by the first Court to be an accretion to the property of the plaintiff, special appellant, and the Lower Appellate Court has given a decree for it to the defendant, on the ground only of the plot being a formation on the site of some lands of the defendant, overlooking the finding of the first Court based upon the report of the Ameen, and overlooking also that, under the law of accretion, no decree could be given merely on the ground of reformations on old sites, and that only the party, to whose lands the new accretions are attached, is entitled to obtain the same.

The pleader of the respondent attempts to argue before us against the clear finding of the Lower Appellate Court, and against the assertions of his client in the Lower Court. The defendant's case below was that of a diluvium and of a *reformation* on the old site, and not that of lands submerged having come out of water.

The special appellant urges, with regard to plot No. 1, that he had obtained a survey-award, but we find it is an order passed after the institution of this case, and therefore is worthless. So far then as to plot No. 1, we uphold the award of the Lower Appellate Court, and dismiss the special appeal with costs.

But, as regards plot No. 2, we find the contention of the special appellant is right; and we, accordingly, remand the case to the Lower Appellate Court to re-try the case as to plot No. 2, with reference to the proper construction of Regulation XI. of 1825, laying down the law of accretions.

The Lower Appellate Court should be quite satisfied that the accretion upon which the decree is to be given to any of the two parties in an accretion to what are shewn to be his lands. The fact of the plaintiff having originally claimed the plot No. 2, as merely an accretion to plot No. 1, which plot No. 1 was alleged to be a reformation on the old site, and the defence of the defendant regarding the reformation on the old site, should not be a bar to any decree in favor of either on the ground of the lands of plot No. 2 being found an accretion to the lands of either party respectively.

Remand accordingly.

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The 21st September 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Mortgage.**

Case No. 1552 of 1866.

*Special Appeal from a decision passed by the Judge of East Burdwan, dated the 20th April 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 29th July 1865.*

Khondkar Nowazush Hossein (Defendant), *Appellant,*

*versus*

Mussamut Woosuloonissa Bibee and others (Plaintiffs), *Respondents.*

*Baboo Sreenath Doss* and *Moulvie Syud Murhumut Hossein* for Appellant.

*Baboos Kishen Kishore Ghose* and *Obhoy Churn Bose* for Respondents.

A mortgagee who once takes the mortgage-money, as deposited by the mortgagor within time, cannot afterwards sue for possession, on the ground that the deposit was made after the expiry of the year of grace, and that he had applied for the money under wrong information from his agent.

THE special appellant contends that, as the mortgagee had filed a petition to take the mortgage-money deposited by the mortgagor, he is debarred from suing for the lands on a right of foreclosure; further, that the mortgagee was at liberty to take the money deposited by the mortgagor, even if

before he knew that it was deposited after the expiry of the year of grace; lastly, that, as it is admitted by the mortgagee that, if once he took the money, he could not be allowed to return it on the ground of having been misinformed by his agents to the effect that the deposit was made within the year of grace, the mortgagee should be held bound by his election to take the money; and, even if he applied for the money under false information from his agent, he had no right now to refuse to take the money ordered to be given to him.

As in a case between a mortgagor and a mortgagee, we think it proper to construe the law so as not to injure the retention of land, we think the above pleas of the special appellant are valid.

When plaintiff, of two courses open to him, elected to take the money, a course which he was legally authorized to take, even if he knew that the money was deposited by the mortgagor after the expiry of the year of grace, then after his application was acted upon by the Judge, plaintiff has no right to ask that his own waivor, in favor of the mortgagor by this election, should be set aside simply on the ground of his having been misinformed by his agent. The fraud or mistake of his agent would give no right to the mortgagee to set aside his own acts; and we see no difference between a case in which, on the application of the mortgagee, the deposit by the mortgagor may be ordered to be paid to the mortgagee, and a case in which the mortgagee may have actually taken away the money, and so closed the transaction.

It is true that legally the mortgagors were not anywise affected by the act of the mortgagee, but we have strong cause to suspect that the mortgagors must have believed that they were depositing in time, and we hold that the mortgagee, having elected to take the money, is debarred from afterwards suing for possession of the property on any ground of misinformation.

If we had any power to decide on facts, we would not hesitate to hold that in this case, at the time when the money was deposited by the mortgagor (owing to which fact no proceedings of foreclosure was recorded by the Judge) and at the time when the mortgagee made an application to take the deposit, the Judge and both the parties did indeed believe that the deposit *was made in time.*

We, accordingly, decree the special appeal with costs, on the grounds of law before set forth, and, reversing the decision of the Lower Appellate Court, dismiss the claim of the mortgagee with costs.

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The 25th September 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Pre-emption—Co-parceners—Christians in Bhaugulpore.**

Case No. 1547 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 24th April 1866, affirming a decision passed by the Moonsiff of that District, dated the 28th August 1865.*

Baboo Moheshee Lal (Plaintiff), *Appellant,*

*versus*

Mr. G. Christian and others (Defendants), *Respondents.*

*Baboos Dwarkanath Mitter, Onookool Chunder Mookerjee,* and *Mohesh Chunder Chowdhry* for Appellant.

*Mr. G. C. Paul* and *Baboo Kishen Succa Mookerjee* for Respondents.

No right of pre-emption can exist as against a co-parcener.

The custom of pre-emption, as applicable to Christians in Bhaugulpore, must be proved on the same principle as has been applied to Hindoos in Behar.

THIS is a case in which the admitted facts as to the status of the parties are these:—

The vendor is a Hindoo. The plaintiff claiming right of pre-emption is a Hindoo. The defendant purchaser is a Christian, whose name also is Mr. Christian.

The locality of the transaction is the province of Behar, and it has been definitively held, both by the late Sudder Dewanny Adawlut in a current of decisions, and by this Court in a Full Bench ruling, that the Mahomedan custom of pre-emption has been adopted by the Hindoos of that province, and is therefore binding on them.

The suit was for possession of a one-anna share under right of pre-emption. The defendants in the first Court answered that the preliminaries required by Mahomedan Law had not been duly fulfilled. Then, in the verbal and written statement of the defendants, it was stated that, "at the time "of purchase at an auction-sale, a promise "was made that the defendant should "be made a co-partner, and, accordingly, "Karoo Lal executed a kobalah in respect

"of the share of one anna in favor of the "defendant (that is, Mr. Christian, the "Christian defendant) with the knowledge "of the plaintiff and all the co-partners who "took the rateable consideration-money from "the defendant, and from the date of the "delivery of possession by the Court which "took place after his purchase, this defend-"ant (Mr. Christian) held possession con-"jointly with the plaintiff and the other "co-partners."

The first Court then found, though with some doubt, that plaintiff did know of the sale of the one-anna share to Mr. Christian before 1st Joisto 1272, and that Mr. Christian had possession thereof with plaintiff's knowledge. The first Court also held that the requisite preliminary formalities in cases of pre-emption, *viz.*, of "*Tulub Moasibut*" and of "*Ishteshabad*" had "*not been proved.*"

The first Court accordingly dismissed the plaintiff's case.

An appeal was made to the Lower Appellate Court generally on the merits of the decision of the first Court on the above finding of facts.

When this appeal was brought up for hearing, a preliminary objection was taken that the law of pre-emption did not bind Mr. Christian as being a Christian.

The Lower Appellate Court then held that, under Section 9, Regulation VII. of 1832, and the general policy of restricting the operation of such a law derogatory of general civil right as that of pre-emption, Mr. Christian should not be subjected to it, especially as he could not on the same principle, as that adopted by the Lower Appellate Court's view, take the benefit of claiming pre-emption.

Then, without going into any further points in the case, the Lower Appellate Court, *solely on the above grounds*, dismissed plaintiff's suit.

The plaintiff appeals specially, urging—

*1st.*—It was never pleaded before, and should not have been taken up for the first time in the Lower Appellate Court without any issue thereupon, that the law of pre-emption did not bind Mr. Christian, because he was a Christian.

*2nd.*—Section 9, Regulation VII. of 1832, has no application to the case.

*3rd.*—There should have been a distinct issue by the Lower Appellate Court, whether Christians were subject to the law of pre-emption.

The *first* plea was not pressed. Indeed, under Section 348, Act VIII. of 1859, it could not have been properly so, for such a preliminary objection could certainly have been taken for the first time in the Lower Appellate Court under Section 348, Act VIII. of 1859.

On the *second* plea, we concur with the special appellant that Section 9, Regulation VII. of 1832, does not apply to the case, and it should not have been decided as it has been upon it. The Section enacts:—

"It is hereby declared, however, that the "above rules are intended, and shall be "held to apply to such persons only as shall "be *bonâ-fide* professors of those religions at "the time of the application of the law to "the case, and were designed for the pro-"tection of the rights of such persons, not "for the deprivation of the rights of others. "Whenever, therefore, in any civil suit the "parties to such suit may be of different per-"suasions, when one party shall be of the "Hindoo and the other of the Mahomedan "persuasion, or when one or more of the "parties to the suit shall not be either of "the Mahomedan or Hindoo persuasions, "the laws of those religions shall not be per-"mitted to operate to deprive such party or "parties of any property to which, but for "the operation of such laws, they would have "been entitled. In all such cases the de-"cision shall be governed by the principles "of justice, equity, and good conscience; "it being clearly understood, however, that "this provision shall not be considered as "justifying the introduction of the English "or any foreign law, or the application to "such cases of any rules not sanctioned by "those principles."

But this is not a case of the nature contemplated by the Section, *viz.*, succession or inheritance, or marriage or caste, as its provisions clearly show. The case before us is simply one where the question is of the law of sale and contract, and whether the Mahomedan system of the law of pre-emption applies under the circumstances of the case by custom or otherwise to defendants, and thus there are other facts which have to be first decided before that question can be determined.

Now, we certainly think that the questions of custom of pre-emption prevailing as amongst Christians in Bhaugulpore had to be clearly proved on the same principle as the late Sudder Dewanny Adawlut, and this Court have always applied in regard to Hindoos. But it is also clear that the first Court decided that Christian was a co-parcener in

possession, and the Lower Appellate Court should have also decided if this was so or not; for, if Mr. Christian was a co-parcener, no right of pre-emption as *against a co-parcener* could exist. The right could, under Mahomedan Law only, be against strangers or third parties, *not* co-parceners. In fact, Mr. Christian as a co-parcener might or might not claim pre-emption as much as plaintiff, but plaintiff could by no possibility claim it against him as a defendant and stranger.

In this view we remand the case to be re-tried with reference to the above remarks.

The issues to be tried will be—

1. Whether Mr. Christian is or is not a co-parcener; if so, how can this suit for pre-emption affect *him?*

2. Whether custom makes pre-emption binding on a *Christian* in Bhaugulpore?

3. Whether the vendor and pre-emptor being Hindoos, their rights of pre-emption are affected by a Christian defendant being the purchaser?

Remand accordingly.

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The 25th September 1866.

*Present:*

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

**Estoppel—Perpetuity of tenure—Income Tax Return—Agent (Fraudulent statement by).**

Case No. 1534 of 1866.

*Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 17th March 1866, reversing a decision passed by the Deputy Commissioner of Hazareebaugh, dated the 30th August 1865.*

Jowahir Loll and another (Defendants), *Appellants,*

*versus*

Tekeit Pookurum Singh (Plaintiff), *Respondent.*

*Mr. J. Coryton* for Appellants.

*Mr. C. Gregory* and *Baboo Chunder Madhub Ghose* for Respondent.

Under Rule 4, Section 97 of the Income Tax Act, XXXII. of 1860, a return made to the Income Tax Officer is not conclusive evidence against the party making it, upon the point of perpetuity of tenure.

Statements fraudulently made by an agent for his own benefit are not binding on the principal.

THE principal point for decision in this case was whether a tenure held by one Rowshun Lall, and now in the hands of the defendant in this suit, was a tenure in perpetuity, or only a tenure for the lifetime of Rowshun Lall, who confessedly held it during his life at a fixed rent.

The evidence which was relied upon to show that the tenure was a tenure in perpetuity was a return made by the plaintiff in the present suit or in his name, in which the tenure in question was described as a tenure in perpetuity. That return, it is contended under the terms of Rule 4, Section 97 of Act XXXII. of 1860, is absolutely conclusive against the persons making it in the present suit and in all other actions or suits. The learned Counsel, who argued the special appeal, applies to us therefore for a construction of this Rule, and admits that the special appeal turns entirely upon the meaning we may attach to its terms.

It appears to us that, for two reasons, this return is not conclusive evidence upon the point of perpetuity of tenure against the plaintiff in this suit. The terms of the Rule are as follows:—

"Every such return and rent-roll shall "be filed in the Collector's Office, and shall "be conclusive evidence against the person "making such return in any suit for the "recovery of rent as to the amount payable "by any tenant included in such rent-roll for "the period to which such return applies, and "shall also be conclusive evidence against "him in all other actions or suits, unless it "shall be proved to the satisfaction of the "Court or officer, before whom such return "and rent-roll is offered in evidence, that "any statement contained therein is erro-"neous, and that the error arose from acci-"dent, and not from any fraudulent inten-"tion, in which case the said Court or "Officer shall not be bound to treat the "same as conclusive."

It appears to us in the first place that the point upon which the return was to be conclusive evidence, both in suits for the recovery of rent, and also in all other actions or suits, was "the amount payable by any tenant included in such rent-roll." It is true that those words "as to the amount payable" are not carried down, and do not appear in the second branch of the sentence following the words "in all other actions or suits." But it appears to be a reasonable and the only fair construction of the Act that the sole point upon which this return was to be conclusive was the matter in which the Government was interested, that is to say, as to the amount of pecuniary benefit which

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the owner was to derive from the land or tenure for the period embraced in the return. It can be of no consequence whatever to the interests of Government, whether a lease or tenure was one for a single year, or for seven years, or twenty-one years, or for perpetuity. All that the Government had to enquire into was the amount of pecuniary benefit which the owner was to receive. This land might be misdescribed as a permanent tenure, and to belong to a particular mouzah or talook, whereas it belonged to another mouzah or talook. But this misdescription would not affect the correctness of the return for fiscal purposes. As, therefore, that was the matter for which the party making the return was to bear in mind, and of which he was to inform the Collector, and upon which his telling the truth would be of consequence to the Government interests, that was, we think, the point on which this return would be conclusive evidence against him; but it was to be made conclusive, absolutely conclusive, upon that point in suits for the recovery or rent, while in all other suits it was only made conclusive where the person making the return should be unable to show that the statement contained therein was erroneous, and that the error arose from accident, and not from any fraudulent intention.

The second ground upon which it appears to us that this statement was not conclusive evidence is that this is really not a statement actually made by the plaintiff in this case, but that it is a statement made by some person on his behalf, which person the Lower Appellate Court believed to have been the very person, Rowshun Lall, in whose name the tenure stood, and which statement the Court believed to have been made for the fraudulent purpose of having this tenure represented as a tenure in perpetuity. Now, to say that a return made under those circumstances, by a servant or dependant of a zemindar, or a wealthy person of that description, should be considered as made by his employer, and on that account be held conclusive against the zemindar on behalf of the person who drew up and submitted the return, would be contrary to the well-established principles of agency. For statements of the agent made by him *bonâ fide* on behalf of his principal, the latter may well be held liable, as for acts falling within the scope of the agent's authority. But it would be an injustice which the Legislature cannot possibly have contemplated that statements made fraudulently by an agent, for his own benefit, should be binding on the principal; and such a fraudulent intention this Court cannot be expected to carry out.

It appears to us, therefore, that this return to the Income Tax Officer cannot be regarded as a piece of conclusive evidence, and that the special appeal must fail. It is accordingly dismissed with costs.

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The 25th September 1866.

*Present:*

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

**Co-sharer (Liability of).**

Case No. 787 of 1866.

*Special Appeal from a decision passed by Baboo Obhoy Coomar Dutt, Principal Sudder Ameen of Dacca, dated the 22nd December 1865, affirming a decision passed by Baboo Mohesh Chunder Sein, Moonsiff of that District, dated the 4th July 1865.*

Prosonno Coomar Sein Mozoomdar (Defendant), *Appellant,*

*versus*

The Rev. B. F. X. Barbosa (Plaintiff), *Respondent.*

*Baboos Greeja Sunker Mozoomdar* and *Anund Chunder Ghosal* for Appellant.

*Baboo Gopeenauth Mookerjee* for Respondent.

The purchaser of a fractional part of an entire estate, subject to a charge, is liable singly to satisfy that charge out of the portion of the property in his possession.

THERE is only one ground of special appeal urged in this case, which is, that the defendant, who was purchaser of a fractional part of an entire estate which was subjected to a charge in favor of the plaintiff, was not liable singly to satisfy that charge out of the portion of the property in his possession; and we have been pressed with a decision in a case arising out of the same bequest before Mr. Justice Trevor and Mr. Justice Glover on the 29th March last, in which those learned Judges decided that it was necessary to bring in all the parties, in order that the ex-

tent to which they were liable severally to satisfy this charge, might be ascertained in the presence of all. That, however, was a suit for contribution, and is quite distinct from the present suit. The whole property being subject to the charge in favor of the plaintiff, he is not bound to follow portions of it in the hands of different persons who acquired or purchased it, but is at liberty to proceed against the party in possession of any part, leaving such party to recoup himself by contribution from his co-sharers.

The special appeal, therefore, must be dismissed with costs.

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The 25th September 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Partnership (between husband and wife)—Interest.**

Case No. 193 of 1866.

*Regular Appeal from a decision passed by Mr. J. Coryton, Recorder of Moulmein, dated the 21st February 1866.*

Kotoo and Mah Ngwai (Plaintiffs), *Appellants,*

*versus*

Ko Pay Yah and another (Defendants), *Respondents.*

*Mr. Jackson* for Appellants.

*Mr. J. Pitt-Kennedy* and *Baboo Sham Lall Mitter* for Respondents.

When a husband and wife are trading in partnership, it is only reasonable to presume that an authority from the husband on matters connected with the partnership is binding on the wife.

A Court has no power to interfere with the contracts of parties in respect of interest.

THIS is an appeal from the decision of Mr. Coryton as Recorder of Moulmein. The suit was brought to recover the sum of Rupees 5,000 due for balance of principal and interest under a bond for Rupees 7,000, dated the 20th November 1862.

The plaintiffs were husband and wife, and joint obligees of the bond; the defendants were also husband and wife, and joint obligors in the same instrument.

The bond was given for a debt of Rupees 5,000 due by the defendants to the plaintiffs, and Rupees 2,000 were added to cover the interest from 20th November 1862 to the 20th June 1862, on which day the money was payable. The deed of the 20th November 1862 assigned to the plaintiffs as a security 220 logs of timber, of which the plaintiffs took possession.

The plaintiffs with their plaint, and defendants with their written statement, filed respectively an account; the plaintiffs' account shewed a balance due to them of Rupees 7,500, of which they relinquished Rupees 2,500 in order, as they said, to avoid an appeal to the Privy Council. The defendants showed a balance of Rupees 2,220 due to themselves, for which they prayed a decree, and it seems to have been agreed that the Court should settle the balance due on either side.

It appears that in March 1863, that is, before the date when the bond became due, the plaintiffs, with the consent of the defendants, sold the logs for Rupees 7,040; of this sum they placed Rupees 5,000 to the defendants' credit; Rupees 2,000 they paid, as they allege, by the male defendant's request to one Moung Mye on account of a debt due to him from the defendants, or the male defendant (it is not quite clear which); and Rupees 40 they paid to a man who had taken care of the timber.

The principal point now in dispute turns on the appropriation of the proceeds of this sale. The defendants claim to be credited with the whole amount realized by the sale; they deny that they ever directed the plaintiffs to pay Moung Mye; and for the female defendant it is contended that, at any rate as against her, the plaintiffs had no authority to make this payment.

The male plaintiff at the trial deposed that he had paid this amount to Moung Mye by the direction of the male defendant, and Moung Mye was called, and he stated that he received the money from the male plaintiff. Neither of the defendants gave any testimony, nor did they call any witnesses.

Under these circumstances we have no doubt that the decision ought, so far, to have been in favor of the plaintiffs. There does

not appear to be the slightest ground for rejecting altogether the testimony of the male plaintiff and his witness, and, until contradicted, it ought to have been received in time.

The judgment of the learned Recorder is in these terms, "verdict for *defendant* for "Rupees 1,040, without costs and without "interest," without any reasons or explanation whatever; but it is clear that he must have rejected the plaintiffs' claim in respect of this item, which we think he was wrong in doing.

The defendants (respondents in this appeal) now contend that they were prepared to call evidence to contradict the male plaintiff and Moung Mye on this point, but that they were prevented from doing so by the Court having declared its intention to reject the evidence given on behalf of the plaintiffs. The learned Judge having given no reasons for his decision, it is very difficult for us to say what course was taken at the trial, but we have been furnished with his notes, and there is not a trace of any such intimation of opinion, nor is there on the record any thing to shew that the defendants ever intended to offer such evidence. On the contrary, the line of cross-examination rather proceeds on the hypothesis that the payment to Moung Mye was made, but that it was made on the authority of the male defendant alone.

For these reasons we do not think we should be justified in instituting any further enquiry on this point, and that the defendants must be bound by the evidence as it stands.

Next, with regard to the question as between the two defendants, namely, whether the male defendant had a right as against the female defendant to authorize the plaintiffs to make his payment. Notwithstanding that the wife may have in Moulmein (as is contended) rights independent of her husband, yet, considering the relationship between the parties, and the fact that this matter at least seems to have been left by the wife entirely to the management of the husband, we think that the plaintiffs were justified in acting on the direction of the male defendant alone. It certainly is not very clearly stated whether the debt to Moung Mye was due from both defendants; but, when husband and wife are trading in partnership, it is only reasonable to presume that an authority from the husband on matters connected with the partnership is binding on the wife. At least, there is no evidence that the plaintiffs had notice that the debt to Moung Mye was a separate debt of the male defendant.

This disposes of the disputed item of Rupees 2,000. The item of Rupees 40 was not contested, so that so far the plaintiffs' account is correct.

The other objection which has been raised by the defendants to the plaintiffs' account is this: They contend that, inasmuch as, out of the Rupees 7,000 secured by the bond, Rupees 5,000 only were for principal, the rest being for interest, and as the logs were sold before the Rupees 7,000 became due, namely, in March 1863, the defendants are entitled to a reduction on that account, and the plaintiffs can only charge interest up to the date when the logs were sold. This contention, however, is not founded on any stipulation contained in the bond, nor is it alleged that the plaintiffs had not a right to sell the logs, but it is said that there is some principle of equity upon which the Court ought to reduce the rate of interest, which the defendants say would otherwise become exorbitant. But it is sufficient on this point to say that we know of no principle upon which a Court has power to interfere with the contracts of parties in this respect. So long as they deal fairly and openly with each other, they are at liberty to contract for interest on any terms they please, and the Court is bound to see that the contract is performed.

These are the only items objected to in the plaintiffs' account; and, as both objections fail, the plaintiffs are entitled to a decree for the amount claimed, namely, Rupees 5,000, with interest at 12 per cent. from the date of the commencement of the suit until payment and costs. The decision of the Recorder is reversed.

We feel bound to add that we have been much embarrassed in the decision of this case by the learned Recorder having omitted to state in his judgment the points for decision, and his reasons for coming to the conclusion which he did, as required by Section 185 of the Code of Civil Procedure. It is most desirable that cases should be sent up to this Court in a state in which they can be finally decided without remand, and this can rarely be done unless, by the report of the Judge, we are made fully acquainted with all that passed in the Court below, and the grounds upon which his decision is based.

The 26th September 1866.

*Present:*

The Hon'ble C. B. Trevor, C. Steer, and E. Jackson, *Judges.*

**Hindoo Law (Mitakshara)—Ancestral property—Purchase by father out of profits of such property.**

Case No. 249 of 1864.

*Regular Appeal from a decision passed by Moulvie Nasirooddeen Mahomed, Principal Sudder Ameen of Cuttack, dated the 24th April 1864.*

Shudanund Mohapattur (Plaintiff), *Appellant,*

*versus*

Bonomalee Doss Mohapattur and others (Defendants), *Respondents.*

*Messrs. R. V. Doyne* and *R. T. Allan* and *Baboo Dwarkanath Mitter* for Appellant.

*Baboos Unnoda Pershad Banerjee, Tarucknath Sein, Nil Madhub Sein, Chunder Madhub Ghose, Obhoy Churn Bose,* and *Mohesh Chunder Chowdhry* for Respondents.

Suit laid at Rs. 1,74,430, 9 as. 8 g. 8 k.

Property purchased by a father in possession of ancestral property as manager for himself and his sons, from the profits of such ancestral property, is itself ancestral property.

*Jackson, J.*—This is a suit brought by Shudanund Mohapattur, plaintiff, as the adopted son of one Chuckerdhur Doss, to set aside certain petitions alleged to contain the will of Chuckerdhur Doss, and to recover possession of the whole landed estate of his father against the defendant Bonomalee Doss, who had also been adopted by Chuckerdhur Doss, but whose adoption was set aside as invalid by a final decision of this Court in Regular Appeal No. 181 of 1860, dated 28th February 1863, reported in Marshall's Reports, page 317. The Principal Sudder Ameen of Cuttack has decreed to the plaintiff his claim as far as it relates to the ancestral property of the deceased, but has dismissed it as far as it relates to the self-acquired property, being of opinion that the judgment of the High Court above alluded to finally decided that, under the will of Chuckerdhur Doss, the defendant Bonomalee had under those petitions been declared entitled to the self-acquired property.

Mr. Doyne, on behalf of the plaintiff, appellant to this Court, has contended: *First,* that the previous judgment of the High Court did not declare that the said petitions contained the will of Chuckerdhur Doss, that there was one distinct will made by him, and that, as regards the self-acquired landed estate devised by that will, his client is not in a position to raise any objections, but that several subsequent petitions are now put forward as forming a part of that will, under which it is alleged that estate obtained after the will was made was devised to Bonomalee; that these petitions are not, either in the terms in which they are recorded, or in the mode in which they were executed, wills; that, subsequently, as regards the self-acquired estate said to be devised by them, the plaintiff, as heir-at-law, is entitled to obtain possession; that, although there may be a passage in the former judgment of the High Court, which declared that these petitions had some connection with the will, still that the effect of these petitions, as devising property to Bonomalee, was then not a question at issue before the Court; that even then, if any decision was come to upon that point, it must be considered to be *ultra vires,* and a mere *obiter* opinion which cannot have judicial effect in this case; that the former suit solely related to the plaintiff Shudanund Mohapattur having been disinherited by his father, and that Shudanund in that suit sought to set aside the wills and petitions solely as far as they disinherited him; and that no question then arose as to their effect in favor of Bonomalee.

*Secondly,* Mr. Doyne urged that the onus of proving what was the self-acquired property of the deceased Chuckerdhur Doss was upon Bonomalee; that all landed estate, purchased with the annual proceeds of the ancestral estate, was ancestral property within the legal definition of those words; that, although this question also had apparently been determined by the former judgment of this Court, still that decision was altogether *obiter,* as there was no question as to any particular property raised in that suit.

For the respondent it was contended that the questions now raised had already been finally ruled in favor of defendant by the former decision of this Court, but that, even if they had not, the judgment which the learned Judges then recorded was correct; that the petitions in the most public manner devised the whole of the self-acquired estate of the testator to Bonomalee; and that, under the Hindoo Law, the proceeds of the

ancestral estate belonged to Chuckerdhur Doss while he lived, and all landed estate purchased with those proceeds was like the money with which it was purchased his self-acquired property.

It appears that Chuckerdhur Doss was a very wealthy man, possessed of large estates which he had inherited from his father, and to which he added during his lifetime. He adopted, in the first place, the plaintiff Shudanund Mohapattur as his son, and again at a later period of his life, he adopted the defendant Bonomalee as a second son. He then made a will, to which he obtained the consent of both these adopted sons, and under which he devised to them his whole landed estate, both ancestral and self-acquired then existing, in the shares of 9 annas and 7 annas respectively, giving the first adopted son the larger share. This will was executed in 1849. Chuckerdhur Doss had reason afterwards to be displeased with the plaintiff Shudanund; and in the year 1857, he presented a petition to the official authorities of his district, in which it is admitted that he disinherited Shudanund, and in which it is asserted for Bonomalee, though denied by Shudanund, that he devised the whole of his estate to Bonomalee. Shudanund presented petitions to the same authorities questioning Chuckerdhur Doss's right to disinherit him, and asserting that Chuckerdhur Doss was not in his right senses. Upon this Chuckerdhur Doss appeared personally before those authorities in January 1858, and presented further petitions to the same effect as those which he had at first presented, and alleging that he was in his perfect senses, and had deliberately and purposely acted as stated in the petitions. The authorities record that they were personally acquainted with Chuckerdhur Doss; that they held a conversation with him to ascertain if he was in his senses, and if he really meant to act as stated in the petitions; and, finding that this was the case, they admitted the petitions, and allowed them to remain as requested with the will.

*First*, then, I have to determine whether, in the former suit between these parties, the learned Judges ruled that these two petitions were a portion of Chuckerdhur Doss's will. In one portion of their judgment, they set aside so much of the will as professes to deprive the plaintiff Shudanund of his right to succeed to the whole ancestral immoveable property held by Chuckerdhur Doss. They go on to say: "But, as regards all other property, seeing that Chuckerdhur Doss was entitled to do as he chose, "and chose to disinherit his son, we cannot "interfere, and in so far dismiss the prayer "of the plaintiff. There is not the least "doubt that, by the petitions presented "by Chuckerdhur Doss, he unmistakeably "published his will, and desired to deprive "the plaintiff of all rights to the property "so far as he could deprive him, and to "give it to Bonomalee." I think this sentence contains a distinct decision that the petitions were a part of the will, that in those petitions he published his will, and gave what he could to Bonomalee.

*Secondly*, it has to be determined whether this decision was beyond the points then at issue before the Court, and therefore *obiter*, or whether it is a binding judgment in this case. It is admitted that the parties in that suit were the same as in this; it is admitted that the plaintiff then sought to set aside these petitions as inofficious and inoperative; but it is said that the relief was demanded only as far as those petitions set aside the plaintiff's adoption, and so disinherited the plaintiff, and that it did not refer to any question as regards the property. There seems to be no doubt that the plaintiff did seek to set aside those petitions as well as the will so far as they disposed of any of the ancestral estate. The will divided the ancestral estate between the sons with their consent. The petition declared that Shudanund was no longer a son, but had been deprived by his father's act of that status, and that Bonomalee was now the sole son and heir. Shudanund, when he preferred the suit, had an interest in the ancestral property. Regarding his father's disposal of that, he could prefer a suit even in his father's lifetime and against his father. But he did not then, and he does not now, question his father's right to dispose of his self-acquired property, and it is therefore difficult to see how he could in his father's lifetime have brought any suit regarding his father's self-acquired property, with which it is admitted on all hands that the father was able to act as he pleased. It may be then that the portion of the judgment above quoted was not a judicial determination as to what was really willed away to Bonomalee, and as to whether the petitions contained as well as the will, a devise of any self-acquired property, but only an expression of the opinion of the Court acquiesced in probably at the time by the Counsel on both sides to the effect that Chuckerdhur Doss had in those disputed petitions pub-

lished his will, and desired to leave all he could to Bonomalee. In this case the contents of those petitions are in contest, and it is put in issue not only what Chuckerdhur Doss desired to do with his self-acquired estate, but what he actually did with it. I have the less hesitation in coming to the conclusion that the opinion given by the Judges in the former suit is not a binding judgment, because I find that the reasons upon which that opinion was arrived at are not recorded as they would have been, had there been any real contest upon it at the time, and, secondly, because I concur in the opinion then given.

It is then, *thirdly*, to be determined whether these petitions of July 1857 and January 1858 contain a devise to Bonomalee Doss of all the self-acquired estate of Chuckerdhur Doss over which he had the power of disposal.

Mr. Doyne argues against that view, that the petitions are not even signed by Chuckerdhur Doss, that they are signed by his Mooktear, that they are not declared in any way to be wills, that they are not executed in any formal manner, and that they are put into Court in a hasty fit of anger at his first adopted son. There is no doubt that they are not regularly executed wills, in the English formal view of a will. But it may be that they contain a sufficient disposition of his property by a Hindoo. Mr. Doyne admits that the determination of the question must not rest on the forms which attended the preparation and publication of these papers, but on the whole of the evidence as proving that Chuckerdhur Doss did by those petitions make a testamentary disposition of his property. If those petitions contain a testamentary bequest, I think that it is proved that they were the deliberate act of Chuckerdhur Doss, even though they were not signed by him. Had only the first petition been presented, there might have been some doubt how far the act and signature of his Mooktear was the act of Chuckerdhur Doss. But the second petition was presented by Chuckerdhur Doss in person, and it is recorded upon it that Chuckerdhur Doss personally attended, and stated to the public authorities of the district, that that petition was his deliberate act, and performed by him in the full possession of his senses, and with a full knowledge of what he was doing; and, even if this was wanting, there is his answer in the suit preferred by Shudanund, in which Chuckerdhur Doss not only admits that he had given in these petitions, but attempts to support their legality. Mr. Doyne however then argues that the petitions, though they may have been intended to sustain a testamentary bequest, virtually sustain no such bequest, that the first petition merely confirms the original will, and points out that the present plaintiff had, according to a Clause in that will, forfeited his rights under it, and having ceased to be a son at all, that Bonomalee as the only son will inherit, and that it goes on distinctly to record that, as respects all property which is not devised by the will, Chuckerdhur Doss retains in his own hands the full power of disposal. My own impression, after a very careful examination of the will and of both the petitions, is that Chuckerdhur Doss did intend by them to declare that Bonomalee was his heir as regards his whole estate. The words are not so precise as they might be. In the first petition, however, Chuckerdhur Doss is distinctly alluding to a disposition of his property after his death, as he states that "he considers that Bonomalee as now being his only son" (according to his opinion) "will perform his funeral ceremonies, and after him be owner and heir of every thing." Mr. Doyne argues that there is a distinction between Chuckerdhur considering that Bonomalee will now be his sole heir, and his declaring that fact. I would not make that distinction, but would give full effect to what was the testator's intention in recording that petition, and that I consider to be formally to declare to the public authorities that Bonomalee was his heir. As to the concluding words of the petition upon which so much stress has been laid, I think they are redundant, and that they do not in any way limit the bequest to Bonomalee. They contain a proviso that, notwithstanding the will, Chuckerdhur Doss retains in his own hands the power of acting with his estate while he lived. They were mere surplusage, the words of an ignorant man who feared that, by making his will, he deprived himself of the power of taking action with his estate during his own lifetime. It is pointed out that this proviso extends only to property not mentioned in the will. But this is very doubtful. The words are "Waseutnamah Sewai," whatever moveable and immoveable property I have acquired or shall acquire, I retain the power of sale or gift over. *Sewai* certainly, as a general rule, has an exclusive signification, but it also has an inclusive meaning much in the same way as our word *besides*, and it is the latter meaning that I

would put upon it in this sentence of the petition. If there was any doubt, however, as to the wording of this petition of July 1857, it is, I think, completely removed by that of the second petition of January 1858, in which Chuckerdhur Doss, distinctly referring to the first petition, states "that he "has made Bonomalee the malick of all his "estate and of all that he possesses, both "that mentioned in the will, and of every "thing that he acquires subsequently, and "that his elder adopted son Shudanund shall "have no right or title to any portion of it." Here, again, it may be said that the word malick is indefinite, but it is evident from the context alluding to funeral ceremonies that he meant by malick to mean heir. I would then hold that Chuckerdhur Doss did bequeath all his estate, as he could bequeath it, to Bonomalee, who is consequently entitled to all his adoptive father's self-acquired estate, whether mentioned in the will or not.

The *fourth* question at issue on this appeal is whether the opinion of the Judge in the former suit that landed estate purchased out of the proceeds of ancestral estate is to be considered as self-acquired estate is a binding judgment. The Judges say, it is a question which fairly arose in the contention then before them, and it is evident that there must have been some argument upon it, and reference to the authorities, though the decision is very short, and does not enter into the grounds upon which it is arrived at. As a general rule, it is much to be deprecated that a Court should, when a decision has been already clearly given by a former Court, re-open the same question between the same parties, and hold the former decision to be *obiter*. But the facts of this case are peculiar. The plaintiff brought the former action against his father, and, while the case was pending in appeal, his father died. The case was still carried on by the second adopted son Bonomalee, the present defendant, who had also been from the first a party to the suit. But, on the father's death, the state of affairs became changed. Many more issues then arose between the two sons than would have arisen between the first adopted son and the father had he lived. The bequest to Bonomalee, except as to the ancestral property, was not in my view of the case contested while the father was alive. The declaration which the father had made in his will, that certain estate was his self-acquired estate, was certainly not contested in the former plaint. It was acquiesced in. It is a point which has only arisen and been prominently brought to the plaintiff's notice—when Bonomalee took possession of that property, that is, when the father died. I do not say that it might not have been raised by the plaintiff in his plaint, but it certainly was not raised, and no issue was declared upon it by the first Court. Looking, then, to all these circumstances, I think the opinion expressed in the former judgment is not binding upon the parties, and I proceed to discuss the question.

I do so with less hesitation, as here also I concur with the former Judges. It is admitted that the law which is to guide us is the Mitakshara. It is admitted that, in a partition between a Hindoo joint undivided family composed of brothers, all acquisitions made by the manager of that family out of the profits of the joint property belong to the joint estate, and therefore that, if we were now considering the question as between brothers, there would be no question that all landed estate, purchased with the profits of the joint estate, would also be joint. It is also admitted that, as respects ancestral immoveable property, a Hindoo father and sons are under the Mitakshara Law a joint family at least to that extent, that the father cannot alienate such ancestral property, except for special purposes. But there seems to be great doubt as to the extent of interest which a son possesses in such immoveable ancestral estate while a father lives. It appears to have been lately *ruled by the learned Judges of the High Court at Madras against the opinion of such learned commentators on the Hindoo Law as Sir Thomas Strange and Sir William Macnaghten that a son's interest extends to that point; that he can compel an unwilling father to transfer to him a share of the ancestral immoveable estate. It appears, again, on the other hand, to be admitted that, although a son has a joint interest in the ancestral immoveable estate with his father, he cannot, as long as that estate remains joint, call upon his father for an account of his management of the profits of that estate, that he, for instance, could not sue his father for mesne-profits for years during which it was under his father's management. If so, it would follow that the son's interest did not extend to the annual profits received from the ancestral immoveable estate while it remained joint, and even though it may reach to the estate itself to the extent of being able to force a separation, and thereby to

*Stokes' Reports, Vol. I., page 977.

enjoy the profits of his share after separation, it would not necessarily follow that his interest would be the same even before his share was separate from the estate. It appears to me that it would be carrying the joint interest of a son to an unprecedented extent to hold that he could call upon his father to account for his management of the ancestral estate as regards all profits received from it. Such a law would be contrary to public policy. Still, if that law was distinctly laid down, it might be acted upon. But, although the Madras decision very nearly reaches that point, it does not altogether do so, and the law itself is silent upon it, and in some passages, looking upon the profits as moveable property directly against that view, Para. 27, Section 1, Chapter I., Mitakshara.

There is still, however, another question for consideration. It may be that, even if the father as manager is entitled to expend the profits received in his lifetime from the ancestral immoveable estate, still, if he expends that money in purchasing other immoveable estate, such estate thereby becomes ancestral. It is not contended that immoveable estate acquired by the father out of any profits but those of the ancestral estate are not self-acquired property and at his disposal. The Mitakshara says (Chapter I., Section 4) that all immoveable estate, acquired or recovered with the use of the patrimony, must be considered ancestral. But it is a question whether in a joint Hindoo family the profits from ancestral estate are patrimony. They are not, I think, patrimony within the meaning of the words "descended from the father." The ancestral immoveable estate alone is the patrimony. The profits of that estate can be used and expended by the father without detriment to the estate. If any of the estate itself is sold or used in any way, what is acquired or recovered with such use takes the place of the patrimony, and is viewed by the law as patrimony. The son's interest in a joint family of father and sons extends only to the patrimony. A son may, by compelling the father to divide that estate and give him a share, obtain an additional interest in it. But, as long as it remains joint, the father alone is absolute master of all the profits derivable from the patrimony. He is at liberty to expend them as he pleases, and is not accountable to his son for such expenditure. He must maintain his son, but, beyond what is necessary for maintenance, he may give what he pleases to any one. Such profits do not, therefore, in my opinion, constitute ancestral property, and immoveable estate purchased with such profits is, therefore, in my opinion, also not ancestral property. Indeed, it appears to me that, even in a joint family of brothers, such profits would not be their patrimony, but their own property acquired by themselves, and to which such brothers would be entitled as such to a share, and for which the manager would be liable to give an account to each brother. The difference between a joint family of a father and sons, and of a joint family of brothers, as regards their rights in the profits of ancestral immoveable property, is that in the former the father is sole unaccountable owner, and in the latter all the brothers are joint owners. In the former, the son's interest extends only to the undivided estate. In the latter, the brother's interest extends to the profits as their acquired property, as well as to the estate as their patrimony.

Holding the above view of the different questions raised in this appeal, I would dismiss it with costs.

*Steer, J.*—My colleague thinks that the petitions of the deceased Chuckerdhur Doss referred to by him were declared by this Court in its judgment of the 28th February 1863 to be parts of the will of the said Chuckerdhur. At the same time, he thinks that the decision of the Judges to that effect was *obiter*, and not therefore binding.

I agree with my colleague in thinking that, if the Judges intended to declare their opinion that the petitions were in their nature and design testamentary instruments, their opinion is *obiter*, for there was no issue to try the question of the character of those documents, and no reasons are given why those papers are to be regarded as wills.

But I disagree with my colleague in thinking that the Judges intended to declare that in their opinion the petitions referred to mere wills. In their remarks they seem to me to refer to *one* will only, and they regard the petitions as so many separate publications of that will.

Every petition was a separate and distinct publication of his will. In every one he announced the forfeiture of the inheritance of his first adopted son, the plaintiff, and as a consequence of the civil death of that son, the right of the defendant, the second adopted son, to the rights of an only son.

As far then as these petitions professed to deprive the plaintiff of the estates which came to his father from his ancestors, the Court declared those petitions as inofficious and inoperative, and that, I think, was the right

in which the Court regarded those petitions. There is no part of their judgment in which it can be gathered that, besides the one admitted will, all these several subsequent petitions were wills also.

Nor can I think, as my colleague has done, that it is right to regard these petitions as wills, or as it were codicils to the original will. Their scope and design were to declare simply that, by reason of the plaintiff's forfeiture of his status as a son, Bonomalee was henceforth to be regarded as an only son, and as such he would be entitled, whether Chuckerdhur had said so or not, to be regarded as his sole heir. I do not think that Chuckerdhur meant in any of those petitions to say that he then and there made a bequest to Bonomalee of all his property. All he intended by the petitions was to remove all doubt as to the effect which his repudiation of his son, the plaintiff, would have in the future devolution of the property. He may be taken to say in these, "Shudanund is no longer my son, he no longer stands in the way of Bonomalee as my heir." And indeed, if, as Chuckerdhur clearly thought, he could disinherit the plaintiff, what reason is there to regard these petitions as wills, for they were useless as wills. If plaintiff was not his son, and had no rights of a son, the whole inheritance was Bonomalee's without any express devise. Chuckerdhur thought he could deprive plaintiff of the status of a son. If plaintiff was deprived, then Bonomalee succeeded to every thing. Where Bonomalee would, as of right, succeed, how can we suppose that Chuckerdhur meant to make a devise in his favor? The theory of a devise can only be sustained by supposing that Chuckerdhur was in doubt as to his power to deprive the plaintiff of his status, and his rights as a son; but there is no ground for supposing that he entertained any doubt upon the point, and, if he did not entertain any doubt then in his view, Bonomalee was his sole successor, and he is not likely to have made a devise in his favor of what would devolve upon him in natural course.

I think then that the petitions cannot be regarded as in the light of wills.

Another point on which I cannot agree with my colleague is as to what we are to regard as the ancestral property of the late Chuckerdhur Doss. There seems to be no question that in his lifetime Chuckerdhur made acquisitions to landed property. It does not seem to be disputed that he made these out of the profits of the landed estates which he acquired from his father. Now, the question is, are these subsequent acquisitions made professedly out of the assets and profits of a joint ancestral estate to be regarded as also ancestral?

Now, there are numerous decisions in which it has been held that, where it is presumable that property has been bought out of the assets of ancestral property, it is itself ancestral. It seems to me, therefore, that it is too late in the day to question the applicability of this principle of law to the case of any joint Hindoo family.

I can see no distinction as regards right of property between the law in respect to one joint family and another. A family, consisting of father and son, is as much under the rules which govern right of property in joint families, as a family of brothers. If one brother of a joint family cannot, by the use of joint funds (and all funds are joint till there is a separation from a joint estate), acquire property for his separate use, no more can a father. In parts of the country, and in families governed by the Mitakshara Law, the father and son are joint proprietors. The father, it is true, is the sole manager, and, as such, he has the control of the expenditure of the income of the family; but I take it, whatever he expends, he must be considered to spend for the family, and whatever he acquires, he acquires for the family; for they have a common interest with him in the expenditure and in the acquisitions.

I can never concede the theory that, in a joint Hindoo family, where the landed property is managed by the father, he is at liberty to spend the surplus income of the family estate in the purchase of a private estate for himself. The income is not his, but the family's; and, though he cannot be controlled while he is manager in the purchase of such property as he thinks fit to buy out of the income of the family estate, the estate he does so buy must be considered the property of the family.

In this view I would decree to the plaintiff all the landed property sued for, with all the costs of suit.

*Trevor, J.*—This case was referred to a third Judge, in consequence of a difference of opinion upon two points between the Judges who heard the case.

These points were: *1st*, whether the petitions presented by Chuckerdhur Doss amount to a testamentary act or not; and, if they do, what is the effect of them? and, *2nd*, whether property purchased by a father, in possession of ancestral property as manager

for himself and sons from the profits of such ancestral property, is itself ancestral property or self-acquired.

On the *first* point I have no hesitation in agreeing with Mr. Justice Elphinstone Jackson. Considering that the testator was a Hindoo, that no particular form is necessary amongst them for making a testamentary disposition, that it is equally valid whether it was in writing or orally published, provided that the intention is clear, it appears to me that these petitions acknowledged by Chuckerdhur Doss were in the nature of codicils to the will executed by him, and that they had the effect of disinheriting Shudanund of every thing that had been left to him by the will which the father could will away, and of a bequest in favor of Bonomalee Doss of all that property.

On the *second* point I am clearly of opinion with Mr. Justice Steer that, as the father and son or sons are co-owners in the ancestral property, so they are co-owners in that which issues from it, *viz.*, the profits of that joint estate, and that consequently any estate purchased by these joint funds follows the character of the fund of which it is the representative.

The decree in the case should, therefore, be drawn up in conformity with the opinion of the majority of the Court on these points.

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The 26th September 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley, *Judge*.

**Sale by Hindoo Widow—Proof of legal necessity—Special Appeal—Remand—Jurisdiction.**

Case No. 2723 of 1865.

*Special Appeal from a decision passed by Mr. A. Hope, Officiating Judge of Sarun, dated the 30th June 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 26th April 1864.*

Ram Pershad Sookul (Defendant), *Appellant*,

*versus*

Rajunder Sahoy (Plaintiff), *Respondent*.

*Mr. R. T. Allan* for Appellant.

*Baboos Unnoda Proshad Banerjee* and *Onookool Chunder Mookerjee* for Respondent.

Suit to set aside a sale by Hindoo widows—

HELD *by Peacock, C. J.*, that the High Court has the power in special appeal, before remanding a case, to see whether there is any evidence on the record which would warrant a contrary finding to that already come to by the Judge below, and that it would be worse than useless to remand the present case to the Judge to find whether any necessity existed for the sale, when the Court sees that there is no evidence on the record to prove the existence of such necessity, when the Judge has found that there was no necessity, and when, if he were to come to a contrary finding upon the evidence as it stands, his judgment would be reversed upon special appeal as being a finding without any evidence in support of it.

HELD *contra by Bayley, J.*, that, under Section 372, Act VIII. of 1859, the Court in special appeal cannot try facts on the evidence on the record, or whether the evidence is sufficient to enable the Court to come to a conclusion of fact on the question of legal necessity, and that the case should be remanded to the Judge for a clear finding on that question.

*Bayley, J.*—THIS is a case in which the special appellant's main plea is that the Lower Appellate Court has erred in law, in investigation, and in procedure, as it has come to no proper judicial finding, as to whether a legal necessity existed, such as would justify the alienation by the sale made in this case by the Hindoo widows.

The Lower Appellate Court dismissed the appeal, and affirmed the decision of the Principal Sudder Ameen, which was, that legal necessity was *not* shown.

It is urged before us that there was a debt of almost the amount of the money obtained by the sale. Further, that Rupees 400 of 1,020, money had by the vendor, was advanced on account of Government revenue; that the rest was paid for maintenance; that there were *unavoidable* Hindoo funeral ceremonies (shrads) to be provided for; that the Lower Appellate Court itself states, "*it is true that Rutton Lall, father "of plaintiff, was deeply involved in debt,*"; and again it is true that "*Rutton Lall was "exceedingly extravagant.*" In reference to the statement by the Lower Appellate Court that, "as the estate of Rutton Lall was *large*, "the widows should not have required any "advance in cash for the purpose of their "*maintenance*," the special appellant urges that an estate may well be *large* in extent and ordinarily in resources, and yet be so encumbered, or its owner in such other difficulties as to have a legal necessity for parting with it as a portion of his landed property.

On the other hand, it is pleaded that it is not shown that the Rupees 400 of Government revenue, before adverted to, was pressingly due, and not capable of being met by the incomes or mortgage of the very property in which the arrears had accrued;

and that the finding of the Lower Appellate Court is substantially *one of fact*, that the estate was so large in its resources as to furnish ample means for the widows to pay all necessary expenses and debts without alienating the property in question in this case.

Now, I certainly find the Judge stating clearly that Rutton Lall was deeply "involved in debt," and "exceedingly extravagant." I find, too, that for the payment of an alleged arrear of Government revenue Rupees 400 was accounted for out of part of the money received from the sale.

But, whether the allegation of necessity is a true one or not, the Lower Appellate Court does *not* clearly, that is (as it ought legally to have done), investigate or find whether the estate for which the arrears of revenue had accrued was a profitable or losing one—one exhausting means, or furnishing them—facts all important in order to arrive at a correct conclusion as to the existence of legal necessity. Nor is it decided by the Lower Appellate Court whether the estate, being "large," was so encumbered as to yield nothing, or so productive as to give funds, notwithstanding Rutton Lall's indebtedness and exceeding extravagance, to pay the debts and interest upon them, as well as unavoidable shrads and charges of maintenance, as also Government revenue. These facts necessarily ought, in my opinion, to have been each and all clearly found, and I do not think they are so, either in terms or in *substance*. At least, the finding is so vague and indefinite, and inconsistent with other facts recorded by the Lower Appellate Court, as to appear to me to be no legal finding at all. In this view, I would, according to the unvarying practice for the last twenty years, remand the case for a clear, that is a legal, finding on these points.

*1st.*—What were the available assets of the estate when the sale was made?

*2nd.*—What were *then* its debts and liabilities?

*3rd.*—On which side was the balance, and was it such as to show, under all the circumstances, such a legal necessity as to justify the sale?

I do not think we can try these points on the evidence on the record, and come to a finding of fact on that evidence.

That evidence consists of depositions of witnesses indicating the indebtedness of the owner and the legal necessity of the sale. The sufficiency or insufficiency of it is not for us, I consider, to weigh when sitting, as we now are, in special appeal. On the contrary, we should, I think, in *special* appeal, be assuming those functions which appertain to the Lower Appellate Court in regular appeal.

I admit that, in a regular appeal, we should decide the case on the evidence without remand. But we should then be sitting as a Court expressly legally authorized to decide on *facts* which we are not in special appeal.

The special appeal law, Act VIII. of 1859, Section 372, does not, in my view, at all allow of our trying facts on the evidence on the record, or whether the evidence is such evidence as is sufficient to enable us to come to a conclusion of fact as to the legal necessity. This sufficiency of evidence is, in my view, a matter for regular appeal only.

The procedure in special appeal, it is said, is to be the same as far as applicable as that in regular appeal. But that provision of the law will not enable us to try questions of fact on evidence in special appeal, exactly as we should in regular appeal, because the legal distinction between the two forms of appeal is that the former trial shall be limited to the questions detailed in Section 372, from which a finding of fact is entirely excluded, and the latter, *i. e.*, regular appeal, may be on questions of law and questions of fact also.

I would, therefore, remand the case for a clear finding of fact on the points above indicated.

*Peacock, C.J.*—The decree of the first Court which was affirmed by the Judge was that the deed of sale be set aside, and that the plaintiff do recover possession. I am of opinion that the decision of the Lower Court of Appeal ought to be affirmed with costs so far as it relates to setting aside the deed of sale and the costs in the Lower Courts.

The plaintiff is the son of Rutton Lall, and sues for possession of the property by setting aside a deed of sale executed by the widows of Rutton Lall as guardians of the plaintiff during his minority. The deed is dated 29th March 1844. The Court of first instance found that there was no necessity to sell the property, and gave a decree for the plaintiff, and the Lower Appellate Court affirmed that decree by dismissing the appeal. The Judge says that Rutton Lall, in conjunction with the widows of his brother, executed a zur-i-peshgee deed, dated the 13th of June 1838, an ikrarnamah, dated the 7th of January 1839, and a tumussook, dated the

9th Cheyt 1247, for sums amounting to Rupees 5,925, and that, after *deducting* the amount due under the said deeds, and interest, amounting altogether to Rupees 5,980, there remained Rupees 1,020, the balance of the purchase-money, out of which, it is alleged that Rupees 400 had been previously advanced to pay Government revenue; and the balance was paid in cash to the widows. He further says: "It is argued that the "greater portion was employed to pay off "the debts of Rutton Lall, and that of the "balance a portion was used to pay Go-"vernment revenue, and only a small amount "was appropriated by the widows for ne-"cessary expenses. But no attempt was "made to show that there was any neces-"sity to sell the estate at all. It is true "that Rutton Lall was exceedingly extrava-"gant. His estate, however, was large, and "ought to have produced sufficient to main-"tain the widows and their dependants. "No valid reason has been given why the "zur-i-peshgee deed, the ikrarnamah, and "tumussook should not have been allowed "to remain in the same state as Rutton "Lall left them. In regard to the ikrar-"namah, the sale was certainly premature, "for interest was not to run on it till 1252 "Fuslee, yet the property was sold in 1251 "Fuslee. Again, it has been ruled by the "Sudder Court, Assonissa Begum, Defend-"ant, Appellant, *versus* Radha Benode "Misser, Plaintiff, Respondent, dated 21st of "July 1856, and other cases, that the sale "of property for the payment of Govern-"ment revenue except under special cir-"cumstances is not valid. No necessity "has been shown for the advance paid on "account of Government revenue in this "case, and as the estate of Rutton Lall was "large, the widows should not have re-"quired any advance in cash for the pur-"pose of their maintenance. Suhawun Lall "and Shooboo Lall (the purchasers) have "since disposed of the property to the "defendant, appellant, under a deed of sale "for Rupees 14,700, and it is pointed out by "the plaintiff that it is clear that his guard-"ians did not receive an equitable amount "for the property."

It is contended in argument that the Judge was wrong in finding that there was no necessity to sell, for he says that Rutton Lall was exceedingly extravagant. But the extravagance of Rutton Lall does not necessarily show that it was necessary for the widows to sell any portion of the estate; and the Judge expressly finds that the estate was large, and ought to have produced sufficient to maintain the widows and their dependants.

It was also contended that the advance of 400 rupees on account of Government revenue showed a necessity, and that, when the Judge says that no necessity has been shown for the advance made on account of Government revenue, he must be understood to mean that no special circumstances existed which warranted the widows in borrowing that money according to the ruling of the case which was decided in 1856 and was cited by the Judge, and that, as that case has been overruled, the Judge was wrong in point of law in holding that no necessity existed for selling the estate in order to discharge the amount borrowed for the payment of Government revenue.

When the Judge says that no necessity has been shown for the advance paid on account of Government revenue, I do not understand him to mean that no necessity has been shown which would bring the case under the special circumstances referred to in the case cited. On the contrary, I think he intended to find generally that no necessity to sell or to obtain the advance for the purpose of paying Government revenue had been shown. He concludes, "under any "circumstances, the widows, as shown above, "had no power to sell the estate, and no "pressing necessity for doing so has been "adduced."

The case of Hunoomanpersaud Panday *versus* Musst. Babooee Munraj Koonwaree, 6 Moore's Indian Appeal cases, page 393, was cited. In that case it was laid down that the power of a manager of an infant heir to charge an estate not his own is under the Hindoo Law a limited and qualified power. It can only be exercised rightly in a case of need or for the benefit of the estate; but where in the particular instance the charge is one that a prudent owner would make in order to benefit the estate, the *bonâ fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. Further it was said: "The lender is bound to "enquire into the necessities for the loan, to "satisfy himself as well as he can, with "reference to the parties with whom he is "dealing, that the manager is acting in the "particular instance for the benefit of the "estate; but their Lordships think that, if

"he does so enquire and acts honestly, the "real existence of an alleged sufficient and "reasonable credited necessity is not a con-"dition precedent to the validity of his "charge."

In the present case the estate was sold for 7,000 rupees and in about 4 or 5 years afterwards, namely, in November 1849, it was sold for Rupees 14,000. It was contended that there was no evidence to show that the plaintiff did not receive an equitable amount for the purchase, inasmuch as other portions of the same estate were sold by other shareholders for a less amount. It is not necessary in this appeal to decide whether the estate was sold for an inadequate price or not. I think that the *onus* lay upon the defendant to show that there was some danger to be averted from, or some benefit to be conferred upon, the estate by the sale, or that the purchaser under whom he claims did make enquiries into the necessity for the sale, and satisfied himself that the widows were acting in this particular instance for the benefit of the infant. Here no evidence was given that there was an actual necessity to sell, nor that any representations were made to the purchaser by the widows, which, if honestly believed, were sufficient to satisfy him that there was such a necessity, or that the widows were acting for the benefit of the estate. On the contrary, the Judge finds that, although Rutton Lall was exceedingly extravagant, his estate was large and ought to have produced sufficient to maintain the widows and their dependants. The term for which zur-i-peshgee had been granted had not expired, and interest had not commenced to run on the ikrarnamah at the time when the sale was effected.

The judgment is not so clearly expressed, nor are the facts so distinctly found, as they might have been. When the Judge says that the estate ought to have produced sufficient to maintain the widows and their dependants, I think he means that it was capable of producing sufficient; and, when he says that the estate of Rutton Lall was large and the widows *should not* have required any amount in cash for the purpose of their maintenance, I think he meant to say that there was no necessity for any such advance. I do not think that any error in law has been shown sufficient to induce us to reverse the decision of the Judge and to hold that the sale was valid as having been made under necessity, or was one which a prudent owner would have made for the purpose of benefiting the remainder of the estate.

It was urged that we ought to remand the case for further enquiry, and to direct the Judge to find the facts with greater clearness and certainty. I regret to differ from my Hon'ble colleague, but I am of opinion that we ought not to remand the case, unless we see that there is evidence on the record which would justify the Judge in finding that there was a legal and valid cause for the sale, or that, from enquiries which the purchaser made, he was honestly induced to believe that a necessity for selling existed, or that a sale was beneficial to the interests of the infant. No such evidence has been pointed out, and there is none which would have warranted the Judge in upholding the deed of sale.

It appears to me that we have the power, before we remand the case, to see whether there is any evidence on the record which would warrant a contrary finding. It would be worse than useless to put the parties to expense and delay by remanding the case to the Judge to find whether any necessity existed for the sale of the estate with reference to the 400 rupees borrowed for the payment of Government revenue, or for the purpose of finding whether any necessity existed for selling for the purpose of providing maintenance for the family, or for the purpose of discharging the debs which were paid out of the purchase-money, when we see that upon the record there is no evidence to prove that any such necessity existed, when the Judge has found that there was no necessity, and when, if he were to come to a contrary finding upon the evidence as it stands, his judgment would be reversed upon special appeal, as being a finding without any evidence in support of it.

It was suggested by Mr. Allan on behalf of the defendant, appellant, that the defendant might be allowed to call further witnesses if the case were remanded. But I am of opinion that the case ought not to be remanded for the purpose of enabling the plaintiff to make out a fresh case. Each of the parties had to prove his case in the Lower Court, and each of them ought at that time to have given all the evidence in his power in support of his case. If we were to remand cases for the purpose of allowing parties to improve their respective cases by calling further witnesses, there would be no end to litigation. As it is, this case has already been once remanded, and returned under that remand.

It appears that the debts due under the zur-i-peshgee, ikrarnamah, and tumussook have

not been actually paid. These debts were treated as satisfied by credit for the amount being given against the purchase-money, which was not paid in full. Under these circumstances the plaintiff is not entitled to possession, but merely entitled to his equity of redemption. It must be borne in mind that the zur-i-peshgee was executed by Rutton Lall, the father, and not by his widow.

I at one time thought that we might direct the necessary accounts to be taken for redeeming the mortgage, but, as the plaintiff has not taken the necessary steps for redemption, and has not tendered or brought into Court the principal money borrowed on the security of the mortgage, he is not, as yet, in a position to redeem.

All we can do is to set aside the deed of sale, leaving the plaintiff to adopt such measures as he may be advised for redeeming the estate.

The decision of the Lower Appellate Court should, in my opinion, be affirmed with costs, so far as it sets aside the deed of sale, and reversed so far as it orders possession, the decision of the Lower Appellate Court will stand as to the costs of the Lower Courts, and appellant will pay the costs of this appeal.

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The 26th September 1866.

*Present:*

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

**Benamee holding—Estoppel.**

Case No. 1641 of 1866.

*Special Appeal from a decision passed by the Judge of East Burdwan, dated the 16th February 1866, reversing a decision passed by the Moonsiff of Pothna, dated the 14th May 1864.*

Ram Dhun Mookerjee (Plaintiff), *Appellant,*

*versus*

Monee Kornica Debee and others (Defendants), *Respondents.*

*Baboo Bhowanee Churn Dutt* for Appellant.

*Mr. R. T. Allan* and *Baboos Kishen Kishore Ghose* and *Kedarnath Chatterjee* for Respondents.

Where a person apparently holds a tenure in a zemindaree, is recorded in the serishtah, and is nominally in possession, though in a suit for rent, or as to the state of the property, the zemindar is, at any particular time, unable to prove that such person is holding *benamee* for others really interested, or if in any future years such zemindar can show that these persons are then really enjoying the profits, paying the rents, and acting as owners, he is not prevented by a decision as to the rents or title in former years, from showing what is the state of things in any subsequent years.

This is a suit by the plaintiff, claiming as heir of Joala Mookhee, for a declaration of his title to succeed to a certain jote consisting of 59 beegahs, which he alleged to have been in her possession.

The Judge, Mr. Wauchope, on a former occasion, tried the question, and found that the plaintiff was not in possession; that certain persons called Ram Soondur, Ram Taruck, and Khetturnath, were and had been in possession; and that there was nothing to show that plaintiff was the ryot.

The case was remanded by this Court; the Court observing that plaintiff claimed the tenure as the heir of Joala Mookhee, and that it was admitted that the tenure was recorded in her name in the serishtah of the defendant. The Court directed the Judge to find whether Joala Mookhee was ever in possession, and whether the plaintiff has a claim to succeed to her by inheritance.

On remand the Judge, Mr. Lillie, has found that the three persons above named, Ram Taruck, Ram Soondur, and Khetturnath, have always been in possession, and that Joala Mookhee was not really in possession at all, and he has sufficiently, and, we think, satisfactorily, tried the question which he was required to try by the order of remand.

On appeal the plaintiff contends that, in a former decision in 1849, Joala Mookhee, in a suit against the former putneedar Gocool Chunder Thakoor, obtained a decree, declaring the 59 beegahs now in suit belonged to her, and he contends that the present defendant is bound by that decision; and that the Judge ought to have relied on that decision, and found that Joala Mookhee was in possession.

The appellant does not and did not show that the present defendant is privy in estate to Gocool Chunder Thakoor, the defendant in the former suit. It is suggested by the respondent's Counsel that the putneedaree interest of Gocool Chunder was sold under Regulation VIII. of 1819; but there is no proof of this one way or the other. If the appellant wished to rely upon the decision now produced as binding on the defendant, it was his business to prove that the defendant came in under, or was privy in estate to, Gocool Chunder. This he wholly failed to do. But, independently of the failure of proof on this point, we think that, where a person apparently holds a tenure in a zemindaree, is recorded in the serishtah, and is nominally in possession,

though in a suit for rent, or as to the state of the property, the zemindar is, at any particular time, unable to prove that such person is a mere name, holding benamee for some other persons really interested, or if, in any future years, such zemindar can show that these persons are then really enjoying the profits, paying the rents, and acting as owners, he is not prevented by a decision as to the rents or title in former years from showing what is the state of things in any subsequent years.

On all these grounds, therefore, we think that the decision of the Judge dismissing the plaintiff's suit, and declaring that, as heir of Joala Mookhee, he was not entitled to a decree, was one which he was competent to pass, notwithstanding the former decision, and we affirm the decree of the Court below, and dismiss this appeal with costs and interest.

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The 26th September 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Survey Map—Possession—Evidence.**

Case No. 1558 of 1866.

*Special Appeal from a decision passed by the Judge of Sylhet, dated the 19th March 1866, modifying a decision passed by the Moonsiff of Russoolgunge, dated the 25th November 1865.*

Mahomed Meher Chowdhry and others (Plaintiffs), *Appellants,*

*versus*

Sheeb Pershad Surmah and others (Defendants), *Respondents.*

*Baboo Greesh Chunder Ghose* for Appellants.

No one for Respondents.

A person in possession may sue to set aside a survey-map.

A survey-map is not conclusive evidence of possession.

It is clear that the Lower Appellate Court thinks the case of the special appellant to be different from what it really is, because plaintiff had alleged that he was in possession.

The inference to be derived from the decision of the Lower Appellate Court is that that Court believes that, in every case of survey, as a question of fact, the decision must always be in favor of the party in possession, and that, therefore, only he who is out of possession can sue to correct a survey-map.

The law requires the Revenue Authorities to survey and make *thak* according to possession; but it may happen that a party not in possession may succeed in obtaining a *thak* favorable to his interests, and prejudicial to that of the party actually in possession, to set aside which the latter must be obliged to sue in a Civil Court.

The Lower Appellate Court, by holding the survey-map to be of itself conclusive proof of possession by the defendant, has attached much more weight to it than it legally deserved in a case like this brought to shew that it was wrongly prepared.

Both the Courts have found the question of title in favor of the special appellant, and the Court of first instance also found that defendant was not in possession, and we think it is quite probable that, if the Lower Appellate Court tries the question of possession properly on all the evidence on the record, and does not give undue weight to the survey-map, the Lower Court may also find possession in the plaintiff.

As it is clear that the question of possession has not been properly tried by the Lower Appellate Court, we remand the case to that Court to re-try the question with reference to the above remarks.

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The 26th September 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Oral Evidence (to vary deed).**

Case No. 1575 of 1866.

*Special Appeal from a decision passed by the Judge of Tirhoot, dated the 13th March 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 21st March 1865.*

Shewab Sing (Defendant), *Appellant,*

*versus*

Shaikh Asgur Ali and others (Plaintiffs), *Respondents.*

*Baboos Tarucknath Dutt* and *Debendro Narain Bose* for Appellant.

*Mr. R. E. Twidale* and *Baboo Upprokash Chunder Mookerjee* for Respondents.

Oral evidence may be received to prove that the consideration stated in a deed to have been paid was not paid, but not to prove that only a small portion of the consider-

ation stated in the deed to have been received in full was to be paid at the time, and that the rest was not only to remain in abeyance pending the result of a suit, but to be paid only in case of the successful termination of that suit.

THE special appellant contends that, under the decisions of the Full Bench, dated 5th of February 1866 (pages 68 and 76, Volume V. of Sutherland's Weekly Reporter), the Lower Appellate Court should not have received oral evidence to vary the original contract in one of the essential conditions, *viz.*, regarding the time and mode of the payment of the major portion of the consideration-money.

We admit that this case before us is not the same as a case in which, although a deed recites that the consideration has been *paid*, without, however, any allegation of the right of the vendor to receive the consideration being affected or limited by any additional verbal contract, the vendor comes in Court to sue on the allegation that the money was *not* received by him.

In such a case the vendor may be allowed, on the ground of constructive fraud, to prove orally a variance in the terms of the deed to the effect that the consideration, stated to have been paid, was *not* paid.

Here, however, the case is quite different. The evidence relied upon by the Lower Appellate Court is that, by an additional oral contract, it was agreed that the vendor should *then* only have a small portion of the consideration in the deed recorded as already received in full; and that the right of the vendor to demand the *rest* was to remain in abeyance until the vendee got a decree in a suit pending up to the highest Appellate Court; and, moreover, that the rights of the vendor to recover any balance would cease and determine, if that suit would be decided ultimately against the vendee.

This undoubtedly is a variance for which oral evidence cannot be received under the decision of the Full Bench noted above.

The Court below does not appear to decide that it has come to this conclusion, with reference to the conduct of the parties as shewing their own acts and intentions regarding the contract; nor is there any mention of such acts or conduct.

We, accordingly, reverse the decision of the Lower Appellate Court, and remand the case to that Court to re-try it with reference to the decision of the Full Bench, and to these remarks.

The 28th September 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Suit to establish title—Section 15, Act XIV. of 1859.**

Case No. 1583 of 1866.

*Special Appeal from a decision passed by the Judge of Sylhet, dated the 20th March 1866, reversing a decision passed by the Moonsiff of Sunkerpore, dated the 20th November 1865.*

Sreenath Surmah (Plaintiff), *Appellant,*

*versus*

Bishonath Surmah and others (Defendants), *Respondents.*

*Baboo Greesh Chunder Ghose* for Appellant.

*Baboos Gopal Lal Mitter* and *Mohinee Mohun Roy* for Respondents.

A person dispossessed of immoveable property, in suing to establish his title to such property, need not also sue to set aside a decree under Section 15, Act XIV of 1859; nor ought his suit to establish title to be dismissed merely because the boundaries in his plaint differ from those in the decree under Section 15.

THE special appellant's suit was on title, and he had no occasion to ask distinctly for setting aside the decree under Section 15, Act XIV. of 1859, awarded to the defendant, because, on plaintiff's succeeding in obtaining a decree on title, the effect of that decree (like a decree under Act IV.) would by itself cease and determine.

Plaintiff could not, only because he had sued also to set aside what is called a summary order, under Section 15 of Act XIV. of 1859, be entitled to obtain a decree, without proving his title to the lands he claims.

The defence of the defendant is that the lands decreed to the defendant under Section 15 of Act XIV. of 1859 are not identical with the lands now in dispute; on the contrary, on the assumption of the identity, defendant pleads limitation. Whether limitation will apply or not is a different question.

The plaintiff may have in his plaint written boundaries quite different from the boundaries given in the decree. That, however, would not of itself decide that plaintiff is not correct. The boundaries in the decree may be wrong. Even if plaintiff had given in his plaint wrong boundaries of the lands, possession of which was awarded to the defendant, that does not prove that plaintiff had given wrong boundaries of the

lands claimed by him. Even if he had done this, that would be no good reason to refuse him a decree according to true boundaries of the lands to which he may be found entitled.

The Lower Appellate Court was not then justified in dismissing the suit, merely because the boundaries in the plaint differed from the boundaries in the decree under Section 15 of Act XIV. of 1859.

Even if the plaintiff has sued for other lands separate from those for which the award was made in defendant's favor, that also of itself would not be a ground to dismiss the case of the plaintiff.

If, for the lands plaintiff has now sued for, he can shew title, he will be entitled to obtain a decree, and will lose his suit if he fail to prove his title or (if necessary) title and possession for the lands claimed by him.

We, accordingly, remand the case to the Lower Appellate Court, to re-try the appeal before it, with reference to the above remarks.

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The 29th September 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

**Jurisdiction—Judgment—Difference of opinion in a Court of two or more Judges—Mortgage—Limitation.**

Case No. 196 of 1864.

*Regular Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 8th March 1864.*

Khelut Chunder Ghose (Defendant), *Appellant*,

*versus*

Tarachurn Koondoo Chowdry and others (Plaintiffs), *Respondents*.

*Messrs. A. T. T. Peterson* and *R. T. Allan*, and *Baboos Onookool Chunder Mookerjee* and *Rajender Misser* for Appellant.

*Mr. R. V. Doyne* and *Baboos Tara Prosonno Mookerjee* and *Mohendro Loll Seal* for Respondents.

**In a Court where the concurrence of two or more Judges is necessary to a judicial determination, there must be a bringing together of the minds of the Judges and an expression of opinion thereafter. If the Judges differ in opinion on points of law, and do not state the points on which they differ, there is no determination of the case; and, should the case thereupon be referred to other Judges for final determination, such other Judges have jurisdiction to go into the whole case.**

Under an English deed a mortgagee is entitled to possession before foreclosure immediately upon default, and he would hold possession subject to his own right to foreclose and to the mortgagor's right to redeem. The decree in the foreclosure-suit would not be binding on a party who purchased *bonâ fide* the rights of the mortgagor, or a portion of them, before the pendency of any suit against the mortgagor.

In a suit to recover possession of land under a mortgage-deed, limitation will count as against the mortgagee from the date of default, and the pendency of a foreclosure-suit will not prevent limitation from running.

*Peacock, C. J.*—THIS was a suit brought by the plaintiffs as mortgagees to recover against the defendant who was a purchaser from the mortgagor. The case was tried before the Principal Sudder Ameen, who gave a decree in favor of the plaintiffs. A regular appeal was brought before this Court, and came originally before a Division Bench consisting of Mr. Justice Morgan and Mr. Justice Shumbhoonath Pundit. Upon the hearing, the case was remanded to the Principal Sudder Ameen for the trial of certain issues, and afterwards remitted with his finding thereon to the High Court. After a further hearing of the appeal before the Division Bench consisting of the same learned Judges, each of them recorded his opinion upon the case as follows:—

"*Morgan, J.*—The result of the finding on the issues which were framed by us when this appeal was in part heard here in September 1864 is to establish that the chur, the subject of the suit, was in and before the year 1845 an accretion to the Sulbhan zemindaree, and that it was therefore the property of Unnoda Pershad Roy, the zemindar, when he mortgaged the zemindaree to Sreekissen Singh in October 1845, also that the chur was in the mortgagor's possession until the year 1849, when it was sold to Gooroo Churn Sen, and that it was afterwards held by Gooroo Churn Sen, until the sale in ——— by his Assignee in Insolvency to the defendant, since which time it has been in the defendant's possession. It has also been found that neither the original proprietor Unnoda Pershad Roy nor those who have since been the owners of the chur under the purchase in 1849 from him have ever acknowledged the title of Sreekissen Singh, or of any of the mortgagees as extending over this chur by payment of interest or (as I read the Principal Sudder Ameen's judgment) by any other recognition of the mortgages. The fact probably is that, the mortgages being of the zemindaree, it was erroneously assumed that the chur was not comprised therein, and that it continued to be the absolute and unencumbered property of Unnoda Pershad Roy and of the subsequent purchasers. Prior to its sale in 1849, the chur had been settled with the proprietor separately from the parent estate. Whatever may have been the actual intention of the parties to the mortgage, and whatever the subsequent mode of dealing with the chur, the words of the mortgage-deed itself operate to convey to the mortgagees both the zemindaree and the chur.

"The foreclosure-suit in the Supreme Court converted the plaintiffs from mortgagees into absolute proprietors of the zemindaree; but the defendant Khelut Chundra Ghose's interest (which at the lowest was an interest in the equity of redemption of the chur) not having been represented in that suit, the plaintiffs have not a complete title so far as regards the chur.

"The defendant insists that the plaintiff's right of suit (if any) to the chur is barred by limitation. I think it is not barred by limitation, and that we should not be justified in concluding that the defendant coming in on the mortgagor's title can stand upon a higher or better right than his vendors, or upon any right derived from an adverse holding. But the present suit is based upon an alleged fraudulent sale by Unnoda Pershad Roy to Gooroo Churn Sen, which the plaintiffs seek to have set aside. I think the evidence wholly fails to support any such case, and that the suit should therefore be dismissed. The plaintiffs may possibly be entitled, in respect of their mortgage, to obtain from the defendant such portion of the property mortgaged as in the defendant's possession by purchase from the mortgagor. But, if they can establish a right to any such relief, it must be in a suit properly framed which recognizes the defendant's right to redeem in respect of his interest in the portion of the mortgaged land which was sold in 1849.

"The decree should in my judgment be reserved, and this appeal decreed with costs.

*Shumbhoonath Pundit, J.*—In this case the earliest deed of mortgage upon which plaintiffs foreclose, and which appears to have been registered, included certain original lands with words sufficient to create a mortgage over accretions to them then existing. For these a resumption-suit was proceeding with the Government. The subsequent sale by the mortgagors to the vendor of the appellant of the chur lands settled as a separate estate after the mortgage cannot convey any right adverse to the mortgagee. The mortgagor held possession of all the lands mortgaged, original or chur lands, and his possession can never be higher than that of a trustee for the mortgagee, and any purchaser from the former can hold and authorize another by sale to hold only in the same capacity as against the latter. There can be no limitation in such a case and no adverse possession, though two decisions of the late Sudder Court shew that three Judges held that limitation was applicable, and that the possession of a purchaser, like the appellant, simply on the ground of a purchase from the mortgagor, can be adverse to the mortgagee.

"In all cases where a purchaser of the rights and interests of a mortgagor has been held entitled to a notice to redeem, he appears to have been the purchaser of the entire rights of the mortgagor. As the mortgage transaction cannot be divided against the wish of the mortgagee, the purchase of a small portion of the mortgaged property must be bound by any notice or proceedings served upon or taken against his vendor, the original mortgagee. In this case, after the plaintiff had foreclosed in the Supreme Court, on his going to take possession, he perceived that the appellant was in possession of the chur lands in dispute; and, as he was no party to the previous case, this suit is brought to prove that the said appellant is not entitled to hold against the plaintiff through a purchase from the mortgagor.

"The plea of the appellant that he has purchased for a consideration from a party who had purchased *bonâ fide* from the mortgagor, even supposing it took place without the notice of the previous mortgage under which the plaintiff is suing, is of no avail to the appellant, as no interest higher than that possessed by the mortgagor can any how be conveyed by any sale made to the prejudice of the rights of the mortgagee.

"The appellant is not entitled to any notice for foreclosure, and must be held bound by the decree of foreclosure passed against the *vendor* of his vendor.

"I have reason to think that, when the first sale of the chur lands was made to the vendor of the appellant, he was aware of the previous mortgage of the original lands, though he might not have understood that it included these chur lands also. The plaintiff does not directly charge fraud against that purchaser, and there is no proof of it. The fact of the deed of sale to the vendor of the appellant recited in the deed of purchase of the appellant, and which, according to all probabilities, was expected to come to the hands of the appellant, not being produced by him, leads me to suppose that the purchase first made was not without some notice of the mortgage.

"I, however, hold that the appellant may have been allowed to prove in this case, if he had occasion to do so, that the original mortgage was not a *bonâ-fide* transaction, or that the debt for which the mortgage was made had been paid off, or that any how the decree of foreclosure was collusively allowed to be obtained merely to defraud the rights of the appellant. He might, for the protection of the property claimed from him, have been allowed to plead, if he could, that the decree for foreclosure was passed at a time when the claim for it was under the law then existing barred by limitation. He cannot, however, be allowed to plead, as he does now, that the present suit would have been affected by limitation if now brought in the late Supreme Court.

"I would, therefore, dismiss the appeal with costs.

"I would have no objection to the case being sent to a Full Bench of five Judges if the question of limitation raised by the appellant in the opinion of my colleague requires such a proceeding."

As the learned Judges differed in opinion, the case was sent to the Chief Justice by the Registrar for the purpose of appointing a third Judge, to decide the point in difference, under Section 23, Act XXIII. of 1861. That Section enacts as follows:—

"If, when the Court consist of only two "Judges, there is a difference of opinion "upon the evidence in cases in which it is "competent to the Court to go into the "evidence, and one Judge concur in opinion "with the Lower Court as to the facts, the "case shall be determined accordingly. If, "in a Court so constituted, there is a difference of opinion upon a point of law, the "Judges *shall state the point upon which* "*they differ*, and the case shall be re-argued "*upon that question* before one or more of "the other Judges, and shall be determined "according to the opinion of the majority "of the Judges of the Court by whom the "appeal is heard."

When the case came before me, I doubted whether it was the intention of the learned Judges that the case should be referred for the decision of a third Judge, and whether I should be justified in appointing a third Judge for the purpose of finally determining the case. I, therefore, wrote a memorandum, which was as follows:—

"This case does not appear to have been "referred for a third voice by the learned "Judges who heard it, and they have not "stated the point of law upon which they "differ.

"As to the last part of Mr. Justice Shumbhoonath Pundit's judgment, I do not think "that there is any point to be referred to a "Full Bench. Both the Judges, as I understand, hold that limitation does not apply.

"Mr. Justice Morgan says, in substance, "that this suit is based on an alleged fraudulent sale from the mortgagor to the "first purchaser, that no such fraud has "been proved, and that the suit should "therefore be dismissed. Mr. Justice Shumbhoonath Pundit says that the plaintiff does "not charge fraud against that purchaser, "*i. e.*, the purchaser from the mortgagor. "He admits that there is no proof of it.

"I think the case should be laid before "the learned Judges, to know whether it "was their intention that the case should go "to a third Judge under Section 23, Act "XXIII. of 1861, and, if so, they should be "asked to state the point of law on which "they differ."

Subsequently, the following memorandum was recorded by Mr. Justice Shumbhoonath Pundit :—

"With reference to a note of our Lord "Chief Justice, I think it proper to record "this memorandum to explain the ground "of difference of opinion between me and "Mr. Justice Morgan.

"Mr. Justice Morgan admits, and so do I, "that, by the deed of mortgage, the churs "passed along with the zemindaree to the "mortgagee who purchased it in the Supreme "Court. Mr. Justice Morgan appears to "hold, and so do I, that the defendant Khelut "Chunder, the purchaser of the rights and "interests of the chur, settled separately "with the mortgagor, and sold by him to the "vendor of Khelut Chunder, not being a "party to the foreclosure-suit, the plaintiff is "obliged to sue the said Khelut Chunder, "and that limitation does not apply to. his "case as now brought.

"Mr. Justice Morgan appears to think "that Khelut purchased only the right of redemption, and I hold that, in fact, he purchased *nothing*, and if a right of redemption, "that right has been forfeited by the "foreclosure-proceedings. Two decisions "were quoted before us, which appeared to "rule that limitation applies to such a case "as brought by the plaintiff, and it was "with reference to these that I, who wrote "before Mr. Justice Morgan had written his "judgment, proposed to send the case to a "Full Bench, if my colleague agreed to this. "Mr. Justice Morgan, however, did not agree "to this, and so the case was never intended "by us to go to a Full Bench. Mr. Justice "Morgan, however, would dismiss the case "of the plaintiff, and reverse the decision of "the Lower Court, on the ground that the "plaintiff charged fraud and has failed to "prove it, and holds that the plaintiff can "sue the defendant in another suit, and must "acknowledge (which he does not do in the "present case) that the defendant has the "right of redemption for any thing he may "hold which formed a portion of the mortgaged property.

"Mr. Justice Morgan did not like to decide "whether the plaintiff should ask for foreclosure in the way that he had done in the "Supreme Court, and the Court should "grant time to redeem, or that the "plaintiff should abide by the Mofussil "Law in completing his rights of foreclosure by taking out process under Regulation XVII. of 1806. He properly thought "that, to decide what course should be pursued, was to be left to the plaintiff.

"If I had agreed with Mr. Justice Morgan "in the first part of his opinion, I would "not differ in his silence regarding the mode "to be hereafter adopted by the plaintiff.

"In order, however, to complete this decree for *reversal* of the judgment of the "Lower Court, under the law it is necessary "to have the concurrence of another Judge. "I was for upholding the decision of the "Lower Court, and decreeing the case of the "plaintiff. As I hold this opinion not on "reference to any question of fact on which "I had agreed with the Lower Court, and "as Mr. Justice Morgan would not try the "questions of fact, my order to uphold the "decision could not be final. Hence arose "the necessity for a third voice.

"I hold that the defendant, as a purchaser, "not of the entire, but only of a portion of "the rights of the mortgagor, is not entitled "to a separate *notice*, and, so differing from "Mr. Justice Morgan, hold that the defendant "is bound through his vendor, the mortgagor, "because I thought the mortgage-transaction cannot be *divided into parts* by the "mortgagor, without the consent, and to the "prejudice, of the mortgagee. I hold that the "want of notice of mortgage gives no rights "to the defendant adverse to the mortgagee, and also believed that the defendant "had notice of the mortgage to some extent. "All these points Mr. Justice Morgan "had no occasion at all to notice. I held "that this case of the plaintiff could be "tried and decreed, and remarked that the "defendant might have been allowed if he "had pleaded so (which he has not done) "to prove that the original mortgage was "altogether a fraudulent transaction, or

"that the mortgage-debt was paid off, or that "the decree for foreclosure was a fraudulent "affair, or was asked at a time when the "right to sue for it had become affected by "limitation.

"The difference between me and Mr. "Justice Morgan, therefore, is whether this "case, as brought, can or cannot proceed to "a trial against the defendant on the merits "of the mortgage, and its foreclosure as ob-"tained by the plaintiff in the Supreme "Court in the absence of the said defendant "the appellant before us, I holding that the "foreclosure-proceedings were binding upon "the defendant, and Mr. Morgan thinking "otherwise.

"I do not think it will now be necessary "to lay this case again before Mr. Justice "Morgan, but of course it must be laid before "him if the Chief Justice thinks it still ne-"cessary to do so. The remarks of the "Chief Justice, and this memorandum of "mine and any of Mr. Morgan's if recorded by "him, may, I believe, be a part of the record, "as they would explain the points of differ-"ence not directly and pointedly brought "out in our respective judgments."

At this time Mr. Justice Morgan had left Calcutta, having been appointed Chief Justice of the High Court at Agra. Under these circumstances, Mr. Justice Morgan having ceased to be a Judge of this Court, and having no power to proceed further in the case, it appeared to me that I could not, as the case then stood, appoint a third Judge under the Section to which I have referred, as the Judges had not expressly stated the point or points of law upon which they differed. I, therefore, thought that the case must be heard *de novo* before a fresh Division Bench; and the case, having been set down for the first Bench, has accordingly been argued before us to-day. Previously, however, to the argument, Mr. Doyne, on behalf of the respondent, contended that the case having been heard before a Division Bench, this Court could not enter into the whole case, and that they could only determine the points upon which the two former Judges differed. The objection was overruled.

I may add that I find it stated, at the end of Mr. Justice Shumbhoonath Pundit's first memorandum: "I would have no objection "to the case being sent to a Full Bench of "five Judges, if the question of limitation "raised by the appellant in the opinion of "my colleague requires such a proceeding." That shows clearly that the two Judges who composed the Division Bench had not finally come to a conclusion as to what was the decision to be pronounced by the Court, and that they had not decided, after consulting with each other, what were the points upon which they differed, or that limitation was not a bar.

In the present case, the Judges differing in opinion on points of law, and not having jointly stated the points upon which they differed, there was not, in my opinion, any determination of the appeal. The memoranda written by the Judges when they were apart, and in which they expressed different opinions, did not amount to a judgment; nor did they amount to such a statement of the points upon which the Judges differed, as legally to authorize a re-argument of those points before a third Judge for his final determination under the Section to which I have already referred.

I apprehend that all acts of a judicial nature to be performed by several persons ought to be performed when they are all present together, and that a final decision ought not to be pronounced in a case in which they differ until by conference and discussion of the points in difference they have endeavoured to arrive at a unanimous judgment. Such a rule is clearly laid down with regard to arbitrators, and it is equally, if not more specially, necessary to be acted upon by a Court consisting of two or more Judges, with power to decide on matters of the greatest importance. With regard to arbitrators, it is laid down in Russel on Arbitration, page 209:—

"As they must all act, so must they all "act together. They must each be present "at every meeting; and the witnesses and "the parties must be examined in the pre-"sence of them all; for the parties are en-"titled to have recourse to the arguments, "experience, and judgment of each arbitra-"tor at every stage of the proceedings "brought to bear on the minds of his fellow "Judges, so that by conference they shall "mutually assist each other in arriving at a "just decision."

In a case in Exchequer, the Court expressed a strong opinion that an award ought to be executed by all the arbitrators in the presence of each other and at the same meeting, upon the principle "that every judicial act done by several should be completed in the presence of each other." *Idem*, p. 210.

Now, I think it is clear, upon the face of the memoranda signed by the learned Judges, that they did not consult together and agree that the memoranda which they respectively signed on the 3rd February 1866 were to be the final decision of the Court; nor did they agree what were the points in difference between them which were to be referred to a third Judge; nor did they decide after consultation that limitation was not a bar. But, even if they had come to a final decision, and intended the case to be referred for the decision of a third Judge, it appears to me that the points of difference are not stated in the manner required by Act XXIII. of 1861. I do not think that any one reading these two memoranda can say with accuracy what are the precise points on which they differ, and upon the decision of which by a third Judge the case is to be determined.

Mr. Justice Morgan held that the suit was based on an allegation of fraudulent sale, and that, without proof of fraud, the plaintiff could not succeed. Mr. Justice Pundit did not agree in that opinion.

Again, Mr. Justice Pundit thought that the purchaser was bound by the decree of foreclosure, though he was no party to it. Mr. Justice Morgan, on the other hand, was of a different opinion.

Then, if Mr. Justice Morgan thought that the case ought to be determined with reference to the question of fraud, it was not necessary for him to decide the point of limitation.

Therefore, it does not appear to me that the Judges did intend that this should be their final decision. Under these circumstances I think that this Court has jurisdiction to go into the whole case. I have made these remarks, because it was contended on behalf of the respondents that this Division Court had no jurisdiction to try any questions except those referred for a third voice.

*Jackson, J.*—After hearing the argument which has now taken place, I desire to express my concurrence in the view taken by the Chief Justice in this matter.

It appears to me that the two learned Judges, who heard this case originally, must have done one of three things. They must either, after hearing the case, have passed a final judgment disposing of the case and of all the issues of fact and of law; or, *secondly*, they must have differed upon some point of law, which point of law they have stated and referred for the decision of a third or more Judges of this Court (because a difference of opinion upon a point of fact would not prevent the two Judges from coming to a decision, inasmuch as the opinion of the Judge who concurred with the Court below upon the facts would prevail); or, *thirdly*, they must have left the case without coming to any judicial determination upon it.

As to the *first* of these alternatives, it is quite clear that no final decision disposing of the case was arrived at.

As to the *second*, it appears to me also clear that the learned Judges have not expressly stated any point of law on which they differed. If this case had come before me (on a reference from the Chief Justice) as a third Judge to hear the case, I think I should have looked in vain for a clear statement of a point of law on which the learned Judges had differed, and I should have found it so difficult that I must have declined jurisdiction in the matter. I had at first some difficulty in this matter, because Section 23, Act XXIII. of 1861, does not clearly state the manner in which the point upon which Judges differ is to be stated, or how the proceedings are to be framed. But I think that, in a Court where the concurrence of two or more Judges is necessary to a judicial determination, there must be a bringing together of the minds of the Judges, and an expression of opinion after that has taken place. Even in cases decided in this Court under the existing Letters Patent, by which it is not necessary that the two Judges should agree on any point, as the opinion of the senior Judge is to prevail, still, in my opinion, it will be necessary that there should be a statement of the point or points on which the Judges agree, and of those on which they disagree.

Therefore, the *first* and *second* failing, the *third* supposition only remains, and it appears to me that the case has been left by the learned Judges without their coming to any judicial determination upon it, and, therefore, the case must be heard *de novo*.

*Peacock, C. J.*—The Court having thus decided to enter into the questions generally, I propose to go into the whole case, so that, if this case should go before the Privy Council in appeal, and if the Privy Council should think that we were not justified in deciding any points except the specific points referred, the Privy Council will have our judgment on the whole case.

Then the question is whether the plaintiff is entitled to recover in this suit. The mortgage was dated 4th October 1845. That

was the last mortgage. It was from Unnoda Pershad Roy, the zemindar of Sulbhan, to Sreekissen Singh, from whom the plaintiff purchased on 4th September 1858. The mortgage was a mortgage of 6 annas of the zemindaree of Sulkea, together with all lands thereto attached; and I think there can be no doubt that, under the "lands thereto attached," the lands originally in dispute and the chur passed under the mortgage. Having passed under the mortgage of 4th October 1845, the mortgagor had only the equity of redemption remaining in him. But it appears that, before the mortgage took place, the Collector had commenced proceedings in regard to this chur; that on the 28th March 1846, after the mortgage, there had been a decree for resumption; and that, on the 29th April 1848, a settlement was made with the mortgagor Unnoda Pershad as to his 6-16ths of this chur as a new and independent estate. But still it may be that, although settled with Unnoda Pershad as a new and independent estate, Unnoda Pershad's interest in it at that time was simply an equity of redemption.

Having got a settlement of that estate, on the 21st September 1849, Unnoda Pershad, whether justified or not, sold the estate to Gooroo Churn Sen. Probably only his equity of redemption passed to Gooroo Churn Sen under that document. Gooroo Churn Sen afterwards became insolvent, and his interests were sold to one of the present defendants, Khelut Chunder Ghose. The plaintiffs brought a suit for a declaration of right to, and possession of, the lands which originally composed the chur, and they alleged that the Roy defendant (*i. e.*, Unnoda Pershad Roy) had fraudulently sold it on the 6th Assin 1256 to the Sen defendants contrary to the terms of the mortgage.

Mr. Justice Morgan and Mr. Justice Shumbhoonath Pundit both agreed that there was no fraud; but Mr. Justice Morgan considers that, under this allegation of fraud, the plaintiff could not recover unless he could make out his sale.

I agree with Mr. Justice Pundit's view of the case. The plaintiff says that the Roy defendant, "having held possession "thereof, fraudulently sold the same on the "6th of Assin 1256 B. S. to the Sen de-"fendants contrary to the terms of the "mortgage, and without the knowledge of "the mortgagee, and the Ghose defendant "is in possession of the same, after having "purchased it at an auction-sale by the "Assignee of the Sen defendant. After "the said final decree, your petitioners were "vested with absolute right to the property "under decree, and these circumstances "have come to your petitioners' knowledge "by an enquiry held by them in August "1862, whence dates the cause of action. "Your petitioners, therefore, praying to "set aside the said illegal sale, insti-"tutes this action to obtain possession of "the 6-annas share consisting of beegahs "32-10-1-2-5 of land."

Now, if the plaintiff was entitled to recover possession of this 6-annas share without setting aside the deed of sale, he was entitled to recover under this plaint.

Then the question arises, is the plaintiff entitled to recover without setting aside the deed of sale? Under an English deed prepared according to the English form, the mortgagor conveys the property to the mortgagee, and the mortgagee is entitled to recover possession of that property.

In this case there was a stipulation that, until default should be made in the payment of the mortgage-money (which was 22,000 Rs. and interest), the mortgagee should not be at liberty to turn the mortgagee out of possession; but that, if default should be made on the 4th April 1848, the mortgagee was to be entitled to possession, and then he would be entitled to the usufruct of the estate. He would receive the usufruct subject to the first mortgagor's right to redeem the estate if he came in and paid the mortgage-money and interest before the mortgagee should foreclose the estate. But he would be entitled to possession and to receive the usufruct of the estate, the mortgagor being entitled to redeem, and the mortgagee being entitled to foreclose.

Now, these lands were situate, not within Calcutta, but in the district of the 24-Pergunnahs, and, therefore, in ordinary course, the Mofussil Court of the 24-Pergunnahs in which these lands were situate would have been the proper Court to try the question of the title to the land. But, the mortgage being between two natives, the mortgagor covenanted with Mr. Hilder, a British subject, who is called a Jurisdiction Trustee, that, in case of dispute, the matter should be determined by the Supreme Court. This covenant was inserted merely for the purpose of giving jurisdiction. Whether this covenant would have given the Court jurisdiction to entertain a Bill of Foreclosure against the mortgagor or not, it is unnecessary for me to decide, for the mortgagor submitted to the

jurisdiction as to the suit for foreclosure. But the mortgagee was entitled to possession before foreclosure immediately default was made, and he would hold possession subject to his own right to foreclose and to the mortgagor's right to redeem. His right to sue for possession did not depend upon his obtaining a decree for foreclosure. The defendant might have been sued for possession immediately default was made. Not being a party to the foreclosure-suit, and having purchased from the Assignee of Gooroo Churn Sen who purchssed *bonâ fide* before any suit was pending against the mortgagor, it appears to me that the defendant is not bound by the foreclosure, and that, even if the plaintiff were to recover possession, he could not avail himself of the decree in the foreclosure-suit against the defendant.

We think that the Court may reject all that part of the plaint which relates to the sales having been fraudulent, and that the plaintiff, but for the Statute of Limitations, would be entitled to recover possession, but that he would hold the land subject to the equity of redemption, the defendant not being barred by the foreclosure.

The next question is, is the suit to recover possession barred by limitation?

*Mr. Doyne* here said that he had not been heard upon the question of limitation.

*Peacock, C. J.*, considered that he had been heard on all the points in the case, but stated that, if there was any misunderstanding, Mr. Doyne might be heard upon the question of limitation.

*Mr. Doyne was accordingly heard, and, the Court having taken time to consider, the following judgment was pronounced by—*

*Peacock, C. J.*—This case has already been decided upon all the points except the question of limitation. There having been some misunderstanding, the Court, considering that Mr. Doyne had been heard upon the whole case, whereas the learned Counsel considered that he had not been called upon to argue upon the question of limitation, he was allowed to resume his argument upon that point. After hearing and considering his arguments, I am clearly of opinion that the plaintiff's right of action to recover possession of the lands in dispute is barred by limitation.

The mortgage under which the plaintiff claims was executed by the defendant Unnoda Pershad Roy. It was dated the 4th October 1845, and was a mortgage in fee from Unnoda Pershad Roy to Sreekissen Singh of 6-16ths of the zemindaree of Sulkea. It may be admitted for the purpose of the present decision that the lands in dispute were an accretion which belonged to the zemindaree, and that 6-16ths of the accretion passed by the mortgage-deed to Sreekissen Singh. The plaintiff is a purchaser of the mortgage, and stands in the same position as Sreekissen Singh. The mortgage was to secure the payment of 22,000 rupees on the 4th April 1848, with interest in the meantime, and there was a condition that the mortgagor should be at liberty to remain in possession until default should be made in payment of principal or interest.

On the 28th March 1848 there was a decree for resumption of the lands in dispute, and on the 29th April 1848 a settlement was made by Government with Unnoda Pershad Roy of his 6-16hs of the accretion as a separate estate; and it was entered in the Towzee under a separate number. On the 21st September 1849, Unnoda Pershad Roy sold the accretion so settled to Gooroo Churn Sen, who does not appear to have known or to have had any notice that the lands were included in the mortgage. On the 15th January 1850, Gooroo Churn Sen obtained an order for mutation from the name of his vendor the mortgagor to his own as to the 6-16ths of the accretion (the lands in dispute). The Ghoses defendants purchased the rights of Gooroo Churn Sen at a sale by his Assignee under his insolvency. The mortgage did contain a covenant by the mortgagor with Mr. Hilder that, in case of disputes arising between the parties to the mortgage, the Supreme Court should have jurisdiction.

After the sale by Unnoda Pershad to Gooroo Churn Sen, default having been made in payment of the mortgage-debt, a suit for foreclosure was commenced by the mortgagees in the Supreme Court; and on the 11th December 1850 a decree for an account and foreclosure was obtained; and on the 9th February 1852 a final order for foreclosure was made. On the 29th April 1854 Unnoda Pershad filed a bill in the late Supreme Court to open the foreclosure. On the 24th September 1858 the Singhs sold all their rights under the mortgage and foreclosure to the plaintiffs who, on the 15th July 1862, obtained a new final decree for foreclosure in the High Court in the suit which had been commenced in the late Supreme Court to open the foreclosure.

From the above statement it appears that default was made on the 4th April 1848; that the property in dispute was sold by the mortgagor to Gooroo Churn Sen (through whom the defendant Khelut Chunder Ghose claims) on 21st September 1849; that a mutation of names in the Collector's books was made on 15th January 1850, when the estate in question was transferred from the name of the mortgagor to that of the purchaser Gooroo Churn Sen; that the suit for foreclosure was not commenced until the 11th December 1850; and that the present suit was commenced on the 27th August 1863, nearly 15 years after the default in payment of the mortgage-debt, nearly 14 years after the sale to Gooroo Churn Sen, and nearly 13 years after the mutation of names. The mortgagee has never had possession of the land in dispute which has been held adversely by Gooroo Churn Sen and the Ghoses who claim under him from the time when Gooroo Churn Sen purchased it in September 1849.

It is clear that, as soon as default was made, the mortgagee might have sued the mortgagor and Gooroo Churn Sen, and recovered possession of the estate in dispute (assuming that it was included in the mortgage); and I am of opinion that, from that date, the Statute of limitation began to run as against the mortgagee in respect of a suit for possession.

If this suit is treated as one to set aside a fraudulent conveyance which the plaintiff first discovered in 1862, there is no evidence to support it. If the suit is simply a suit to recover possession of land to which the plaintiff is entitled under the mortgage-deed, the case falls within Act XIV. of 1859, Section 1, Clause 12, and the suit is therefore barred by limitation.

It is contended that limitation did not begin to run until the first decree for foreclosure obtained in the High Court on the 15th July 1862. But, even if the pendency of a suit for foreclosure would prevent limitation from running against a claim to recover possession of the land included in the mortgage, it is to be remarked that the lands were not situate within the limits of the jurisdiction of the late Supreme Court or of the original jurisdiction of the High Court, that Gooroo Churn Sen and the Ghoses defendants have had possession from the time of Gooroo Churn Sen's purchase in 1849, that that purchase was not made *pendente lite* but before any legal proceedings were commenced, that neither Gooroo Churn Sen nor the Ghoses defendants in this suit were parties to the proceedings in the late Supreme Court, and are not shown to have been ever subject to the jurisdiction of that Court, that they were not and could not be affected by the covenant made by the mortgagor with Hilder that the Supreme Court should have jurisdiction in case of dispute, and that neither Gooroo Churn Sen nor the Ghoses defendants could have been turned out of possession of lands not within the local limits of the jurisdiction of the Supreme Court under the decree of foreclosure of the 15th July 1862 in a suit to which they were not parties, and by a Court to whose jurisdiction they were not subject.

With reference to the covenant with Hilder, it seems clear that it could not run with the land which was never conveyed to Hilder by the mortgage-deed, but to Sreekissen Singh. If Unnoda Pershad was bound by the covenant with Hilder, and might have been sued under it by Hilder in the Supreme Court for non-payment of the mortgage-debt by virtue of Section 13 of the Letters Patent of the Supreme Court of the 26th March 1774, which is extremely doubtful, it is clear that the rights of the Ghoses defendants in the land could not be affected by the covenant, and that they were not liable by reason of it to be sued in the Supreme Court. But, even if they were so liable, neither the Ghoses defendants, nor Gooroo Churn Sen, through whom they claim, were parties to the foreclosure-suits in the late Supreme Court.

This case is very different from that cited from 7 Moore's Indian Appeals, page 323 (Prannath Roy Chowdry *vs.* Kookee Begum), for, even if the pendency of the foreclosure-suits would, under the old law of limitation, have been a good and sufficient cause for not instituting proceedings against a person holding adversely lands included in the mortgage-deed, this case is governed by Act XIV. of 1859, which contains no words similar to those in Regulation III. of 1793, Section 14, upon which the decision of the Privy Council was founded.

The appeal must be allowed, and the decision of the Lower Court reversed, and a decree entered for the defendants with costs of the suit in the Lower Court and the costs of the appeal. This decree must be registered.

*Jackson, J.*—I entirely concur with the Chief Justice upon the merits.

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The 29th September 1866.

*Present:*

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

**Religious Endowment—Appointment of Manager by Trustee.**

Case No. 49 of 1866.

*Regular Appeal from a decision passed by the Judge of Shahabad, dated the 29th November 1865.*

Shah Moheeooddeen Ahmed, disciple of Shah Kobeerooddeen Ahmed, deceased (Plaintiff), *Appellant,*

*versus*

Elahee Buksh and others (Defendants), *Respondents.*

*Moonshee Ameer Ali Khan Bahadoor* and *Baboos Romanath Bose* and *Kishen Dyal Roy* for Appellant.

*Mr. C. Gregory* and *Baboo Dwarkanath Mitter* for Respondents.

Suit laid at Rupees 48,022.

**An appointment as manager, by the trustee for the time being of a Mahomedan religious endowment, was held not effectual beyond the incumbency of the nominator.**

PLAINTIFF, as heir and successor of the late Shah Kobeerooddeen, sues to obtain possession of certain trust-properties devoted to religious and charitable purposes by certain ladies since deceased, and of which the late Kobeerooddeen, his heirs and successors were appointed trustees, a certain share of the income being also expressly assigned to the trustees. Defendant claims under an unstamped paper set up by him, by which Kobeerooddeen appointed him to the management of the estate and charity *in perpetuity*, and assigned to him the trustee's share of the income.

Plaintiff objects, to begin with, that the unstamped document cannot be received; that the words *in perpetuity* were fraudulently entered without the knowledge of Kobeerooddeen whose eyesight was bad; and that it was surrendered during Kobeerooddeen's life and on his demand. But in the view which we take of the case, it will not be necessary further to consider these pleas, since the case will be determined with reference to the terms of the documents supposing them to be admissible and genuine.

The Principal Sudder Ameen, considering defendant's document to be genuine and effectual, dismissed the suit. Plaintiff appeals.

The original deed of endowment appointed as trustees Shah Kobeerooddeen, his heirs, and his successors (Kaem Mokaman or those standing in his place), and authorized the trustees to conduct the affairs of the charity, either personally or by the appointment of a trustworthy person, that is, in fact, by a deputy or manager. It is unnecessary here to examine the exact mode in which the trust would descend. It is enough in this place to say that we do not think that the deed of endowment gave the original trustee power to divert the succession. He only enabled him to appoint a fit person as manager, and it was as manager, in the exercise of that power, that the defendant was appointed, the trustee's share of the income being given to him in remuneration for his services. That being, in our view, the character in which the defendant held, we do not think that an appointment by the trustee for the time being, even assuming that it purported to be made in perpetuity, is effectual for that purpose beyond the incumbency of the nominator. In our opinion, it cannot bind his successor, who is entitled to appoint his own manager.

Respondent takes objection to plaintiff's right to sue. He says that plaintiff is not the legal heir of the deceased Kobeerooddeen, being his nephew, while, in fact, a brother survives. But we find that the other more immediate heirs of Kobeerooddeen have appeared and acquiesced in plaintiff's claim, and we gather that, in fact, the plaintiff has been recognized by Kobeerooddeen's immediate family as his religious heir and successor in the larger endowment of Sasseram, as well in respect of the endowment the subject of suit. A contest regarding the larger endowment which seems to be pending is not between the members of Kobeerooddeen's proper family, but between them represented by plaintiff and a more distant branch.

Considering, then, that in this case plaintiff is in a position to sue as successor of Kobeerooddeen in the trusteeship, and that defendant has no title to hold against the will of the trustee for the time being, we decree the appeal with costs.

The 29th September 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Breach of Indigo Contract—Limitation—Damages.**

Cases Nos. 970 and 994 to 1002 of 1866.

*Special Appeals from a decision passed by the Judge of Purneah, dated the 28th November 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 31st March 1865.*

Motee Sahoo and others (Defendants), *Appellants,*

*versus*

Mr. A. J. Forbes (Plaintiff), *Respondent.*

*Messrs. R. V. Doyne* and *C. Gregory* for Appellants.

*Mr. G. C. Paul* and *Baboos Toolsee Doss Seal* and *Umurnath Bose* for Respondent.

In a suit for damages for breach of contract to cultivate Indigo—

HELD (1) that, if the ryots sowed at any time in the sowing season within three years of the institution of the suit, they could not be deemed to have committed a breach of contract, and that, therefore, the cause of action on such breach of contract could not commence before the close of the sowing season.

(2) That only one set of damages for one breach of contract alone could be recovered, and not a separate set of damages for each breach or failure to do each of all the various acts specified.

(3) That such stipulated damages should be for one year only, *i. e.*, that the first breach involves a liability to pay once, and once only, the stipulated damages, and that the contract ceases and determines therewith (*Shumbhoonath Pundit, Judge, dissenting*).

*Bayley, J.*—THE learned Counsel (Mr. Doyne for the appellants, and Mr. Paul for the respondent) admit that all these cases will be governed by one and the same decision in special appeal, and that the decision of all rests on the construction to be given to the indigo "*teep*," or agreement of the 22nd of October 1859, and on which it is stated by both parties that each and all of these suits are based.

The learned Counsel further agree that, although the Full Bench decision of the 1st of September 1866* gives abstract answers to the abstract questions put by E. Jackson and Bayley, JJ., in their reference of the 20th June 1866, still these answers will not decide these cases. The correctness of those answers, as general propositions of law, is not questioned by either party, but both parties agree that those answers do not apply to these cases further than that, nor are of themselves sufficient to enable this Division Bench to decide these cases.

We may here notice that the "*teep*," or agreement before referred to, was not before the Full Bench at all.

It may be convenient for readier reference to cite the questions put to the Full Bench by E. Jackson and Bayley, JJ. They were in these terms :—

"The points are, *first*, whether in a suit "for breach of a contract, which, in fact, "includes a series of contracts, limitation "must be *calculated from the* first breach "of the contract, or may be calculated from "any breach of it? On this question, the "judgments reported at page 277, Weekly "Reporter, Volume V., and those reported "at pages 45 and 148, Sutherland's Small "Cause Court Rulings, are at variance.

"The *second* point is whether damages "can be awarded for *each year when the* "*contract* extends over several years, or "must be confined to the *first year?* Up-"on this point, the judgment reported at "page 277, Volume V., Weekly Reporter, is "at variance with the decree passed at page "386 of Marshall's Reports."

The answers given by the Full Bench were as follows :—

"With regard to the *first* question, it ap-"pears to me" (the Chief Justice) "that, in a "suit for breach of a contract to be perform-"ed at different times, limitation must be "calculated from *each breach* of contract as "*it arises.*

"Thus, in a suit upon a contract to pay "by instalments, or to perform certain acts "at different periods, each breach would be "separate; and limitation as to such breach "would run from the date at which the "money was to be paid, or the duty had to "be performed.

"This ruling would not apply to any con-"tract which expressly provides that, in the "event of any breach, the whole debt shall "become due, or the whole damages shall "be recoverable, or a sum certain shall be "paid as compensation, in respect of the "whole contract as in the case cited from 5 "Weekly Reporter, page 277.

* *See* Vol. VI., Act X. Rulings, p. 61.

*N. B.*—Printed by mistake under Act X. Rulings, instead of under Civil Rulings.

"The answer to the *first* question is substantially an answer to the *second* question, namely, whether damages can be awarded for *each year* where the contract extends over several years, or must be confined to the *first* year. Where there is a contract for performing certain duties in each of several years, each breach of the contract would be a complete cause of action, and separate damages would be recoverable for each breach."

We would here observe that, in the case cited from page 272, Weekly Reporter, Volume V., Bayley and Kemp, JJ., the pleader then employed stated that, under the terms of the contract (this very same indigo *teep* or agreement, according to the construction of which all these cases are to be decided), the cause of action arises from 1st October 1860, that suit being (as they are all here) for damages for 1860-61 and 1861-62. We may also notice that respondent's pleader admitted that damages, as well as recovering advances, were not both sought for before us in the appellate stage.

That Division Bench in that case held that the liquidated damages (15 rupees per beegah) were a lump sum payable on account of the *first year only* in which the breach of contract took place, and did not spread over the second year sued for, or over the remaining 8 years of the term of the agreement.

We would further notice that in that case the opinion was also expressed that the instigators (who were also there sued for damages) could not be liable to plaintiff for such damages, as there was no contract between them and plaintiff as to damages. It is admitted at this present hearing that, in the present ten cases, no question of the liability of instigators has in any way to be considered by us.

We, therefore, now proceed to the consideration of the *agreement*, the proper construction of which both parties admit is *the matter* for this Bench now to consider, and on which it must decide these cases.

We give it *in extenso*, for it cannot be properly considered or construed except as a whole and with reference to all its terms and their general relation to one and another.

The translation used is one agreed to by both parties. The words underlined are those which we have so marked as of the most importance in the proper construction of the deed.

"To Mr. Alexander John Forbes, of Kalee, Sultanpore.

"We, Molee Sahoo and Doorga Kapoor Chund Baboo, and Manick Chund, Eklaul Mahtoo, inhabitants of Peepra, Pergunnah Sultanpore:

"Do hereby execute a tumussook (bond) for the cultivation of indigo (for a period of) ten years, beginning from 1860 to 1869. Agreeably to the advances detailed below, we shall *continue to have measured* 23 beegahs 5 cottahs of Phagoony and Bysakhy lands with cottah of 4½ hands, selected by the amlahs of the factory, *year by year*, at the commencement of the season of cultivation of indigo. *When the season for sowing indigo will commence*, we shall come to the factory, and carrying indigo-seeds for sowing, we shall sow our respective lands according to custom. If the indigo-plants do not grow, or do not remain at the first sowing, then we shall sow twice, thrice, until the plants continue (to come up) and whatever quantity (of land) of indigo we sow and prepare, to that extent we shall get credit as for cultivated lands; the remaining beegahs will be placed (against us) as not cultivated. The terms which are fixed for not cultivating lands will be brought into force. When the plants grow, and they become ready to weed (the lands), we shall, according to the decision of the amlahs of the factory, weed the land twice and throw out the accumulation of weed. When the indigo becomes fit for cutting, we shall come to the factory and carry carts and bullocks, and having got the indigo plants of our respective lands cut by our laborers, men shall load them respectively into the carts and come with the carts to the factory; and shall get the plants measured and bundled with the chain of 4½ hands, equal to 7 English feet, consecutively, and take receipts for them. We shall have the price of *neelghas, moorlum, khootea*, at the rate of 9 bundles per rupee, credited in our accounts. The cost of the carriage of the *neelghas* shall be defrayed by the factory. The price of the indigo-seeds which we shall take from the factory for sowing will be paid at the rate of 5 rupees per maund of sicca rupees, and all the seeds which will be produced in our lands shall be deposited and given in the factory, weighed with the weight of 85 siccas. When the indigo-plants of our lands bear seed, then the amlahs of the factory will then and there effect the *denabundee* (or

"estimate the quantity of seed), and we also, "being present there with the amlahs, shall "effect the denabundee. If we be not pre-"sent at time of denabundee, and the am-"lahs effect the denabundee in our absence, "we shall agree to that, and, according to the "denabundee of the factory, deliver up "(the seeds). The seeds which shall be "delivered from January to 15th February "will be accounted for at the rate of 4 "rupees per maund, and those, which may "be delivered afterwards up to the last "day of February, will be accounted for "at the rate of 3 rupees per maund. "*If we do not allow the lands to be mea-"sured according to this deed, or omit to "sow (them), even in that case we shall con-"tinue to pay damages at the rate of "rupees 15 per beegah, besides the advance "to the Saheb*, the proprietor of the factory, "without any objection or hesitation. *If "we fail, and cultivate less land out of the "whole, or break up the indigo-plants and "seeds, or destroy them by cattle, or in any "way damage them, we shall, without any "hesitation, pay the above-mentioned dam-"ages out of our own pockets according "to the measurement of the factory. If "we deliver up any quantity of seed less "than that mentioned in the denabundee, "or do otherwise with the deficient quan-"tity, or dispose of the same in other "places, or any damages may be caused on "account of our neglecting to cut, gather, "and clear up the seeds, then, that being "proved, we shall have, without any objec-"tion, to pay damages at the rate of 15 "rupees per maund to the proprietor of the "factory from our own pockets.* The "wages of the laborers that may *be sent* "by the owner of the factory to weed, cut, "and bind the indigo-plants and bun-"dles will be paid from our own pockets. "We shall not be able to cultivate any other "crops together with the indigo, or in the "lands measured for that purpose; and, if "we do that, the amlahs of the factory shall "be authorized to cut and throw it out, and "sow indigo in its place, which we shall be "bound to admit. We also agree to culti-"vate the lands which, having been selected "by the amlahs of the factory, may be "measured in our presence, or behind us; "and, if after the execution of the tumussook "(bond) we fail to cultivate the lands, and "they be cultivated by the factory, the ex-"penses of the same will be defrayed by us. "The loss of the seeds which may be caused "on account of drought or excess of water "will be borne by us, and shall have "nothing to do with the proprietor of the "factory. *We shall annually take the "price of the indigo-plants and seeds "which we may deliver, according to the "above rate and accounts mentioned in the "books of the factory.* With the advances "we have taken for the cultivation of the "indigo-plants, we shall *annually* to the "period, *according to the term mentioned* in "period in the above-mentioned '*teep*,' cul-"tivate the lands detailed below, and, when "the owner of the land will demand the "money back, we shall, without delay, pay "the amount in cash, according to what in "the books of the factory may be found due "from us. Until the expiration of the term, "we shall not be able to return the money, "without the permission of the owner, "but we shall liquidate this money with "the price of the indigo-plants of the "lands. Up to the time of liquidation of "the same, when the owner may desire, or "the amlahs of the factory suspect that the "ryots will remove their seeds, then the "plants bearing seeds of our lands or cultiva-"tions being cut together with the jhurva "shall be carried to the factory and pre-"pared there. The cost of cutting, car-"riage, and beating the seeds, will be de-"ducted from the price of the seeds, and the "remainder will be taken by us. We do "also hereby pledge our cattle for the "amount received in advance as detailed "below, and till the payment of the said "advance, we shall, by no means, transfer "our cattle any where; if we do, it will be "illegal. The cattle pledged will remain "under our care, and not with the owner of "the factory; and, if any cattle be lost, it "shall not be claimed from the factory *Saheb*, "but be made up from other property. "Under these terms, we do, with our hands "and of our own will, and being in sound "health and mind, execute this tumussook, "so that it may be useful when required. "22nd October 1859."

The three questions which we have to decide as arising out of the contested construction of those above agreements are in the view of this Court and of the parties:—

*1st.*—From what time the cause of action arose to plaintiffs, and thus whether limitation bars the suit; and, if so, does limitation bar the suit entirely, or to a certain extent only, and then to what extent?

*2nd.*—If limitation be not a bar, either wholly or in part, is plaintiff entitled to the

damages for which he sues, or to any damages; and, if to any, to what damages?

*3rd.*—Whether for each breach in regard to which damages are stipulated and for each year, or only for the first year?

As to the first of these three questions, the parties admit that the limitation to be applied is that of three years from the date of what the Court may decide was the cause of action in these cases. The suit (it is also admitted) was brought on the 4th March 1864. Therefore, if limitation applies to his case, the plaintiff will be in time if it be decided that his cause of action arose after the 4th March 1861.

The plaint is that the defendant received advances from plaintiff on the above agreement of 22nd October 1859 "separately as to former time and recently to cultivate 23 beegahs 5 cottahs with indigo, "and cultivated indigo accordingly. From "the month of October 1860-61 A. D. "(1267-68), owing to instigations and "out of wickedness, at once left off the "entire lands of indigo, although they were "told to cultivate indigo, but the instigators being proved of their respective "wealth and their function as principal "ryots, and, although they knew that the "ryot had entered into contract (with plaintiff), brought the ryots under their own "power, and did not allow the cultivation "of indigo. By this, great loss and damage "have accrued to me, the plaintiff. The "*cause of this action* has arisen from which "the claim is preferred (1860-61 the expiration of the years from 1861-62, "1267-68, 1268-69)."

The damages are taken in the plaint at the amount of profits plaintiff might have expected to realize had the indigo been duly and carefully cultivated.

The instigators (who were made defendants below) denied any instigation on their parts, but, as before observed, all parties state that this Division Bench have now nothing to decide in this case in regard to the alleged instigators (defendants).

The other defendants pleaded limitation; and that only a lump sum of 15 rupees per beegah on account of the first year of the contract could be awarded. Any breach as to the seed was also denied, the defendants answering that indigo-seed was duly delivered.

The *first Court* found that the agreement was a true one; that the damages accrued at the end of each year of default; and that the suits had been instituted within time under Clause 16, Section 1, Act XIV. of 1859 (*viz.*, 6 years); that no sufficient evidence has been given by plaintiff to shew that he was entitled to the amount of damages he claimed, but that 15 rupees per beegah should be taken as the damage accruing to the plaintiff.

The first Court decided the case accordingly.

Upon appeal to the Judge, he decided that six years was the proper period of limitation under Section 1, Clause 16, Act XIV. of 1859; and that, therefore, the plaintiff was *not* barred by lapse of time. The Judge further held that the "*teep*" or bond was genuine and true; and that "*plaintiff is entitled to interest or damages sustained by him annually.*"

Accordingly, the appeal as on the part of the ryots against Forbes was dismissed by the Lower Appellate Court; and the ryots have now appealed to this Court.

The previous proceedings in this special appeal on its first coming up, having been duly stated in a previous part of this judgment, and the substantial contentions of the parties in special appeal having been specified in the issues recorded above, it only remains for us to give our decision in regard to them, and to give also our reasons for it.

In respect to *limitation*, we are of opinion that the plaintiff's suit is not barred. We consider the cause of action to have arisen from a date not anterior to that on which the suit was brought, *viz.*, the 4th March 1864, *i. e.*, within three years, the period which both parties agree before us is that in which the plaintiff had to sue.

We hold this, because the first stipulation for which a penalty is attached to a breach is that the ryots shall let the lands be measured and shall sow. It is strongly pressed upon us by Mr. Doyne that, when the ryots did not carry out the first condition, *viz.*, the measurement which would ordinarily take place about February, or March, the breach accrued *then*, and plaintiff was *then bound* to sue. But we read the contract to be that the penalty would attach only if the ryots would not measure or sow the land *when it could be done.* Now, it is not contended that the sowing season ceased on or before the 4th of March 1861.

We think, then, that, if the ryots sowed within any time in the sowing season within three years of the suit, they cannot be said to have committed a breach, and that, therefore, the cause of action on such breach

could not commence before the 4th March 1861.

As then this suit was brought within the period admittedly open to plaintiff, no limitation applies.

We do not (we may here remark) agree with the argument of the learned Counsel, Mr. Doyne, that the plaintiff was *obliged* to sue when sowing was not commenced at the beginning of the sowing season, because, as long as the ryots *could* sow, they might have fulfilled their contract, and thus avoided any breach; and, therefore, avoided also coming under any penalty.

In respect to *damages*, it is contended by Mr. Paul, for the special respondent, that the plaintiff has a right to the full prospective profits as damages which he claimed; but that, if the Court thinks not, then at least plaintiff is entitled to one set of damages at 15 rupees per *beegah*, if the ryots did not measure or sow, and to a second 15 rupees per *beegah*, if the ryots did not cover with indigo sowing the area mentioned in the "*teep*," or if they rooted out any plants. It is again urged that plaintiff is entitled to a third set of damages at 15 rupees per *maund* if the ryots did not duly deliver seed at the factory.

It is further pleaded that the damages are leviable for each breach for *each of the years* 1860-61, 1861-62, as far as within three years of suit.

Mr. Doyne, on the other hand, contends that only one set of damages for one breach alone is payable under the deed and for one year, *and no more.*

We concur in this last view. We do not read the contract to be that the damages would be payable for each breach or failure to do each and all of the various acts specified; *firstly*, because we view the intention of the parties from the terms used to be that one breach should involve one penalty, and, with it, the contract should cease and determine; and, *secondly*, because the contrary view would involve this, *viz.*, that, if the ryots were guilty of the first breach of not sowing, and then *also* for failure to do the other acts specified, they would be liable for damages for what they *could not do;* that is to say, if they let the sowing season pass with sowing, there would be no area at all covered with seed, and consequently no *short* area planted and no plants to root out, and no seed to deliver over, and, therefore, all these being specific subjects of contract in the "teep" could not be in existence, or consequently a separate breach exist as to them.

Lastly, I think that the stipulated damages should be for *one year only*, *viz.*, that the first breach would involve a liability to pay once, and once only, the stipulated damages, and that the contract ceases and determines therewith.

Thus, the damages would, in this case, be for the one year in which plaintiff was not barred by three years having passed, and no further liability would accrue to defendants.

In this view I hold that—

*1st.*—Limitation does not bar the suit as for any breach before the 1st of March 1861.

*2nd.*—That the defendant, who, it is admitted, did not cultivate at all, will be liable to pay damages at 15 rupees per beegah, from the first breach for which that penalty is specified, *viz.*, not measuring or sowing; and *for no other.*

*3rd.*—That the damages cannot be for the profits sued for by plaintiff, but only for 15 rupees per beegah, and not for two years, but for that year in which the said breach was a cause of action within three years of suit.

*Order.*—The plaintiff's case is decreed to this extent and with costs in proportion to the amount decreed and dismissed.

*Shumbhoonath Pundit, J.*—I agree in this ruling regarding limitation and as regards the right of the plaintiff to recover only one set of damages at the rate of 15 rupees per beegah; but I would, with reference to the distinct wording of the deed upon which this case is brought, decree to the plaintiff one set for each of the two years 1860-61, 1861-62 damages.

The 29th September 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Mortgage—Rights of Usufructuary Mortgagee —Contract —Accounts — Benamee Lease — Fraud.**

Cases Nos. 184 and 185 of 1866.

*Regular Appeals from a decision passed by the Judge of Shahabad, dated the 29th March 1866.*

Munnoo Lal (Plaintiff), *Appellant,*

*versus*

Baboo Reet Bhoobun Singh and others (Defendants), *Respondents.*

*Messrs. R. V. Doyne* and *R. T. Allan*, and *Baboo Onookool Chunder Mookerjee* for Appellant.

*Mr. G. C. Paul, Moonshee Ameer Ali Khan Bahadoor*, and *Baboos Kalee Kishen Sein* and *Romanath Bose* for Respondents.

A mortgagor may give his usufructuary mortgagee the power to sue him personally, or to sell the land, or both, at any moment.

Since the repeal of the usury laws, a mortgagor and mortgagee may make what contract they please with reference to the profits of the mortgaged estates, and the mortgagor may by contract deprive himself of the right to compel the mortgagee in possession to account for the profits.

The mere taking a *benamee* lease, unaccompanied by any other circumstances of suspicion, does not *per se* constitute fraud.

*Markby, J.*—THIS was a suit brought to recover Rupees 37,458-5-9 principal, and Rupees 933 interest, under a mortgage-bond dated January 8th, 1857, and executed by one Gooman Bhunjun Singh. The plaintiff prayed that the amount might be realized by the sale of Mouzah Keshopore Pukree, and from the person of Bhunjun Singh, a defendant in the suit.

It appeared that, in the year 1850, Bhunjun Singh, being largely indebted, executed on the 5th January in that year an ijarah zur-i-peshgee lease of Mouzah Keshopore Pukree to one Mohun Sahoo, the uncle of the present plaintiff, at a jumma of Rupees 2,300 for a term of ten years. The deed acknowledged a debt of Rupees 30,000 due by the plaintiff to Mohun Sahoo, and authorized Mohun Sahoo to take from the annual jumma Rupees 1,980 on account of interest, and Rupees 237 on account of Government revenue, the balance of Rupees 83 to be paid to the plaintiff as "huq azooree," or proprietary profits. It was also agreed that, if the income of the mouzah increased through the agency of Mohun Sahoo, the plaintiff should have no claim to it, nor should Mohun Sahoo have any claim against the plaintiff if it should decrease. The plaintiff, moreover, agreed to pay the entire loan of Rupees 30,000 in Jeith 1267; and, if the plaintiff failed to repay the amount, the condition of the deed was to remain in force up to date of payment, and in the meantime the plaintiff agreed neither to sell, pledge, nor mortgage the property.

On the 9th December 1856, the defendant executed a simple money-bond without security to the plaintiff Munnoo Lal, for Rupees 6,254.

It appears that about this time both the zur-i-peshgee lease and the bond were in the hands of the plaintiff; for, on the 8th January 1857, Bhunjun Singh executed a deed in which these two deeds were recited, and also that the whole sum due thereon, with arrears of interest, amounted to Rupees 37,455-5-9; that Bhunjun Singh had asked the plaintiff for his own benefit to return these two deeds and to have another deed executed at a reduced rate of interest, and to deliver up possession of the Mouzah Keshopore to which the zur-i-peshgee lease related; and that Munnoo Lal had agreed to this. Bhunjun Singh by this deed then agreed to repay the sum of Rupees 37,455-5-9, with interest at 6 per cent. to the plaintiff in Jeith 1268 (June 1861); and as a security pledged the same mouzah, which he agreed neither to sell, pledge, nor hypothecate, until the debt should have been liquidated.

Five days after this, namely, on the 13th January 1857, Bhunjun Singh executed an ijarah lease of Mouzah Keshopore to one Sujewan Lall for the term of 10 years, at an annual jumma of Rupees 2,300.

Three days later, namely, on the 16th January 1857, Bhunjun Singh executed a document therein, called a letter of assignment, whereby he directed Sujewan Lall to pay to the plaintiff Rupees 948-12-3 on account of interest due for the current year, and Rupees 22,445 annually on account of interest from Jeith 1264 to Jeith 1268 (June 1857 to June 1861): Sujewan Lall was to take receipts from the plaintiff, and credit was to be allowed him accordingly.

Subsequently, the property was attached and put up for sale, when it was purchased by one Mitterjeet Singh, the principal defendant in this suit, in conjunction with one Byjnath Singh, who is also a defendant, but has not appeared.

Mitterjeet Singh does not deny the existence of the debt to the plaintiff, or the genuineness of the deeds above set out; but his case is that the deeds of January 1857 constituted in reality but one transaction, namely, a bhoye-bun dhak, or usufructuary mortgage; that, though Sujewan Lall's name was used in the ijarah lease of December 13th, 1857, the plaintiff was the real lessee; that the plaintiff ever since January 1857 has been and is still in possession of the property as usufructuary mortgagee; and, therefore, that he is not entitled to sell the land or sue for the recovery of the debt; and, even if entitled to sell the land and sue for a recovery of the debt, he is bound to account for all the profits which he has received from the estate.

There are several questions of fact and law comprised in this contention; but with many of them it is unnecessary to deal, because we think it is based on a misconception of the relation between a mortgagor and mortgagee.

The defendant starts with the proposition that a usufructuary mortgage or a mortgagee in possession of the mortgaged estate is bound to account for every farthing received by him out of the estate, allowance being made only for necessary outlay and expenses of collection, and goes on to contend that this is a right of which the mortgagor cannot deprive himself even by contract. And, moreover, he contends that a mortgagee in possession is not only bound to render an account to a mortgagor in every instance, but that he can never sue the mortgagor for the principal debt, or sell the land even though the mortgagor has made an express contract to repay the loan on a day certain.

With regard to the last part of the contention, namely, that a usufructuary mortgagee in possession cannot in any case have a personal remedy against the mortgagor, or sell the land, it is true that, in the case of a pure usufructuary mortgage, that is, where the lender takes possession of the estate of the borrower, and *agrees to pay himself out of the proceeds*, the mortgagor cannot be sued personally, nor can the land be sold. But why so? Simply because it is considered that the mortgagor by his contract undertakes no personal liability so long as the mortgagee remains in possession, and that the mortgagee has agreed to satisfy his claim out of the proceeds of the estate. But there is no rule of law which says that, if a mortgagor be so minded, he may not also give his usufructuary mortgagee the power to sue him personally, or to sell the land, or both, at any moment. On the contrary, the possibility of uniting these different forms of remedy is recognized in a standard work on this subject (*see* Macpherson on Mortgages, page 14, *2nd* Ed.); and, as far as we are aware, the view taken by that learned author has never been questioned.

With regard to the first part of the contention that a mortgagee in possession is bound in every case to account for the profits, and that a mortgagor cannot by contract deprive himself of this right, it is, no doubt, true that, while the usury laws were in force, a restriction in this respect did certainly exist. But this prohibition on the free power of the parties to contract as they please was solely a consequence of the usury laws then in force; and, on the abolition of those laws, the restriction in question fell with them. By Section 4 of Act XXVIII. of 1855, it is expressly enacted that an agreement that the use or usufruct of any property shall be allowed in lieu of interest shall be binding upon the parties. We are of opinion that a mortgagor and mortgagee are now at liberty to make what contract they please, with reference to the profits of the mortgaged estate; and we are strongly fortified in this opinion by observing that it is also that taken by Mr. Justice Macpherson in the work already referred to (*see* page 160, *2nd* Edition).

Applying this view of the law to the present case, we are of opinion that there is here a clear and unmistakeable contract by the mortgagor that all he shall be entitled to receive out of the mortgaged property is an annual sum of Rupees 2,300. If that contract was in reality, as it purports to be, made with Sujewan Lall, then the surplus profits belong to him; but if, as the defendant Mitterjeet Singh contends, the real lessee was the plaintiff, still we think the plaintiff is entitled to the benefit of the contract, and that the most he is bound to account for is the sum of Rupees 2,300, which he is willing to do.

We may remark that no case of fraud has been made or even attempted to be made against the plaintiff. All that could be said on that point was that the taking the lease benamee in the name of Sujewan Lall was

a badge of fraud. It is true that benamee transactions ought to be scrutinised with care, and that they are frequently resorted to cover a fraud; but taking a lease benamee, unaccompanied by any other circumstances of suspicion, does not in itself constitute fraud.

An objection was also raised by the defendant Mitterjeet Singh that, if the plaintiff were the real lessee, at any rate, he could not sue for the recovery of the principal and a sale of the mortgaged property until the expiration of the lease in 1867. But we think that this objection is also answered by a reference to the terms of the agreement. By the deed of January 8th, 1857, there is a distinct undertaking that the money shall be repaid in the month of June 1861, and we see nothing in the lease, even supposing it to have been made in favor of the plaintiff, repugnant to that stipulation. On the other hand, the letter of assignment only provides for the rent being taken in lieu of interest up to the year 1861, which is consistent with the notion that the principal became then payable.

We, therefore, reverse the decision of the District Judge by which the suit is dismissed, and direct an account to be taken of all sums received by the plaintiff in respect of principal and interest down to the time when the account is taken; the plaintiff to be allowed in the account credit for such sum as he may have advanced for payment of Government revenue in respect of the mortgaged property, and not to be bound to account for the profits of the estate beyond the sum of Rupees 2,300 per annum (if any) received by him; the plaintiff to have a decree for the balance found to be due against the defendant Bhunjun Singh, with interest at the rate of 6 per cent. from the date of the decree until payment; the plaintiff to have his costs of this suit and the appeal. If the principal, interest, and costs be not paid, the plaintiff to be at liberty to put the property up for sale.

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The 4th December 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

**Jurisdiction—Suit—Interest.**

Case No. 1659 of 1866.

*Special Appeal from a decision passed by Mr. W. Ainslie, Judge of Patna, dated the 16th April 1866, reversing a decision passed by Moulvie Ali Hyder Khan, Sudder Ameen of that District, dated the 25th November 1865.*

Ashruffunnissa Begum (Plaintiff), *Appellant,*

*versus*

Mussamut Khanum Jaun (Defendant), *Respondent.*

*Mr. R. E. Twidale* for Appellant.

*Baboo Romanath Bose* for Respondent.

A suit will not lie for interest in respect of money deposited under a decree subsequently reversed on appeal.

*Peacock, C.J.*—The defendant, as plaintiff in a former suit, obtained a decree against the plaintiff in this suit, who appealed against that decree. Pending the appeal, the defendant proceeded to execute his decree, and the plaintiff, in order to save his property from sale, deposited in Court the amount of the decree. The defendant, however, did not take the money out of Court. Subsequently, the decree in the former suit was reversed, and the plaintiff withdrew his money from the Court. He now sues for damages by way of interest on the money deposited by him in Court.

I do not think that the plaintiff is entitled to recover interest. There was no contract by which he was entitled to interest; and, although the plaintiff has been deprived of his money, still he was not deprived of it by reason of any wrong done by the defendant. The defendant, having obtained a decree, was entitled to enforce it. There is nothing to show that the suit brought by the defendant was an improper or vexatious one. The decision of the Lower Appellate Court will be affirmed with costs.

*Jackson, J.*—I quite concur in affirming the decision on the grounds stated by the Chief Justice, but not precisely on the grounds which the Judge below has given.

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The 4th December 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Jurisdiction—Maintenance.**

Case No. 1639 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated*

*the 2nd April 1866, affirming a decision passed by the Moonsiff of that District, dated the 22nd December 1865.*

Bhugwan Chunder Bose and others (Defendants), *Appellants,*

*versus*

Bindoo Bashinee Dossee (Plaintiff), *Respondent.*

*Baboo Bungshee Dhur Sein* for Appellants.

*Baboos Anund Gopal Paleet* and *Bama Churn Banerjee* for Respondent.

A Small Cause Court has jurisdiction only as regards arrears of fixed maintenance, but not to determine the right to receive it.

On what principle maintenance for a Hindoo widow should be awarded.

*Shumbhoonath Pundit, J.*—On the case coming up for trial, the respondent took objection regarding jurisdiction, but we hold that the Small Cause Court could have jurisdiction only as regards arrears of fixed maintenance, and not for determination of the right to receive it.

We have great doubts regarding the legal liability of the special appellant, the brother of the deceased husband of the plaintiff, to support her. At least he may be liable to maintain her in case of his having obtained from his father any property yielding him an income. In that case also the amount of the maintenance can be fixed only with reference to the amount of this income, and not solely on the necessities of the plaintiff. It is also to be kept in mind that, in case of the income of the special appellant from ancestral property, or in case of his personal liability, his personal property being small, the Lower Appellate Court will have to consider that the special appellant may find it more convenient to maintain the plaintiff if she live in his house than if she were to live separate. The reasons given by the Lower Appellate Court to decree 2 annas per day appearing incorrect, inasmuch as they are not in accordance with the above principle, we remand the case to the Lower Appellate Court to retry the whole case, with reference to the above remarks, and to fix an amount suitable to the income of the special appellant.

The 4th December 1866.

*Present :*

The Hon'ble C. B. Trevor and W. S. Seton-Karr, *Judges.*

**Resumed Lakheraj—Ejectment—Rent.**

Case No. 1668 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of the Twenty-four Pergunnahs, dated the 29th March 1866, affirming a decision passed by the Sudder Ameen of that District, dated the 28th August 1865.*

Bhoopal Chunder Biswas and others (Plaintiffs), *Appellants,*

*versus*

Khan Mahomed Mollah and others (Defendants), *Respondents.*

*Baboos Sreenath Doss* and *Bungshee Dhur Sein* for Appellants.

*Baboos Kishen Kishore Ghose* and *Dwarkanath Mitter* for Respondents.

A zemindar can only sue the holder of resumed lakheraj land in possession for rent, but not oust him as a trespasser.

*Trevor, J.*—Plaintiff sued, as the purchaser from Government of its rights in a khas mehal, for possession of 30 beegahs of resumed lakheraj of which defendant has taken possession without warrant of law.

The defendant pleads that he was not a party to the resumption-suit, and that, at any rate, as lakherajdar in possession, the plaintiff cannot oust him from the land as a trespasser.

The Lower Court found that the resumption-suit was passed in 1846, and defendant was a party to it. As, however, from that year to the period at which the present suit was instituted, the resumption-suit had not been acted on, that decree was at the present day inoperative, and plaintiff might sue again to resume the lands if so advised. It consequently dismissed plaintiff's suit.

Plaintiff now appeals specially, urging that the Courts below were wrong in holding that the resumption-decree was inoperative; and that, the land having been declared liable to resumption, the plaintiff is entitled to oust the defendant.

It is unnecessary in this case to consider whether the decree of resumption is operative or not. Admitting that it is operative so far as to declare the land liable to pay revenue to Government and rent to the zemindar, the plaintiff can only sue the defendant, the lakherajdar, for rent as a dependant talookdar, and cannot oust him as a trespasser. The present suit, therefore, has been rightly dismissed by the Lower Courts. When plaintiff brings his suit for rents either after the issue of notice or otherwise, the question as to whether his claim is barred by lapse of time or other cause will then arise and be determined. We reject the special appeal with costs.

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The 5th December 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

**Fraud.**

Case No. 2948 of 1865.

*Special Appeal from a decision passed by Baboo Lukheenarain Mitter, Additional Principal Sudder Ameen of Dacca, dated the 1st August 1865, reversing a decision passed by Moulvie Syud Noorul Hossein, Moonsiff of Chowkey Manickgunge, dated the 27th August 1864.*

Aloksoondry Goopto and others (Defendants), *Appellants*,

*versus*

Horo Lal Roy (Plaintiff), *Respondent*.

*Baboos Romesh Chunder Mitter* and *Sreenath Doss* for Appellants.

*Baboo Hem Chunder Banerjee* for Respondent.

**A suit founded on an admission of fraud, and seeking protection from the consequences of that fraud, cannot be maintained.**

*Jackson, J.*—THIS was a suit to obtain a declaration of the plaintiff's right to certain lands in respect of which the plaintiff had sued the ryot for arrears of rent, but the suits for rent had been dismissed on the intervention of third parties now defendants. It was admitted that these defendants had long been the ostensible owners of the land, had exercised proprietary rights, and had, by desire of the plaintiff, brought various suits in the capacity of owners; and it is admitted and is abundantly clear that this arrangement was adopted for the fraudulent purpose of concealing or protecting this property from the plaintiff's creditors. The plaintiff, however, in order to secure himself, had, he alleges, taken from the defendants an ikrar or acknowledgment that they were not the true owners, and that the title really vested in him, the plaintiff; and on this ikrar the present suit was founded.

The judgment of the first Court, dismissing the suit, was reversed by the Additional Principal Sudder Ameen, who gave the plaintiff a decree to the extent of declaring his title. The defendants appeal specially; and the first point which they raise is that the plaintiff's case, resting as it does upon admission of fraud and asking protection from the consequences of that fraud, ought to have been dismissed.

We think this contention thoroughly well-founded. The Courts of Justice are designed for the protection of honest suitors, and the enforcement of just claims. They are not available as machinery to aid in the carrying out of schemes of fraud.

It is right that parties should know, in making secret arrangements in regard to their property for fraudulent purposes such as defeating their creditors, that they are entering on a dangerous course, and that they must not expect the assistance of the Courts to extricate them from the difficulties in which their own improbity has placed them.

The decree of the Lower Appellate Court is reversed, and the decision of the Moonsiff, dismissing the suit, is restored with all costs.

The 5th December 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Interest (prior to suit).**

Case No. 1772 of 1866.

*Special Appeal from a decision passed by the Judge of Patna, dated the 17th April 1866, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 11th December 1865.*

Abdool Kurreem Khan and others (Defendants), *Appellants,*

*versus*

Shaikh Meah Jan (Plaintiff), *Respondent.*

*Mr. R. E. Twidale* and *Moulvie Syud Murhumut Hossein* for Appellants.

*Mr. C. Gregory* and *Baboos Onookool Chunder Mookerjee* and *Mohendro Lal Shome* for Respondent.

Interest cannot legally be awarded prior to suit in cases governed by the provisions of Act XXXII. of 1839.

*Kemp, J.*—THE only point contended before us is that the Judge's award of interest in this suit is illegal.

The debt was for goods sold, the debt was not payable by virtue of any written instrument at a certain time, nor was any demand for payment made by writing. No interest, therefore, can be awarded prior to suit; the provisions of Act XXXII. of 1839, which has not been repealed or amended, precluding such award.

Section 10, Act XXIII. of 1861, does not repeal Act XXXII. of 1839. It enacts that, in a case where interest prior to suit could be legally awarded under the law in force, the Court may award such interest in addition to any further interest and to such extent as the Court in its discretion may think proper and just from date of decree.

The judgment of the Judge is amended. Interest will be awarded from date of suit to date of payment, with costs in proportion in the Courts below. Costs of this appeal to be borne by the respondent.

The 5th December 1866.

*Present:*

The Hon'ble C. B. Trevor and W. S. Seton-Karr, *Judges.*

**Estoppel—Erroneous Admission.**

Case No. 1370 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Midnapore, dated the 19th February 1866, affirming a decision passed by the Moonsiff of that District, dated the 29th November 1864.*

Krishto Prea Dossee (one of the Defendants), *Appellant,*

*versus*

Puddo Lochun Mytee and others (Plaintiffs), *Respondents.*

*Baboo Bama Churn Banerjee* for Appellant.

*Moulvie Syud Murhumut Hossein* for Respondents.

A party is not bound by an erroneous admission on a petition.

THE pleader attempts to contend that the plaintiff ought to be bound by the admission in a certain petition to the effect that the principal of the first mortgage, the subject of this suit, had been paid off. But we think that both the Lower Courts have clearly shown that this statement of the plaintiffs is a simple error, and that the defendant's husband, on the second deed of mortgage, had expressly stated that he pledged fresh property for the interest alone, and that the principal of the original mortgage had not been paid off at all.

We cannot admit, in this state of things, that the plaintiff is bound by a pure error in a petition. The conduct of the defendant has been evasive throughout. She denied the mortgage, as well as the service of the notice of foreclosure; and, when these points are proved incontestibly against her, she now wishes to turn round and show that the principal of a mortgage, which deed she had repudiated altogether, had been paid off on the plaintiff's showing, though this is contrary to the facts disclosed by the whole evidence.

We see no force either in a plea that the Court decided the case two or three days before the date fixed for the attendance of a certain witness whom the Court itself had summoned.

Altogether we have no doubt that substantial justice has been done, and that no defect or error of law is to be found in the decision.

The appeal is dismissed with costs.

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The 5th December 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Remand—Jurisdiction.**

Case No. 1340 of 1866.

*Special Appeal from a decision passed by the Second Principal Sudder Ameen of Hooghly, dated the 19th January 1866, reversing a decision passed by the Moonsiff of Serampore, dated the 24th July 1865.*

Joy Kissen Mookerjee and others (Defendants), *Appellants,*

*versus*

Hureehur Mookerjee (Plaintiff) and others (Defendants), *Respondents.*

*Baboos Pearee Mohun Mookerjee* and *Mohendro Lall Shome* for Appellants.

*Mr. R. T. Allan* and *Baboo Umbica Churn Banerjee* for Respondents.

Where a respondent in the Lower Appellate Court, formally under Section 348, Act VIII. of 1859, took an objection in writing on the ground of jurisdiction, and that Court did not notice the objection—HELD in special appeal that the party was entitled to a remand to the Lower Appellate Court for an adjudication on that point.

*Bayley, J.*—DEFENDANT is special appellant. In this case the first plea is that there was a petition filed under Section 348, objecting to the Lower Appellate Court that the Civil Court had no jurisdiction, and the first Court had decided against the defendant on this point. But, notwithstanding this, and the petition under Section 348, the Lower Appellate Court did not notice this objection.

There are other pleas in the petition of special appeal, but we think that it is no use to consider these till the point of jurisdiction be adjudicated by the Court, which had it so clearly brought before it by the petition referred to.

Mr. Allan for special respondent contends that, as it is a point of law, we should now decide it here. But we are of opinion that we cannot legally do so, without at least the consent of the parties if we could then; and the special appellant does not consent, but claims a decision of the Lower Appellate Court on the point.

We think that, if it had been a plea in law never taken before in any of the Lower Courts, there might possibly be something in this request of the pleader. But, as the plea has been *formally* taken in cross-appeal, *i.e.*, under Section 348, *in writing*, before the Lower Appellate Court, and the first Court had decided on it, we must remand the case to the Lower Appellate Court to decide the point.

The other pleas in special appeal will remain open.

Remand accordingly.

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The 6th December 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Pleadings—Admission—Variation of claim.**

Case No. 1387 of 1866.

*Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 7th March 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 4th December 1864.*

Nidha Chowdhry (Plaintiff), *Appellant,*

*versus*

Bundah Lal Thakoor and others (Defendants), *Respondents.*

*Baboos Chunder Madhub Ghose* and *Dwarkanath Mitter* for Appellant.

*Mr. C. Gregory* and *Baboo Romanath Bose* for Respondents.

Where a plaintiff deliberately claimed lands as rent-free, he was not allowed, merely on the ground of the proprietor admitting the lands to be leased to plaintiff's vendors or even of the defendant making a somewhat similar admission, to benefit by such admissions and vary his claim.

*Bayley, J.*—In this case plaintiff is special appellant. He sued alleging a title to the lands in dispute as burmottur lands purchased by him. It was clearly found that the lands were *not* burmottur, and the Lower Appellate Court finally dismissed plaintiff's suit.

Upon this plaintiff appeals specially, pressing on us chiefly that, whereas the record shows that the alleged vendors really held. under some title or other, those lands for which plaintiff sues, this is enough to start plaintiff's case, even though there be a misdescription as to the rent-free character of the lands, and that, therefore, the defendants should have been called upon to prove their title. The proprietor admits that the lands were lands leased to plaintiff's vendor and to his co-sharers.

We think that, after plaintiff had deliberately termed these lands *rent-free and claimed them as such*, it is not for him merely on the ground of the proprietor admitting them to be leased lands to plaintiff's vendors, or even on defendants making a somewhat similar admission, in this same suit to say, "No, I claimed them as lands of a distinct "and separate character from ordinary leased "lands, *viz.*, as lakheraj; but, if I am wrong, "give me the benefit of others, saying they "are such lands as I said they were not." This is against proper rules in pleading, and might be an embarrassing precedent.

In this view we dismiss this special appeal with costs.

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The 6th December 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Transfer of Suit—Arbitration.**

Case No. 1649 of 1866.

*Special Appeal from a decision passed by the Judge of Sylhet, dated the 23rd March 1866, affirming a decision passed by the Moonsiff of Nubeegunge, dated the 24th December 1865.*

Aboo Mahomed and others (Defendants), *Appellants,*

*versus*

Kishen Mohun Surma and others (Plaintiffs), *Respondents.*

*Baboos Kishen Kishore Ghose* and *Obhoy Churn Bose* for Appellants.

*Baboo Greesh Chunder Ghose* for Respondents.

This case having been withdrawn by the Judge, for trial in his own Court, from the Principal Sudder Ameen's Court, where it had already been referred to arbitration—Held that the Judge was quite competent to decide the case himself without necessarily being bound also to refer it to arbitration.

*Bayley, J.*—In this case plaintiffs sued defendants for possession of certain lands, alleging that they belonged to particular talooks of plaintiffs.

The defendants sued answered severally that the lands in suit belonged to their talooks.

The first Court found in favor of defendants, and dismissed plaintiff's suit. Plaintiff appealed, and the Judge on appeal reversed this decision. Both Courts came to these conclusions by findings of fact on the evidence, although those conclusions differed.

Plaintiff having thus obtained a verdict in the Lower Appellate Court, defendant appeals specially, and urges (1) that the Lower Appellate Court had no right himself to decide a case which had already been referred to arbitration; (2) that the plea of defendants, as to plaintiff's claim including more lands than were within the boundaries given by plaintiff, was not properly decided, as the Lower Appellate Court has not precisely tested this by a definition of the boundaries; (3) that copy of a decision of April 13th (1849), which decided that a portion of the land now in suit belonged to defendant, had not been duly considered.

After hearing Counsel, and referring to the record, we think that none of these pleas are tenable. The Judge withdrew the case from the Principal Sudder Ameen's Court before decision for trial in his own. Having the case thus before him, it was quite competent in the Judge to decide it without necessarily being bound also to refer it to arbitration. On the *second* plea we observe that the Judge carefully compared the map,

chittahs, and other documentary evidence, and came to his own conclusion of the facts upon that evidence. There is no reason to interfere with his proceeding as he has done. In respect to the *third* plea, the decision is not relied on, or particularly mentioned by, the first Court which gave defendant a decree, nor is it shewn that the Judge, who says he considered *all* the evidence, overlooked this; or that, in fact, the decision referred to the lands in suit identically.

In this view we dismiss this special appeal with costs.

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The 6th December 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Agreement—Attachment.**

Case No. 1767 of 1866.

*Special Appeal from a decision passed by the Officiating Judge of Nuddea, dated the 10th April 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 10th March 1865.*

Mothoor Mohun Pal Chowdhry (Defendant), *Appellant,*

*versus*

Shurroop Chunder Pal (Plaintiff) and others (Defendants), *Respondents.*

*Baboos Nil Madhub Sein* and *Bhowanee Churn Dutt* for Appellant.

*Baboos Sreenath Doss* and *Nil Monee Sein* for Respondents.

A judgment-debtor on the day of sale paid a part of the money due on the decree, and obtained a postponement of the sale by consent of the decree-holder, on the condition that the attachment should continue. HELD that a mere formal entry on the record striking off the case was of no consequence.

*Bayley, J.*—IN this case plaintiff sues for possession of certain lands, on the allegation that he is the purchaser at a sale in execution of them, and is prevented from getting possession by defendants setting up a putnee title created at a date subsequent to the existence of the attachment in execution.

It appears that the judgment-debtor, on the very date on which the sale was advertised to take place, paid a part of the money due on the decree, and obtained a postponement of the sale by the consent of the decree-holder, on the express provision suggested by the judgment-debtor himself that the attachment should continue, a provision accepted by the decree-holder.

On that same date, however, an order appears on the record actually in these words and no more: "Having seen the papers, let the case be struck off." These words of form only are the basis of the putneedar's claim to hold the putnee as one legally created by the judgment-debtor subsequent to the above arrangement entered into by himself.

The Lower Appellate Court decided that the attachment existed, citing the special appeal case of the 18th July 1864, Bama Soondurie's case from the same district, and the Privy Council's judgment in the case of Mohesh Narain Roy.

The putneedar appeals specially, relying on the order to strike off the case. We think the Lower Appellate Court is quite right. The first case cited by it is precisely in point. The second (that of the Privy Council) can only be applied where circumstances justify it, and is not necessarily of universal application. Be that as it may, it is quite clear to us that, when the judgment-debtor bound himself to allow the attachment to stand, a mere formal entry on the record, as the one on which reliance is placed, is not to be regarded.

In this view we dismiss this special appeal on this point with costs, and express our displeasure at the Principal Sudder Ameen's allowing such an order under the facts of this case.

The special appellant also urges that the decree is worded so as to make him jointly responsible for all costs and wassilat, whereas his putnee rights are quite distinct from those of the other putneedars. This is admitted by special respondent to be so. We, accordingly, order that the decree be not considered joint in this respect.

amount of mesne-profits which have accrued due subsequent to a decree for possession passed in 1859, and finally confirmed by the High Court in 1863.

*Macpherson, J.*—THE points taken in this appeal by the pleaders for the appellant are two: *firstly*, that, inasmuch as in the original deed of mortgage a certain sum is named as the amount realizable from the estate, the amount so named must now be taken as the basis on which to calculate the mesne-profits for the recovery of which this suit was instituted, and no further enquiry is necessary or proper; and, *secondly*, that, if the parties are not restricted to the amount named in the mortgage-deed, the enquiry which has taken place is unsatisfactory, and the results unreliable and incorrect.

We have no hesitation in deciding the first point against the appellants. The recital in the mortgage-deed of the amount realizable from the property was at best merely descriptive; and it would be absurd to hold that such a recital in a deed executed in 1845 is in 1866 to be taken as conclusive as to the amount of mesne-profits accrued due subsequent to a decree for possession passed in 1859, and finally confirmed by the High Court in appeal in 1863.

As regards the second objection, it appears to us to be well founded, and we think the case ought to be remanded, in order that there may be a proper enquiry into the amount of mesne-profits for which the appellants are liable. The Lower Court is quite right in holding that the appellants are liable for the amounts actually collected from the ryots, and not merely for the *jumma* of the *theeka* lease which they are said to have granted to a middle-man. But the *jummabundee* papers on which alone the Lower Court has proceeded in ascertaining the amount are very incomplete and unsatisfactory, and wholly insufficient, in our opinion, to enable the Court to say, with any degree of certainty or accuracy, for what sum the decree ought to be given. The papers give no details; the villages are all lumped up together, and it is impossible to say which are *uslee*, and which *dakhilee*. Such papers are not sufficient to justify the decree, although they might be possibly something of a guide in making a local investigation. We remand the case that an Ameen may be deputed to ascertain the amount of wassilat accurately in the usual manner.

The 11th December 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

**Limitation—Cause of action—Substitution or addition of parties to a suit—Section 73, Act VIII. of 1859.**

Case No. 10 of 1866.

*Special Appeal from a decision passed by Mr. T. C. Pennington, Principal Sudder Ameen of Dacca, dated the 31st October 1865, modifying a decision passed by Baboo Hurro Chunder Doss, Moonsiff of Kesragunge, dated the 31st December 1864.*

Raj Kishoree Dossee (Plaintiff), *Appellant*,

*versus*

Buddun Chunder Shaha and others (Defendants), *Respondents*.

*Baboos Chunder Madhub Ghose* and *Oopender Chunder Bose* for Appellant.

*Baboos Romesh Chunder Mitter, Dwarkanath Mitter*, and *Issen Chunder Chuckerbutty* for Respondents.

When a person is substituted or added as a defendant under Section 73, Act VIII. of 1859, the suit is commenced against that person at the time he is made a defendant, and not before.

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We think that, when a person is substituted or added as a defendant under Section 73, the suit is commenced against that person at the time he is made a defendant, and not before.

Under these circumstances, the period of limitation having expired before Messrs. Jardine, Skinner, and Co. were made defendants, the suit is barred as against them, and the decision of the Court below is correct in that respect.

The decision of the Lower Appellate Court is, therefore, affirmed with costs payable to all the respondents who have appeared, in proportion to the value of their respective interests, to be ascertained in execution.

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*Present:*

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**Costs.**

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Mahomed Abed and others (Plaintiffs), *Appellants,*

*versus*

Jumal Reza and others (Defendants), *Respondents.*

*Baboo Gopal Lal Mitter* for Appellants.

*Baboos Greesh Chunder Ghose* and *Romanath Bose* for Respondents.

*A* cannot sue *B* for costs due to him by *C* on the ground that *C* has deducted them from costs due to him by *B*.

*Shumbhoonath Pundit, J.*—The question of the liability of the special appellant to the defendant in this case, on account of any payment made by the latter in execution of the decree passed in the case in which both these parties were jointly sued by a third party, has already been finally decided in the previous suit brought by the present defendant respondent against the special appellant. That question cannot be allowed to be re-opened so far as the Lower Appellate Court appears to think, otherwise its decision is not correct.

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*Present:*

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**Onus probandi—Admission (by one defendant against another).**

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*Special Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 14th March 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 25th August 1865.*

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*versus*

Monohur Doss and others (Defendants), *Respondents.*

*Baboo Roopnath Banerjee* for Appellant.

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An admission by one defendant against another, which admission the Court finds to be collusive, cannot relieve the plaintiff from the burden of starting his case against the repudiating defendant, nor can it shift the burden of proof to the shoulders of the latter from off the plaintiff.

*Seton-Karr, J.*—We are quite clear that the plaintiff is entitled to a decree against Hyat Buksh, who admits that he received a sum of four hundred rupees from the plaintiff on account of Monohur Doss, and, to this extent, we give the special appellant a decision in his favor.

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We have no hesitation in deciding the first point against the appellants. The recital in the mortgage-deed of the amount realizable from the property was at best merely descriptive; and it would be absurd to hold that such a recital in a deed executed in 1845 is in 1866 to be taken as conclusive as to the amount of mesne-profits accrued due subsequent to a decree for possession passed in 1859, and finally confirmed by the High Court in appeal in 1863.

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An admission by one defendant against another, which admission the Court finds to be collusive, cannot relieve the plaintiff from the burden of starting his case against the repudiating defendant, nor can it shift the burden of proof to the shoulders of the latter from off the plaintiff.

*Seton-Karr, J.*—We are quite clear that the plaintiff is entitled to a decree against Hyat Buksh, who admits that he received a sum of four hundred rupees from the plaintiff on account of Monohur Doss, and, to this extent, we give the special appellant a decision in his favor.

But the plaintiff has not started any case at all against Monohur Doss, who entirely repudiates the claim of the plaintiff as false and unfounded. An admission by one defendant against another, which admission the Court finds to be collusive, cannot relieve the plaintiff from the burden of starting his case against the repudiating defendant, nor can it shift the burden of proof to the shoulders of the latter from off the plaintiff.

Our decision will, then, be that, to the extent of four hundred rupees, the plaintiff's claim is decreed against Hyat Buksh with costs. As against Monohur Doss, the special appeal is dismissed with all costs.

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The 12th December 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Appeal—Revival of ex-parte decree—Section 119, Act VIII. of 1859.**

Case No. 1781 of 1866.

*Special Appeal from a decision passed by Baboo Kedarnath Banerjee, Principal Sudder Ameen of East Burdwan, dated the 29th March 1866, affirming a decision passed by Baboo Mohendronath Mitter, Moonsiff of Mahomedpore, dated the 15th July 1865.*

Radha Binode Chowdhry and others (Plaintiffs), *Appellants,*

*versus*

Juggut Shurnokar (Defendant), *Respondent.*

*Baboos Dwarkanath Mitter, Hem Chunder Banerjee,* and *Mohinee Mohun Roy* for Appellants.

*Baboo Bykuntnath Paul* for Respondent.

An appeal will lie from an order of the Lower Court admitting an application made (after the time allowed by law) for an order to set aside an *ex-parte* decree under Section 119, Act VIII. of 1859.

*Shumbhoonath Pundit, J.*—We hold that the Lower Appellate Court was authorized to try whether, under the law, the Court of first instance had power to receive an application to revive the case.

The power of the Appellate Court to hear a regular appeal on facts is not lost by the Court of first instance ordering a suit to be revived under Section 119 of Act VIII. of 1859, if originally the Court of first instance has acted upon an application made to the latter after the time allowed by law.

The Legislature required that, by a party ignorant of the previous existence of a decree against him, an application contemplated by that Section should be made to the Court empowered to receive it within a short time of his obtaining the earliest notice of the existence of the decree. They then thought it proper to fix the time by law, and not to leave it entirely to the discretion of the Court to say whether an application is or is not in time.

It is provided by law that the application should be made within a reasonable time, but never after thirty days from the service of any process for the enforcement of the decree.

Such a process could either be an application to attach the body of the debtor, or to attach his property previous to a sale. In the first instance the debtor cannot but become aware of the decree, and has 30 days to take his steps; and, as regards the latter, the Legislature took upon themselves to decide that an attachment of the property of a debtor must necessarily give him notice of the decree. That in generality of cases, on the attachment of his property, the debtor will get notice of the decree cannot be denied; but there may be cases in which the attachment may be made in the ordinary form by papers, and still the debtor may not become aware of the fact. The Legislature, ignoring the probability of such an occurrence, have held that the service of such a process is legally to be considered tantamount to an actual and personal notice to the debtor of the existence of the decree.

The special appellant complains that the application to revive the case was made after more than 30 days from the date of first attachment of the property, and that it is likely to be proved on enquiry that, before the debtor made the application to revive his case under Section 119, Act VIII. of 1859, he was prefectly aware of the fact of the decree having been previously passed *ex-parte* against him.

The Lower Appellate Court should try these points, as well as the fact regarding the original service of notice upon the defendant, and then decide whether the order of the Court of first instance, to set aside its former *ex-parte* decree, is, with reference to the facts found by the said Lower Appellate Court, legally with or without jurisdiction.

It will be holding out a premium to abuse of power to revive and review if this Court were to hold that the Appellate Court has no power to set aside an order of its subordinate Court even when the latter may have admitted a review, notwithstanding that the application for the same was made, and the order for admission was passed, in direct opposition to the law specifically enacted for such cases.

We accordingly remand this case to the Lower Appellate Court to re-try the appeal of the special appellant with reference to the above remarks.

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The 12th December 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Hoondees—Notice of dishonor.**

Case No. 1816 of 1866.

*Special Appeal from a decision passed by the Judge of Dacca, dated the 14th April 1866, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 21st November 1865.*

Radha Gobind Shaha (Plaintiff), *Appellant,*

*versus*

Chundernath Dass Shaha and others (Defendants), *Respondents.*

*Mr. R. T. Allan* and *Baboo Dwarkanath Sein* for Appellant.

*Baboos Sreenath Dass, Mohinee Mohun Roy,* and *Nil Madhub Bose* for Respondents.

Although the English Law of prompt notice by return of post does not apply to cases of native hoondees drawn by natives upon natives, and endorsed by natives, yet reasonable notice of dishonor is essential.

*Shumbhoonath Pundit, J.*—THE endorser of the hoondees, who has been released from liability by the Lower Appellate Court, did not, in his written statement in this case, complain of want of notice of the refusal of the drawee to pay the said hoondees. Accordingly, there was no issue upon this point by the Court of first instance, and so the special appellant has a right to complain that he had no opportunity to produce any specific evidence upon that point. The objection was, for the first time, raised in the Lower Appellate Court in trying that issue, and that Court records that the witnesses for the special appellant do not distinctly state when and how the required notice was given.

We do not hold that the English Law of prompt notice "by return of post" applies to cases of native hoondees drawn by natives upon natives, and endorsed by natives. We do, however, hold that, before holding the endorser or the drawer responsible for the consideration of a hoondee dishonored by the drawee, some reasonable notice is essentially necessary to be given to the party who may be asked to pay.

What and in what manner that notice is required by native merchants in general, and the merchants of this particular district where this case arose, are points which the Courts below should find by enquiry; and, from the evidence to be given upon these subjects, by both sides.

Plaintiff should further be allowed to produce fresh evidence to establish what and how the required notice was given by him.

The evidence already on the record should be re-considered *de novo* by the Court of first instance as well as the Lower Appellate Court, if the case goes up to that Court in appeal.

The case is, accordingly, remanded to the Court of first instance.

Remand accordingly.

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The 13th December 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Review of judgment—Appeal.**

Case No. 1241 of 1866.

*Special Appeal from a decision passed by the Judge of Gya, dated the 13th April 1866, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 9th January 1865, and remanding the case to that officer for trial.*

Ahmud Hossein Jan (Plaintiff), *Appellant;*

*versus*

Sharbanund Tewaree and others (Defendants), *Respondents.*

*Mr. C. Gregory* for Appellant.

*Mr. R. E. Twidale* for Respondents.

Where, at the time of granting an application for review of judgment, the Court proceeded to dispose of the whole matter at once as on a re-hearing—HELD that so much of the order as granted, the application for review was final and not open to appeal; but that so much of it as went to dispose of the case finally as on a re-hearing was a distinct order and open to appeal.

*Macpherson; J.*—IN this case the Lower Court granted an application for review of judgment, and then and there proceeded to dispose of the case as on a re-hearing. This proceeding was in itself contrary to the provisions of Act VIII. of 1859, which requires (Section 380) that, after an application for review has been granted, a note shall be made thereof in the register of suits, and the Court shall make such order as it shall think fit as regards the re-hearing of the case. As, however, in the present instance, the Lower Court went fully into the whole matter in the presence of all the parties, and as no objection seems to have been taken to the case being then finally dealt with in like manner as if proceedings had been taken regularly under Section 380, we think that the course adopted must have been adopted with the consent of the parties. We, therefore, do not consider that there is any reason for setting aside the proceeding on the ground of its not having been strictly in accordance with the provisions of the Civil Procedure Code.

The respondents object to the appellant going into the question of the propriety of the order of the Lower Court remanding the case to the Court of first instance. It is said that the order is merely an order granting an application for a review of judgment, and that, by Section 378, such an order is final, and not open to appeal. But the order is not only an order granting a review, it is also an order disposing of the case on a re-hearing. It is true that, so far as the order merely grants the application for review, it is not open to appeal; but so much of it as goes beyond that, and disposes of the matter finally, as on a re-hearing, is a distinct and separate order, and is open to appeal in the ordinary manner.

The appellant's objection to the Lower Court's order is that that Court ought to have re-heard the case, and finally disposed of it itself, instead of remanding the case to the Court of first instance. We think the objection a valid one, and can see no possible reason why the Court should have remanded the case. Indeed, we are of opinion that, under the circumstances, the order of remand was illegal and contrary to the express provisions of Act VIII. of 1859. All the necessary parties are already before the Court. It is under Section 351 alone that an Appellate Court can remand a case in this way. In the present instance, the Court of first instance did not dispose of the case "upon any preliminary point, so as to exclude any evidence of fact" essential to the rights of the parties; and it is only when a suit has been so disposed of that (under Section 351) the Appellate Court can remand it. The Lower Court ought to dispose of the case itself, either under Section 353, or, if there is not sufficient evidence on the record to enable the Court to pass a satisfactory judgment, then under Section 354 and the three following Sections, the provisions of which ought to be strictly attended to. We have said that it seems to us that all necessary parties are already before the Court. The question being whether the right, title, and interest of the original mortgagor became vested in Choa Singh, and whether the mortgage was legally foreclosed in proceedings against Choa Singh and his representatives, in such a manner as to extinguish all right of redemption in the mortgagor, and consequently in the plaintiff in the present suit, it appears to us that all that has to be proved (as far as this point is concerned) is that the mortgagor's right vested in Choa Singh, and that the mortgage was finally and legally foreclosed. These facts must, of course, be proved by those who now rest their title upon them. But we cannot see what occasion there is to have before the Court any representative of Choa Singh, other than those already before it. Even if other parties had to be added, that would not necessarily justify a remand.

The Lower Appellate Court will itself dispose of the case with reference to the above remarks.

Under the circumstances we direct that the parties shall respectively bear their own costs of this appeal.

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The 13th December 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Mahomedan Law of Inheritance—Unchaste daughter.**

Case No. 1844 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 5th May 1866, affirming a decision passed by the Moonsiff of that District, dated the 30th November 1864.*

Noronarain Roy (Plaintiff), *Appellant,*

*versus*

Neemaee Chand Neogy and others (Defendants), *Respondents.*

*Baboo Nilmonee Sein* for Appellant.

*Baboos Hem Chunder Banerjee* and *Lukhee Churn Bose* for Respondents.

*Semble.*—According to the Mahomedan Law, want of chastity in a daughter, before or after the death of her father, whether before or after her marriage, is no impediment to her inheritance.

*Sumbhoonath Pundit, J.*—THE special appellant, plaintiff, having purchased the whole of a parcel of lands from the son of a deceased Mahomedan, was opposed to the extent of one-third by a purchaser from a daughter of the said deceased.

He brought an action to set aside this sale to the extent of one-third, and, accordingly, to have his title declared to the whole of the property.

The Court of first instance, finding that plaintiff himself does not plead that his rights, beyond the extent of one-third, have been opposed, and holding that the daughter has a right to the extent of that one-third, dismissed the claim of the plaintiff, distinctly recording that it does not thereby intend to injure the unopposed title of the plaintiff to the remaining two-thirds of the property.

Plaintiff appealed against the validity of the sale of one-third by the daughter of the opposing defendant, and the Lower Appellate Court dismissed his appeal.

It is urged in special appeal that the Courts below should not have dismissed the entire claim of the plaintiff, when as to the extent of two-thirds they found he had a legal right unopposed by any body in this case. This plea is invalid, as the Courts below never intended to injure the right of the plaintiff to the two-thirds of the property not claimed by the purchaser of the one-third portion from the daughter.

The special appellant further objects that the daughter admittedly of abandoned character had no right to succeed, and did not hold the property at all to the extent of one-third sold by her.

Both the Lower Courts have found that the father of the vendor of the plaintiff died within twelve years of this suit, and that some of his heirs died afterwards; that plaintiff was entitled to obtain one-third at the time that she executed the conveyance for one-third; and that, as the earliest cause of action for the inheritance to her is within twelve years, she can, through her vendee, claim her share, though she may not have held any thing within twelve years. The Courts below have also decided that, according to the Mahomedan Law, want of chastity in a daughter, before or after the death of her father, or whether before or after her marriage, is no impediment to her inheritance.

Though the doctrine appears opposed to morality, yet, as the special appellant cannot shew any text of Mahomedan Law, or any precedent contrary to the decision passed below, we are constrained to reject this special appeal with costs.

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The 14th December 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Sale by Hindoo Widow.**

Case No. 617 of 1866.

*Special Appeal from a decision passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 9th December 1865, reversing a*

*decision passed by Baboo Anund Chunder Banerjee, Principal Sudder Ameen of that District, dated the 26th April 1865.*

Kisto Moyee Dassee and others (Defendants), *Appellants,*

*versus*

Prosunno Narain Chowdhry and others (Plaintiffs), *Respondents.*

*Baboos Mohinee Mohun Roy* and *Nil Monee Sein* for Appellants.

*Baboos Onookool Chunder Mookerjee* and *Bhugobutty Churn Ghose* for Respondents.

Where only the rights and interests of a Hindoo widow in the property left by her husband were sold in execution of a decree against her on account of a debt contracted by her, and neither the decree nor the sale-proceedings declared the property itself liable for the debt—HELD that the purchase conveyed an interest in the estate only during the widow's lifetime.

*Loch, J.*—THE special appellants are purchasers of certain shares in an estate sold in execution of a decree. It appears that Roy Bissessur Roy paid the Government revenue, and then sued his co-proprietors for contribution, and obtained a decree against Oojal Monee, widow of Raj Narain Chowdhry, and the plaintiffs in this case, and in execution sold their shares in the estate which were purchased by the defendant, special appellant. The plaintiffs in this case, as the legal heirs of Raj Narain, now bring a suit to recover possession of his share of the estate, on the ground that the sale in execution of Bissessur Roy's decree against Oojal Monee was a sale only of her rights and interests as a Hindoo widow in the property left by her husband, and was not a sale of the estate. The Lower Appellate Court has taken this view of the case, and has given a decree in favor of the plaintiffs as reversioners, reversing the order of the first Court.

A special appeal is preferred on the ground that, though, according to the terms of the sale-notification, the rights and interests of the widow only were sold, yet the Courts have always disregarded the terms of sale-advertisements, and looked to the purpose for which the sale was made. The pleader for the appellant then quoted the following decisions at page 515, S. D. A. Rep. of 1859, 20th April; Weekly Reporter, Civil Rulings, Volume I., page 145; and Weekly Reporter, Special Number, page 119.

The *first* case quoted is not in all points similar to the present; for, though a decree for contribution passed against the widow, no sale took place, she having in the meantime adopted a son. One question, then, before the Court was whether the estate could have been sold in execution of the decree, had she not adopted a son; and it was held that, the debt being incurred on account of an urgent necessity, the estate might have been made liable. Had a sale taken place, there would still have been the question what was sold, and this could only have been determined by the terms of the sale. In the *second* case quoted, the widow was guardian to her minor son, and as such had no separate rights; and the Court held that what were sold were the rights and interests of the minor whom she represented. The *third* case shews that the rights and interests of the debtor were sold. The debtor died leaving a widow, and the suit was brought against the widow to recover the debt due by her husband. The sale-advertisement, though in one place stating that the rights and interests of the defendants were to be sold, in another set forth that it was the property of the actual debtor which was put up for sale, and the Court held that her rights were nothing, for the property descended to her son, then a minor.

In all these cases, and in another reported at page 919 of S. D. A. Rep. for 1859, and referred to in the judgment reported at page 145, Volume I., Weekly Reporter, Civil Rulings, the position of the widow has been different from that of the widow in this case. Here she was a Hindoo widow in possession, and the debt contracted was by her, and her rights and interests in the property were sold. To that extent, and no further, did the appellant purchase, and that purchase conveyed an interest in the estate only during the life of the widow. The decree might have declared the property itself liable for the debt; but in the absence of any such statement in the decree, or in the sale-proceedings, we think, under the circumstances, we must restrict the auction-purchaser to the terms of his purchase. Under this view of the case, we reject the appeal with costs.

The 14th December 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Hindoo Law—Sradh—Endowment.**

Case No. 1801 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 17th April 1866, affirming a decision passed by the Moonsiff of Sonamookhy, dated the 28th December 1865.*

Ram Chunder Chuckerbutty and another (Defendants), *Appellants,*

*versus*

Gooroo Churn Chuckerbutty (Plaintiff), *Respondent.*

*Baboo Bama Churn Banerjee* for Appellants.

*Baboo Gopeenath Banerjee* for Respondent.

**The Hindoo Law does not declare that the priest who performs the *sradh*, however temporary his incumbency may be, is entitled to the land endowed in consideration of the continuous performance of the recurring ceremonies of *sradh* and other rites for the spiritual benefit of the donor.**

*Kemp, J.*—We think that this case must be remanded to the Court below to submit a finding on the evidence as to the intention of the donor Gooroo Churn Sein.

The gift was a verbal one, and the daughter of the donor was enjoined by her father to make a gift of eight cottahs of land to the priest in consideration of his continuously performing the recurring ceremonies of *sradh* and other rites for the spiritual benefit of the donor; no particular priest was mentioned.

The Principal Sudder Ameen, without coming to any decision as to the intention of the donor, lays it down as a broad principle of Hindoo Law (which we have not been shewn to be a correct view of the law) that whoever was the priest, however temporary his incumbency may have been in that capacity at the time of the *sradh*, and performed the ceremonies of the *sradh*, is entitled to the endowed land.

The Principal Sudder Ameen will submit his finding on the point raised, and the appeal will remain on the file of the Court, the parties being at liberty to file any objections to the finding of the Court below.

The 14th December 1866.

*Present:*

The Hon'ble C. B. Trevor and W. S. Seton-Karr, *Judges.*

**Limitation (Clause 3, Section 1, Act XIV. of 1859)—Suit to set aside fraudulent deeds—Sale by Hindoo widow.**

Case No. 157 of 1866.

*Regular Appeal from a decision passed by the Judge of Tirhoot, dated the 22nd February 1866.*

Baboo Kishen Bullub Mahatab (Plaintiff), *Appellant,*

*versus*

Roghoonundun Thakoor and others (Defendants), *Respondents.*

*Baboos Dwarkanath Mitter* and *Romesh Chunder Mitter* for Appellant.

*Mr. R. E. Twidale* and *Baboo Onookool Chunder Mookerjee* for Respondents.

Suit laid at Rupees 4,295-7-3.

**Clause 3, Section 1, Act XIV. of 1859, applies only to suits to set aside sales on account of irregularity and the like, but not to suits to set aside fraudulent deeds under color of which a sale was made.**

**Where a party does not sue as an heir of a Hindoo widow or her husband to set aside a sale by her on the ground of its illegality under the Hindoo Law, but sues as a decree-holder to have the same set aside as fraudulent, he cannot raise the question of necessity.**

*Trevor, J.*—Plaintiff in this case sues the nominal vendor and purchasers, original and subsequent, of certain properties to have the original sale set aside, on the ground that it was collusive and fictitious, and the subsequent sales made without title, and to have the properties declared as belonging to his judgment-debtor, and liable to sale in execution of his decree obtained against the husband of defendant No. 2. He alleges that he is the holder of a decree against Pearee Lall Mahta, husband of defendant No. 2, Bilasoo Koer, dated 23rd June 1860, for money lent by him to the defendant; that, after the death of her husband Pearee Lall Mahta, defendant No. 2, with a view of defrauding her creditors, executed a fraudulent and collusive deed of sale of certain properties on the 19th Magh 1265 or 18th January 1858, in favor of one Duriao Thakoor, ancestor of defendant No. 1, and a bosom friend of her husband, she still remaining in possession of the properties entered in the fraudulent deed, and enjoying the profits of the same, and no consideration having passed between the parties; that, with a view of concealing the fraud, the so-

called purchaser Duriao Thakoor instituted a suit for possession of the properties, on the ground that his vendor refused to perform the contract into which she had entered; that the vendor Bilasoo, defendant No. 2, entered upon a confession of judgment, and on the fraudulent confession a decree was passed against her in favor of the plaintiff in that suit on the 29th August 1859; that, as the whole transaction above declared between the parties was fraudulent and colorable only, he now sues to have it declared such and set aside; that, moreover, when in execution of a decree in his favor he attached Gossainpore Tengra and Poorunwara, Lalla Sitaram Mookhtar, defendant No. 3, objected, and pleaded that those villages had originally belonged to Duriao Thakoor, the ancestor of defendant No. 1, Rughoonundun Thakoor, under the deed of sale from Bilasoo, dated 19th Magh 1265, or 18th January 1858, and had been put up for sale in execution of a decree of Nowkee Lall obtained against that person, and had been purchased by him; and also that Poorunwara was not an *usulee* but a *dakhilee* village; and, though not specifically mentioned in the sale-proclamation passed to him with the main village, that this objection on the part of Lalla Sitaram was admitted on the 25th July 1863. He, therefore, brings the present suit to have this order set aside, and to have the sale and confession of judgment above cited declared fraudulent and collusive, and to have them all set aside, so as to be liable for his decree against Pearee Lall Mahta.

The defendant No. 1 Rughoonundun, the son of Duriao Thakoor, pleads that the bills of sales in favor of his father were *bonâ fide*; that a consideration of Rs. 29,500 was paid for the same; that he is still in possession of certain of the properties, and has sold some to other parties, and one has been sold in execution of a decree against him; that consequently the deed cannot be set aside.

The defendant No. 3, Lalla Sitaram Mookhtar, in his statement urges that the kobala in favor of Duriao Thakoor for Gossainpore Tengra was a *bonâ-fide* document, and that he, and after his death his heirs, were in possession of the property; that the plaintiff has in a miscellaneous case stated that the real obligor in the bond executed by Duriao Thakoor in favor of Nowkee Lall was Bilasoo Koer; that in consequence only Gossainpore Tengra was sold, and that he is estopped by this statement from suing to set aside the order of the 25th July 1863 as regards that property, and that Mouzah Poorunwara is a hamlet of Gossainpore and included in it.

The defendants Kisoree, Lall and Nubbee Buksh pleaded that, in execution of a decree held by them against Duriao Thakooor, the village Simlee Alumpore was sold and purchased by them on 18th November 1862; that consequently plaintiff's claim to set aside the sale after the lapse of more than one year is barred under Clause 3, Section 1, Act XIV. of 1859.

The other defendants claim under private deeds of sale from Duriao Thakoor or his son Rughoonundun Thakoor, defendant No. 1, and urge the *bonâ-fide* nature of the transactions in which they were severally concerned.

The Judge, with the consent of the parties to the suit, laid down the following issues:—

*1st.*—Is plaintiff estopped by any admission in the miscellaneous proceedings on the objection of Lalla Sitaram Mookhtar, defendant No. 3, to the sale of Tengra Gossainpore, from seeking now to reverse the order of the Civil Court, dated 25th July 1863, as to that village, and was the right of the judgment-debtor in Mouzah Poorunwara sold with Mouzah Gossainpore or not?

*2nd.*—Is plaintiff's claim, in respect to Simlee Alumpore, barred by reason of his not having sued within one year to set aside the sale in execution of the decree at which defendants Kisoree Lall and Nubbee Buksh purchased the rights and interests of Rughoonundun Thakoor?

*3rd.*—Are the conveyances of the properties in suit by Bilasoo Koer to Duriao Thakoor fraudulent and collusive, or genuine and *bonâ fide*?

On the *first* issue the Judge was of opinion that the plaintiffs are not estopped from claiming Mouzah Tengra Gossainpore by reason of their having stated, in a former miscellaneous proceeding, that the real obligor in the bond, in satisfaction of a decree upon which the property was being sold as Duriao Thakoor's, was Mussamut Bilasoo Koer, for this was a loose statement on a point not in dispute, or that could be brought under dispute in execution of a decree passed against Duriao Thakoor; and, as plaintiff now alleges, it may have been made by mistake. The Judge also thinks that Mouzah Tengra Gossainpore, *usulee* and *dakhilee*, were sold in execution, but that Poorunwara is a separate village, consequently it was not sold with Gossainpore.

On the *second* issue the Judge considers that plaintiffs were bound to sue within one

year to set aside the sale of Simlee Alumpore; for, if they are endamaged, it has been directly by the action of the Court in selling as Duriao Thakoor's property what they say belong to their judgment-debtor Bilasoo Koer. Possession was given to the auction-purchaser under Section 269 of Act VIII., and plaintiff's own witnesses admit that, since the sale, the auction-purchasers have been in possession and receipt of the rents. "The auction-purchaser's title, therefore," remarks the Judge, "is undoubtedly protected by its "having remained undisputed for more than "one year after possession given."

On the *third* issue the Judge is of opinion that the conveyance of the property was *bond fide;* that there seems only to have been one decree for Rs. 4,000 in existence against Bilasoo at the time of the execution of the bill of sale; that plaintiff has entirely failed to prove that the villages are still in Bilasoo Koer's possession; that two of the subscribing witnesses to the deed of 19th Magh 1265, or 18th January 1858, assert that the consideration-money was paid in their presence; and, though the writer of the deed says that the transaction was fictitious, still it is clear that he has colluded with plaintiff at the last moment, otherwise he would not have been called for the defence. "It is doubtless true," proceeds the Judge, "that the defendants have not shewn what "necessity Bilasoo Koer was under when "she made that alienation, nor what debts "were paid with the consideration-money; but, "looking to the very insufficient evidence "adduced to prove that Bilasoo Koer, and not "the purchaser, is still in possession of the "property, I do not think that the plaintiff "has established a violent presumption that "the sale was fictitious." The Judge, therefore, dismissed the suit with costs.

From the decision of the Lower Court, an appeal has now been brought before us by the plaintiff below, and it has been urged, on his behalf by Baboo Dwarkanath Mitter, that the Judge is altogether wrong in holding that, in consequence of the defendant having been in possession of Simlee Alumpore for more than a year under the sale in execution, he, plaintiff, is barred from bringing the present suit by Clause 3, Section 1 of Act XIV. of 1859; that that Section only applies to actions to set aside sales on account of irregularities in proceeding and such like; that the present suit is not of that nature, but to get rid of certain fraudulent deeds under color of which the sale was made; that, to bring this action, plaintiff is admittedly within time; and, if he proves the fraud, the sale must fall as a matter of course. As to the finding of the Judge regarding the *bond-fide* nature of the deed of sale, dated 19th Magh 1265, or 18th January 1858, it is contended that the fact of a Hindoo widow selling and plaintiff purchasing without a necessity, that the fact of the purchaser instituting a suit shortly after the sale for possession, on the ground that the vendor would not transfer the property sold, and the vendor's confession of judgment shortly after, and again the third fact that, three years after the first conveyance, the major part of the property was conveyed first to the widow of Bunsi Lall the Mookhtar in the first transaction, all raise a presumption that the conveyance was a fraudulent one; that, in addition to this, when the evidence tendered by him as to the continued possession of Bilasoo Koer after and notwithstanding the sale is taken into consideration, he, plaintiff, has made out such a case of fraud as to entitle him to what he asks, unless the defendants are able to rebut the same, and that they have been unable to do, for their evidence as to the genuineness of the deed of sale, and the passing of the consideration-money, is not worthy of belief; that altogether plaintiff is entitled to a decree.

This is a suit by a decree-holder to the amount of 4,000 rupees to set aside a deed of sale and other transactions, whereby property to the amount of 30,000 rupees has passed into other hands on the ground of fraud. On the first point raised before us, we are clearly of opinion that plaintiff is not estopped by Clause 3 of Section 1, Act XIV. of 1859, from bringing the present suit so far as regards the property of Simlee Alumpore. The present suit is not one to set aside the sale in execution, either on the ground of irregularity, or other matters referring to the sale itself; but it is one to get rid of the document which alone made the sale valid, as having been a collusive and fraudulent transaction. If plaintiff proves his allegation of fraud, the sale in execution might stand as that of Duriao Thakoor's rights and interests, but those interests will have become null, and the purchaser consequently at the sale will have taken nothing under his purchase. What then is the evidence produced by plaintiff to prove the *mala fides* of the sale by Bilasoo to Duriao Thakoor under date 19th Magh, or 18th January 1858? It would, of course, be impossible for the plaintiff to show, and consequently an error in the Court to require

from him direct proof of the fraud; if proved at all, it must be proved by inference amounting to legal presumption, and inference amounting to mere suspicion will not suffice. The plaintiff requires the Court to presume, from the absence of any necessity for the sale proved on the part of defendant and from certain subsequent transactions, that the deed of sale is fraudulent. But we observe that the plaintiff is not suing as an heir of the defendant or her husband to set aside the deed of sale on the ground of its illegality under Hindoo Law. He is simply as a decree-holder suing to have the same set aside as fraudulent. In the former case, undoubtedly, it would be necessary for the defendant to prove the necessity for the sale; in the latter it is enough. as against a stranger, to prove that the sale to him was *bonâ fide;* the question of necessity is one which the plaintiff has no right to raise, and, therefore, defendants are not bound to show. The absence, therefore, of any proof of necessity on the part of defendants in no way assists the plaintiff's present case. As to the subsequent transactions from which the learned pleader wishes us to infer fraud, putting them at the highest, they alone raise a suspicion of fraud, and that is insufficient for the plaintiff's case; but, in addition to these facts and the inferences deducible from them, the plaintiff produces witnesses to show that Bilasoo Koer is still in possession of some of the property, and remained after the sale in possession of all; but, without minutely analysing that evidence, we remark that we consider that it does not satisfactorily establish the fact of Bilasoo Koer's possession of the property, covered by the bill of sale subsequent to the suit which ended in the confession of judgment on the part of that lady.

On this view of plaintiff's case, he has failed to establish the fraud alleged by him by any evidence raising a fair and legal presumption. We might, therefore, at once dismiss it; as, however, we have considered the evidence of the subscribing witnesses to the bill of sale produced by the defendant, we may say that we see no sufficient reason to distrust it, and that it altogether neutralizes the suspicion which the plaintiff has raised from the facts in evidence in the case.

We, therefore, dismiss the plaintiff's appeal with costs, affirming the decision of the Court of first instance.

The 14th December 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Limitation—Deduction on account of appeal prosecuted bona fide in wrong Court.**

Case No. 1326 of 1866.

*Special Appeal from a decision passed by Moulvie Syud Ahmed Buksh Khan, Principal Sudder Ameen of Tipperah, dated the 14th March 1866, affirming a decision passed by the Moonsiff of that District, dated the 6th July 1865.*

Raj Krishto Roy (Plaintiff), *Appellant,*

*versus*

Beer Chunder Joobraj and others (Defendants), *Respondents.*

*Baboos Kishen Kishore Ghose* and *Jugodanund Mookerjee* for Appellant.

*Baboo Onookool Chunder Mookerjee* for Respondents.

Where a suit is brought and dismissed for want of jurisdiction, and an appeal is preferred in which the first decree is affirmed, if a suit be afterwards brought in the right Court, the period which elapsed between the decision of the first Court and the disposal of the appeal should be excluded in computing the period of limitation prescribed by Act XIV. of 1859.

*Markby, J.*—In this appeal the bare abstract question placed before us is whether, where a suit is brought and dismissed for want of jurisdiction, and subsequently an appeal is preferred in which the first decree is affirmed, then, when a suit is brought in the right Court, the period which elapsed between the decision of the first Court, and the appeal being preferred, is to be included or not in computing the period of limitation prescribed by Act XIV. of 1858.

The decision turns entirely on Section 14 of the Act, which provides that, "in computing any period of limitation prescribed "by this Act, the time during which the "claimant or any person under whom he "claims shall have been engaged in prose-"cuting a suit upon the same cause of action "against the same defendant or some per-"son whom he represents *bonâ fide*, and "with due diligence in any Court of Judica-"ture, which, from defect of jurisdiction or "other cause, shall have been unable to de-"cide upon it, or shall have passed a decision "which on appeal shall have been annulled "for any such cause, including the time "during which such appeal, if any, has been

"pending, shall be excluded from such com-
"putation."

It is admitted that, if the time between the decision in the first suit and the filing the appeal is to be included, the plaintiff in this suit is barred; otherwise not.

The Section in question contemplates two classes of cases: *first*, the case in which the plaintiff fails to obtain a decision on the case in the Court of first instance; *secondly*, the case in which, a decision having been given in the Court of first instance, that decision is annulled by a Court of Appeal.

The Section contains no express provision for the case in which the plaintiff, having failed to obtain a decision in the Court of first instance, tries through a Court of Appeal to remedy this failure, which is the case before us.

It was, however, assumed before us in argument, and also appears to have been assumed by the Courts below, that the time during which such an appeal was actually pending ought to be excluded. And we agree in this view, because we think that, whilst the plaintiff is seeking through a Court of Appeal to compel a Court of first instance which has refused to take up his case to do so, he is "engaged in prosecuting the suit," that is, the suit in the Court of first instance, within the meaning of this Section.

We also think that he is engaged in prosecuting the same suit "*bonâ fide*, and with due diligence," whilst he is considering whether or no he shall appeal against the decision of the first Court. The time within which the appeal is required to be brought is fixed by the law, in order to give the unsuccessful party time to take advice and come to a conclusion whether or no he should contest the decision which has been given against him. And it seems to us that, if he appeals at any time within the prescribed period, he ought to be considered as proceeding with due diligence. The decision of the Lower Court is, therefore, reversed, and the appellant will have his costs of this appeal. The case will go back to the Lower Appellate Court, to try the appeal on its merits.

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The 14th December 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Master and Servant—Purchase of goods on credit.**

Case No. 1978 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of 24-Pergunnahs, dated the 14th May 1866, affirming a decision passed by the Sudder Ameen of that District, dated the 24th November 1865.*

Maharanee Narainee Koonwaree (Defendant), *Appellant,*

*versus*

Joogul Kishore Roy and others (Plaintiffs), *Respondents.*

*Mr. R. V. Doyne* and *Baboo Gopal Lal Mitter* for Appellant.

*Baboo Dwarkanath Mitter* for Respondents.

*Semble.*—If a master usually instructed his servant to buy goods upon credit, he will be bound by his acts even when he has prohibited him specially from buying upon credit.

*Bayley, J.*—PLAINTIFF sued defendant for a balance of account as due from her as a principal purchasing by her authorized agent.

The following facts are admitted in this case, *viz.*, that plaintiff is a dealer in chunam; that Mr. Arathoon first, and then Shumsooddeen, defendant, were employed by defendant (Ranee Nobonarain Koonwar) to repair the buildings of which the Ranee was the owner in Calcutta; and that he (Shumsooddeen) purchased the materials for which the present claim is made from plaintiff.

The Ranee disclaims liability; and her statement is that Shumsooddeen had no authority to pledge her credit, but distinct orders to pay ("nugud") cash, and to obtain that cash from her Superintendent in Calcutta.

On the other hand, it is alleged that Shumsooddeen really was the agent for the Ranee; that cash was *not* paid, but accounts made out and furnished to Shumsooddeen, and that *thereafter from time to time* money was paid; and that, when the purchase of the materials was made, no cash was paid. Further, that this practice had prevailed in the time of Shumsooddeen's predecessor, Arathoon, as well as in Shumsooddeen's, and that the balance due by plaintiff was carried on in the account opened by Shumsooddeen. That, under such circum-

stances, an implied agency from the Ranee was created, and the Ranee, as principal, was liable.

The first Court held that there was an implied power in the defendant, Shumsooddeen, to pledge the Ranee's credit, from the facts found; that the goods were supplied on credit, and the accounts shewing the defendant's purchases were subsequently forwarded to the Ranee at Burdwan, and, being examined, orders for money were sent to the Superintendent in Calcutta to pay Shumsooddeen (as agent) the amounts; or, in other words, the first Court found as a fact, that cash was *not* supplied to be paid *on delivery* of the goods, as alleged by the Ranee to have been the condition of her employment of Shumsooddeen.

The Lower Appellate Court found, as a fact, that Shumsooddeen was the recognized agent of the Ranee, and in that capacity made purchases of chunam, *on credit*, from plaintiff; that this was part of his business as agent for repairs; that, when the Ranee pleaded that she had prohibited any but cash payments, it was on her to prove this, and that she had failed to do so.

The Lower Appellate Court accordingly decreed plaintiff's case.

Defendant, the Ranee, appeals specially, and urges—

*1st.*—That the agent had no authority to pledge her credit, as the Ranee had prohibited all but cash payments.

*2nd.*—That it was for plaintiff to prove this, and not for defendant to do so.

*3rd.*—That the judgment of the Lower Appellate Court is not based on the evidence of what were the agent's powers to pledge the Ranee's credit, as raised by the pleadings, but on the bare doctrine of the purchase of chunam being within the general scope of the agency to repair buildings.

After hearing Counsel, we think that the pleas in this special appeal are untenable.

The facts are either found or admitted that Shumsooddeen was an agent of the Ranee for repairing buildings; that he and his predecessor purchased the chunam necessary for those repairs from plaintiff, in the Ranee's name, and on her credit; that cash was *not* provided by the Ranee, *nor paid for the goods on delivery;* but that the accounts containing the items, *as items purchased on credit*, were sent to Burdwan, and there passed, and the money order given by the Ranee to pay *subsequently*.

We may here observe that Shumsooddeen deposes to the above facts, and plaintiff only contradicts his deposition by a contrary statement, not by depositions of herself or others. We think that, when there was Shumsooddeen's deposition on oath in favor of plaintiff's case, it was quite right in the Lower Appellate Court to throw the *onus* of rebutting that deposition on defendant, the Ranee. But the Ranee did not produce any rebutting evidence. Thus, then, we think that the purchases on the Ranee's credit were made under a recognized agency which, in our view, fixes the principal's liability for the agent in this case. We would also remark, if it were necessary to go farther, that, *under certain circumstances*, if a master usually instructed his servant to buy goods upon credit, he will be bound by his acts, even when he *has prohibited him specially from buying upon credit.* The habit of entrusting Shumsooddeen to buy on credit from plaintiff being shewn in this case, by the way the accounts were sent to Burdwan, and *afterwards* money sent to pay the sums due, the buying on credit was properly taken by plaintiff to shew the power of Shumsooddeen to pledge the Ranee's credit.

In this view we dismiss this special appeal with costs.

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The 14th December 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Sale (to near relative of debtor).**

Case No. 1888 of 1866.

*Special Appeal from a decision passed by the Judge of East Burdwan, dated the 9th April 1866, affirming a decision passed by the Moonsiff of that District, dated the 29th September 1864.*

Jadubendur Roy and others (Defendants), *Appellants,*

*versus*

Shaikh Kumurooddeen (Plaintiff), *Respondent.*

*Baboos Bama Churn Banerjee* and *Woomesh Chunder Banerjee* for Appellants.

*Baboo Debendur Narain Bose* for Respondent.

In a case where a purchaser is a near relative of a debtor, it is not sufficient to decide that the deed of sale is proved to have been executed. Proof of the *bona fides* of the transaction is also necessary.

*Shambhoonath Pundit, J.*—The decision of the Lower Appellate Court is not satis-

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factory. It does not meet all the points necessary to be met in the case. The plaintiff purchaser is a near relative of the debtor, and this fact is suspicious, and there are other facts equally suspicious.

In a case like this, it is not sufficient simply to decide that a bill of sale is proved to have been *executed*, but to prove also the *bona fides* of the transaction.

The Lower Appellate Court then should try whether this conveyance is or is not a *bonâ-fide* transaction, and who, since the date of the alleged purchase, has actually held real possession of the lands claimed to have been purchased by that deed.

The case is, accordingly, remanded to the Lower Appellate Court, to re-try it with reference to the above remarks.

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The 14th December 1866.

*Present :*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Invalid Jagheerdars—Permanent Settlement.**

Case No. 1989 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 11th May 1866, affirming a decision passed by the Moonsiff of that District, dated the 26th October 1865.*

Mussamut Sanoo (Plaintiff), *Appellant,*

*versus*

The Government of India (Defendant), *Respondent.*

*Baboo Kishen Succa Mookerjee* for Appellant.

*Baboo Kishen Kishore Ghose* for Respondent.

Regulation I. of 1864, and not Regulation I. of 1793, applies to the case of a person claiming as an heir to an invalid jagheerdar.

*Shumbhoonath Pundit, J.*—We see no reason to interfere. The Lower Appellate Court has rightly applied limitation to the case of the plaintiff.

She claims as an heir to an invalid jagheerdar, whose case is provided for in Regulation I. of 1804. She cannot be allowed to plead the provisions of Regulation I. of 1793 which provides for a right of a recusant to apply for a permanent settlement after the expiration of the period or periods of one or more intervening temporary settlements. The latter law applies only to the proprietor or heir of proprietor of an estate or talook-paying revenue to Government of which the proprietor may have refused to settle when the permanent settlement was offered before, and not to these jagheerdars.

We, accordingly, reject the special appeal with costs.

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The 15th December 1866.

*Present :*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, *Judge.*

**Possession—Declaratory decree.**

Case No. 1780 of 1866.

*Special Appeal from a decision passed by Lt.-Colonel J. S. Davies, Judicial Commissioner of Chota Nagpore, dated the 19th April 1866, affirming a decision passed by Lt. R. C. Money, Deputy Commissioner of Pooroolia, dated 17th June 1865.*

Lukhun Sing and another (Plaintiffs), *Appellants,*

*versus*

Nuffur Sing and others (Defendants), *Respondents.*

*Baboos Mohesh Chunder Bose* and *Nil Madhub Bose* for Appellants.

*Baboo Nil Madhub Sein* for Respondents.

Where a plaintiff sued for sole possession and a declaration of sole title, and the defendant admitted that he was in joint possession, but the plaintiff went on with his suit in order to get a decree that he was solely entitled and in sole possession and failed to prove his case, he was held not entitled to a decree founded on joint possession.

*Peacock, C. J.*—The plaintiff in this case sued to obtain sole possession, and a declaration that he was solely entitled. The defendant admitted in his answer that he was in joint possession. But the plaintiff was not satisfied with that, and he went on with his suit in order to get a decree in that suit declaring that he was solely entitled and in sole possession. He failed in proving the case so set up, and he was not entitled to a decree founded on joint possession.

The decision of the Lower Appellate Court is affirmed with costs.

The 15th December 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Simple Mortgage—Execution of money-decree.**

Case No. 1171 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 30th January 1866, reversing a decision passed by the Moonsiff of Naraingunge, dated the 25th July 1865.*

Bindabun Chunder Shaha and others (two of the Defendants), *Appellants,*

*versus*

Janee Bibee (Plaintiff) and others (Defendants), *Respondents.*

*Baboo Ramesh Chunder Mitter* and *Umurtonath Bose* for Appellants.

*Baboo Kalee Kishen Sein* for Respondents.

If the holder of a simple mortgage obtains a mere money-decree for the amount due to him (without any declaration that the mortgaged property is liable for the debt), he cannot attach and sell the property to the prejudice of a *bonâ-fide* purchaser for valuable consideration. In such a case the mortgagee must enforce his lien by a separate suit against those in possession of the property.

*Macpherson, J.*—We dismiss this appeal with costs. Under the circumstances, the plaintiff's title being found to be *bonâ fide* and for valuable consideration, it could not be prejudiced by the sale in execution of the simple money-decree which had been passed. It may be that the decree-holder might have obtained, or may yet be able to obtain, a decree declaring that the money due to him forms a charge on the estate in question. As he has not got such a decree, he is simply in the position of an ordinary judgment-creditor, and can only seize the rights and interests of the debtor, such as they are at the time of attachment. The case falls within the ruling of a Full Bench in the suit of Gopeenath Singh *versus* Sheo Suhay Singh, I. Weekly Reporter 315. If the property was, in fact, mortgaged for this debt, the mortgagee must enforce his lien by a separate suit against those in possession of the property.

The 15th December 1866.

*Present:*

The Hon'ble C. B. Trevor and W. S. Seton-Karr, *Judges.*

**Sale (to wife)—Onus probandi—Benamee—Bona fide purchaser—Notice.**

Case No. 1900 of 1866.

*Special Appeal from a decision passed by the Additional Judge of Hooghly, dated the 25th April 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 30th June 1865.*

Bindoo Bashinee Debee (Plaintiff), *Appellant,*

*versus*

Pearee Mohun Bose and others (Defendants), *Respondents.*

*Baboo Woomesh Chunder Banerjee* for Appellant.

*Baboo Hem Chunder Banerjee* for Respondents.

In a suit to declare certain sales *benamee* in a case where the property of a husband was sold to realize a fine of Court and passed from hand to hand until it was sold to the wife, who moreover was in possession of the property when the sale of the husband's rights and interests took place—Held that the plaintiff was entitled to a clear finding as to whether the wife held the property in her own right or in trust for her husband; and that the *onus* of showing the source whence the money came was on the wife.

An unenquiring purchaser from a Hindoo wife, whose husband is living at the time, is in no sense a *bonâ-fide* purchaser without notice.

*Trevor, J.*—The plaintiff in this case sued originally for possession of 20 beegahs of lands. He alleges that the rights and interests of one Modoo Soodun Howalee, a defendant in this case, in certain land and a house situated upon it were sold on the 6th November 1854 (22nd Kartick 1261) to realize a fine inflicted on him by the Principal Sudder Ameen of Hooghly, and purchased by one Kylas Chunder Banerjee who, being unable to obtain possession of his purchase, sold it to him, plaintiff, on the 23rd Kartick 1264, or November 1857; that, as the property had passed into various hands, the plaintiff brings the present suit to have it declared that the sales were fictitious and nominal, and that the property at the time of his purchase still belonged to Modoo Soodun, and for possession of the same.

The first Court, after remarking that the land in dispute consisted of two parcels, one containing 16 beegahs and the other containing 4 beegahs with a house upon it, gave plaintiff,

for reasons upon which it is unnecessary to enter at length, a decree for 8 beegahs, or half of the first parcel, and 1 beegah of the second, and dismissed his claim to the remainder. The Judge, on appeal, affirmed the decision of the Court below with costs.

As to the 8 beegahs of the first parcel for which his claim was dismissed, the plaintiff does not appeal specially; but, as to his claim to the 3 beegahs with the house upon it, forming part of the second parcel, which was likewise dismissed, he appeals specially, urging that the Lower Appellate Court should have decided whether the sale of that quantity of land, *viz*, 3 beegahs with the buildings, to Bindoo Bashinee Debee, the wife of Modoo Soodun Howalee, was *benamee* or not, instead of confining himself to the question whether the sales were free from fraud or not.

The remarks of the Judge concerning this portion of plaintiff's claim are as follows: "With regard to the parcel of land consisting of 3 beegahs, which are admitted to have been originally the property of Modoo Soodun Howalee, it is proved that, so far back as 10th March 1846, or nearly nine years before the sale on which appellant claims the property, these 3 beeghas were put up to auction on account of Modoo Soodun's debts, and purchased at that sale by one Tarinee Churn. This land was again sold by him to one Jugo Moyee Debee in 1253 or 1846, and by her in 1256 or 1849 to defendant's wife Bindoo Bashinee. Then, as to the building on this land, it was sold at public auction in satisfaction of Modoo Soodun Howalee's debts, on the 21st May 1845, corresponding with 28th Bysack 1252, or nine years and a half previous to the auction-purchase by the appellant's vendor, and was purchased by Anund Chunder Chuckerbutty, who in 1256 again sold it, with the 3 beegahs of land on which it stood, to the defendant Debee Churn in 1271 or 1864. There is no question of the transfers having taken place; all that has to be considered is whether both transactions were not fraudulent. But there is no credible evidence to prove that such was the case, and the circumstances of the case are altogether against the supposition. Both properties had been sold long before the purchase by appellant's vendor of Modoo Soodun's rights and title in them; and it was utterly impossible for him to have anticipated that he would be fined 8 rupees, or that his property would be put to sale in consequence."

The plaintiff in this case has alleged that all the sales of the 3 beegahs with the house upon it are nominal, and therefore fraudulent, and he has produced evidence to substantiate his allegation; but, in the Judge's opinion, he has failed to prove this contention. His present contention is that the particular sales by Jugo Moyee and Anund Chunder severally in 1256 to Bindoo Bashinee, if not fraudulent, were hers nominally in trust for her husband, that he was the beneficiary, and therefore that, though in her name the nominal possession, the property was his, and that the question of trust or not should have been enquired into specifically; and this contention we think sound. We think that, as to the sales to Bindoo Bashinee of the property involved in this special appeal, *viz.*, 3 beegahs and the house upon it, the Judge has missed the real point, which is not whether the sales were generally fraudulent, but whether the property was held by her in trust or on her own account. Now, seeing that Bindoo Bashinee was admittedly in possession of this property when the sale of her husband Modoo Soodun's rights and interests took place in November 1854 or Kartick 1261, the plaintiff is entitled to a clear finding as to whether she held it in trust for him or on her own right. That point can only be determined by her showing the source whence the money came; and, as in such a case, the burden is on the defendant Bindoo Bashinee, we remit the case to the Judge, for the purpose of enquiring whether the 3 beegahs and 3 cottahs purchased by her ostensibly from Jugo Moyee Debee and Anund Chunder Chuckerbutty in 1256, was purchased by her from her *streedhun*, or by her from her husband's money, and held in trust for him. If she proves that she purchased it from her own money, plaintiff's suit must be dismissed, otherwise he will be entitled to a decree for this property, 3 beegahs with the house upon it.

We may remark that the special appellant Debee Churn has urged that he, in 1261 or 1864, purchased this property for a valuable consideration without notice; and that, therefore, whether Bindoo Bashinee held the property as trustee or in her own right, his purchase cannot be affected, but this contention will not hold water. As to the principle that, if a trustee alienates property for a valuable consideration to a person who pays that consideration without notice of the trust, the interest of the beneficiary suffers from the act, there is no doubt; but we consider that an unenquiring purchaser

from a Hindoo wife, her husband living at the time, is in no sense a *bond-fide* purchaser without notice. The position of the wife is such that it amounts to a constructive notice which should put a purchaser on enquiry; and, if he disregards such notice, he must stand the consequence.

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The 18th December 1866.

*Present:*

The Hon'ble C. B. Trevor and W. S. Seton-Karr, *Judges.*

**Right of user.**

*Special Appeal from a decision passed by the Judge of Patna, dated the 16th May 1866, modifying a decision passed by the Moonsiff of that District, dated the 31st July 1865.*

Mussamut Amjudee Begum and others (Plaintiffs), *Appellants,*

*versus*

Syud Ahmed Hossein and another (Defendants), *Respondents.*

*Mr. R. E. Twidale* for Appellants.

*Baboo Romanath Bose* for Respondents.

Where a right of user of a drain or passage is incidental to a house, that right is not affected by the owner of the house letting the house to a tenant.

*Seton-Karr, J.*—In this case the contention regarding the possession of the wall and the closing of the two windows has been set at rest, and nothing on these points has been urged before us.

The contention is limited to a certain drain and to a passage. The first Court found that the plaintiff had a right to what he claimed, but it provided that, if the plaintiff and his family remained at or returned to their house, the drain or passage should remain open, otherwise they should be closed so as not to annoy the defendant. The house, it is admitted, had been let by the plaintiff to a tenant, a stranger.

The Judge observed that he agreed with the result of the Moonsiff's personal enquiry, but he remarked that the plaintiff had really no right to what he claimed, inasmuch as the circumstances under which the right was created had ceased, and a new state of things had arisen, in which the introduction of a stranger into the premises had become possible.

Now, this point was never raised by the defendant in his written statement. He never admitted the existence of any right personal to the plaintiff, but he denied his rights altogether. The Judge was in error in raising or in allowing this point to be raised at the trial, and the position, which he has taken up thereon, appears to us not to be sound in law.

Either the plaintiff has a right to the user, which he contends for as incidental to his property, or he has not. If he has, and the Courts find him to possess such a right, it may be exercised at all times, and by any persons who may be placed in the shoes of the plaintiffs in regard to the property in question. The Judge should confine himself to the existence or not of this right, and, if he finds it to exist, it is not one to be exercised conditionally as the Moonsiff had provided; nor is it one to be annulled by the introduction of any such new feature as the tenancy of the house by a stranger.

The Judge's decision is set aside, and he will re-try the case with reference to our remarks, confining himself to the real contention between the plaintiff and the defendant, the former of whom asserts the right as appertaining to his property, and the latter entirely repudiates it.

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The 18th December 1866.

*Present:*

The Hon'ble C. B. Trevor and W. S. Seton-Karr, *Judges.*

**Butwara.**

Case No. 1920 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 27th June 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 29th June 1865.*

Huro Pershad Roy and others (Plaintiffs), *Appellants,*

*versus*

Mohunt Ram Churn Sing and others (Defendants), *Respondents.*

*Baboo Kishen Succa Mookerjee* for Appellants.

*Baboos Debendro Narain Bose* and *Kalee Kishen Sein* for Respondents.

The dispossession of a party from land assigned to him under a legal butwara, though a wrongful act, is no ground for a suit for restoration to the old state of things as they existed before the butwara was made.

*Trevor, J.*—Plaintiff in this case sues for possession of a certain share—4 ans. 7 gds.

1 cowrie share of the village of Bhoolwara, and for confirmation of his possession over 4 ans. 7 gds. of two other villages Bhugwanpore and Dheerajpore. It appears that plaintiff was the mortgagee of certain rights of one Asudoollah in certain villages, and the defendants the mortgagees of the rights of Imam Buksh and Khoda Buksh in the same. Plaintiff foreclosed and got possession of his mortgage as owner. The defendants remained in possession of their mortgaged property as mortgagees, and, whilst mortgagees, the plaintiff and they petitioned for a butwarah of the villages which was made in due legal form. By this butwarah to plaintiff were assigned the 16 annas of Bhugwanpore and Dheerajpore, and he gave up rights to Bhoolwara. To the defendants was assigned, as representing their rights, the village of Bhoolwara. Subsequently, the heir of Imam Buksh and Khoda Buksh, Buksish Hossein, sued to redeem the mortgage, and obtained a decree against his mortgagee. The plaintiff was made a *pro formâ* defendant. In execution he dispossessed the plaintiff of a portion of the two villages of Bhugwanpore and Dheerajpore, and plaintiff now sues to have things in reality restored to the state in which they were before the butwarah.

Without noticing the particular ground taken in special appeal, we may say that this suit, in its present form, is untenable. In the case between Buksish Hossein and his mortgagees, he was only entitled to possession of the property in their possession, and the butwarah between them and the plaintiff appears to have been made in good faith; but whether rightly or wrongly made, having been sanctioned, Buksish Hossein could only get possession of the property in their possession under the butwarah; he is, of course, at liberty to take any steps, which the law allows him, to set aside the butwarah; but, until those have been taken, he is bound by it. This being the case, his dispossession of plaintiff of land assigned to him under the butwarah was a wrongful act; and plaintiff should take steps, if he can do so now, to set it aside, and to obtain possession of the property awarded to him under the butwarah. His present suit to fall back on an old state of things, in consequence of the illegal act of Hossein Buksh, is not maintainable.

We, therefore, though for different reasons, affirm the decision of the Principal Sudder Ameen dismissing plaintiff's suit, and dismiss this special appeal with costs.

The 18th December 1866.

*Present:*

The Hon'ble L. S. Jackson and Shumbhoonath Pundit, *Judges.*

**Sale Law (Act XI. of 1859)—Lease of a single co-sharer.**

Case No. 1859 of 1866.

*Special Appeal from a decision passed by Mr. A. Pigou, Judge of Hooghly, dated the 19th April 1866, reversing a decision passed by Moulvie Naziroodeen Mahomed, Principal Sudder Ameen of that District, dated the 28th November 1864.*

Monohur Mookerjee (Plaintiff), *Appellant,*

*versus*

Joy Kishen Mookerjee and another (Defendants), *Respondents.*

*Mr. R. T. Allan* and *Baboo Bama Churn Banerjee* for Appellant.

*Baboos Mohendro Lal Shome* and *Pearee Mohun Mookerjee* for Respondents.

An auction-purchaser, under Act XI. of 1859, has no right to question the act of a single co-sharer in respect of a lease granted by him of land separately enjoyed by him under an arrangement made by the several co-parceners by which such a lease by one of them was to be looked upon as the act of all.

*Jackson, J.*—We are of opinion that, after the full enquiry which has been conducted by the Judge and the explicit finding at which he has arrived upon the several points referred to him by the order of this Court when it remanded the cause for a new trial, there remains nothing which would justify the Court interfering in the decision of the Court below, or which would support the special appeal.

The Judge has most distinctly found on all the evidence before him, and after apparently a careful investigation, that this lease was granted by Joy Kishen Mookerjee *bonâ fide* under the circumstances alleged, and with the intention of immediately passing a substantial interest to his son. With that finding it is impossible for us to interfere in special appeal.

Mr. Allan has urged upon us that the case of the defendant is that valuable consideration passed on this occasion between the father and son. But it has not been proved that such consideration did pass; and, if the case of the defendant fails in this particular, the transaction ought not to be sustained. But it appears to us that the passing of consideration-money was wholly immaterial, and, in point of fact, it was not a matter referred to the Judge below on remand.

Then Mr. Allan also contended that this deed, if good, was valid only to the extent of the fractional interest which Joy Kishen Mookerjee held in this 13-annas share. But it appears to us that, under the arrangement made by the co-parceners for their enjoyment of this estate, the lease granted by each of the co-parceners in respect of the lands situated within the portion which he separately enjoyed must be looked upon as to that extent the act of the whole of the co-parceners. Consequently, no auction-purchaser, coming in under Act XI. of 1859, has any title to question the act of a single co-sharer in respect of such lease.

We, therefore, think that this appeal must be dismissed, and the decision of the Lower Appellate Court affirmed with costs.

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The 18th December 1866.

*Present:*

The Hon'ble L. S. Jackson and Shumbhoonath Pundit, *Judges.*

**Review (of predecessor's judgment).**

Case No. 1825 of 1866.

*Special Appeal from a decision passed by Moulvie Syud Abdoolla Khan, Principal Sudder Ameen of Chittagong, dated the 28th April 1866, affirming a decision passed by Moonshee Shokoor Ali, Moonsiff of that District, dated the 6th September 1864.*

Aman Ali Chowdhry (Plaintiff), *Appellant,*

*versus*

Kasim Ali and others (Defendants), *Respondents.*

*Baboo Nursing Chunder Mitter* for Appellant.

*Baboo Mutty Lal Mookerjee* for Respondents.

The law makes no distinction between the power of a Judge who originally heard a case and subsequently has an application for review before him, and the power of a Judge subsequently succeeding to the same office who has such an application before him and is not barred by the circumstances stated in Section 379, Act VIII. of 1859, from considering that application.

*Jackson, J. (Shumbhoonath Pundit, J., concurring).*—In this case two grounds of special appeal are stated in the application. The second of these is purely a question of fact, and has not been brought before us in argument.

The first, however, is a point of law. It is this that the Principal Sudder Ameen has committed an error in law "in admitting a review of his predecessor's judgment apparently on no ground, and afterwards in reversing it." The vakeel for the special appellant contended that it was not legally competent to a Principal Sudder Ameen to review the decision of his predecessor upon evidence and to come to a different conclusion from that to which his predecessor had come; and, in support of his contention, he refers us to a case in the *2nd* Weekly Reporter, page 174, in which Mr. Justice Steer observes: "The law of review never "intended that a Principal Sudder Ameen "should hear an appeal against the judg-"ment of his predecessor in the same office; "and it seems to me that any officer who "allows a review and decides a matter of "fact upon the same identical evidence as "that on which his predecessor decides the "case wholly misapprehends the law of "review; and that it is not a proper ground "within the meaning of the law for the "admission of the review, nor a proper "ground to decide upon, that the evidence, "as laid before the predecessor, and which "inclined him to decide one way, leads his "successor to an exactly contrary conclu-"sion. Where a Judge has so misappre-"hended the intent of the law, and has "constituted himself an appellate authority "over his predecessor, I should hold that "to be a valid ground of appeal; and I "should not hesitate to set aside such an "unwarrantable judgment."

These are the observations of one of the learned Judges who heard that case; but I do not find anything to the same effect in the judgment of the other Judge who sat on that occasion, Mr. Justice Elphinstone Jackson. That learned Judge proceeds entirely on the ground that the Principal Sudder Ameen, having admitted a review of judgment in that case, had misconstrued a particular document which was material in the case, and upon that he based a decision which the Court considered to be erroneous.

I cannot find that the law makes any distinction between the power of the Judge who originally heard the case and subsequently has an application for review before him, and the power of a Judge subsequently succeeding to the same office who has such an application before him (not being barred by the circumstances stated in Section 379 of the Civil Procedure Code from considering that application).

It appears to me that any circumstance which would justify the Judge who passed the decision in reviewing it upon application of the party aggrieved will also justify a succeeding Judge in the same office. It is not contended that the circumstances of this case were such as would have made it unlawful or irregular in the original Principal Sudder Ameen to review his judgment; and it appears to me, therefore, that it cannot be contended that any law or any usage bars the succeeding Principal Sudder Ameen from reviewing the case. If the vakeel for the special appellant in this case had been able to show us any decision of a Division Bench of this Court, in which it had been held that a Principal Sudder Ameen succeeding to the office of his predecessor was debarred in the mode contended in the present case, I should have felt obliged to refer the case for the decision of a Full Bench; but I do not find any decision of the kind reported.

It appears to me, therefore, that this ground is entirely untenable; and, as there is no other ground of special appeal, the decision of the Court below must be affirmed with costs.

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The 18th December 1866.

*Present:*

The Hon'ble H. V. Bayley and F. A. Glover, *Judges.*

**Survey Award (What constitutes a)—Suit for confirmation of possession.**

Case No. 1933 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Furreedpore, in Dacca, dated the 4th May 1866, affirming a decision passed by the Moonsiff of that District, dated the 27th November 1865.*

Nubo Kishen Roy and others (Plaintiffs), *Appellants,*

*versus*

Gobind Chunder Sein and others (Defendants), *Respondents.*

*Baboo Umbika Churn Banerjee* for Appellants.

*Baboos Nil Monee Sein* and *Mohesh Chunder Chowdhry* for Respondents.

**To constitute a survey-award, there must be a decision on a *bonâ-fide* contention between the parties after a proper investigation into the points at issue between them.**

**A plaintiff suing for confirmation of possession must first prove that he is in actual *bonâ-fide* possession of the land over which he wishes to have his title confirmed.**

*Glover, J.*—THIS was a suit to set aside a survey-award by which certain land alleged to appertain to plaintiff's zemindaree of Chur Deah had been demarcated as belonging to the defendant's talook. The plaintiff sued for confirmation of possession only, denying that he had ever been actually dispossessed.

The Moonsiff found that there had been no survey-award between the parties, and that, therefore, the preliminary objection of special limitation under Act XIII. of 1848 did not apply. He held further that the defendants had proved both title and possession.

The Principal Sudder Ameen on appeal raised two issues of limitation; the *special* one of three years applicable to survey-awards, and the *general* one of twelve years; and found (1) that there had been an award which, not having been appealed against within three years, was final; (2) that, besides this, the plaintiff had been out of possession for very many years, and was barred by the general Law of Limitation; and (3) that there was no reliable proof that the plaintiff had had possession at all, whilst the evidence showed the defendants to have both right and possession.

It is urged in special appeal—

(1.) That the special Law of Limitation does not apply.

(2.) That the Principal Sudder Ameen was not justified in deciding the issue of *general* limitation, inasmuch as it had not been raised in the Court below; and

(3.) That the evidence in favor of special appellant was legally sufficient and proved his case.

With regard to the *first* objection, there can be no doubt, we think, that the Principal Sudder Ameen was wrong. It has been frequently ruled by this Court that, to constitute a survey-award, there must be a decision on a *bonâ-fide* contention between the parties, after a proper investigation into the points at issue between them. Now, in this case, there appears to have been no such enquiry. When the land was mapped as appertaining to the special respondent's talook, the special appellant protested by petition; but the only notice taken by the survey-authorities was to send this petition for report to the officers who had effected the measurement, and, on their reporting unfavorably, to refuse any further enquiry. This was manifestly no "award," and the special

appellant could not be bound to contest it within three years.

It will be unnecessary for us to go into the *second* ground of objection, because we find on going over the papers of the case that the Principal Sudder Ameen has found, as a fact on evidence, that the special appellant is not, and has not been for many years, in possession of the land he claims under an allegation of possession, and a prayer for confirmation of it.

It has been ruled by many decisions of the High Court that a plaintiff, suing for confirmation of possession, must, as a first step, prove that he is in actual *bond-fide* possession of the land over which he wishes to have his title confirmed; and, as the Lower Appellate Court has found, as a fact, that the special appellant has no such possession, we dismiss the appeal with costs.

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The 18th December 1866.

*Present:*

The Hon'ble L. S. Jackson and Shumbhoonath Pundit, *Judges.*

**Sale of Putnee—Notice.**

Case No. 1814 of 1866.

*Special Appeal from a decision passed by Mr. G. G. Morris, Officiating Additional Judge of Jessore, dated the 25th April 1866, affirming a decision passed by Pundit Tarakant Bidyasagur, Principal Sudder Ameen of that District, dated the 31st July 1865.*

Omul Chunder Chaklaynuvis (Defendant), *Appellant,*

*versus*

Dobeeooddeen and others (Plaintiffs), and others (Defendants), *Respondents.*

*Baboo Romesh Chunder Mitter* for Appellant.

*Baboos Greeja Sunkur Mozoomdar* and *Kishen Kishore Ghose* for Respondents.

Pleas set up in former suits for rent brought against a vendor by persons who have omitted to protect their interests by having their names inserted in the putnee pottah do not constitute notice of their title to an innocent purchaser for valuable consideration.

*Jackson, J.*—It appears to me that in this case the decision of the Lower Appellate Court ought to be reversed. The defendant appears to me to be clearly in the position of an innocent purchaser for valuable consideration without any notice of the title of the plaintiffs. It is idle to say that pleas set up in suits for rent antecedent to this purchase will avail the plaintiffs as constituting notice to the purchaser. Those suits were brought against the defendant's vendor alone, and, as far as we see, decreed against him alone, and we also find him alone dealing with this very putnee by way of mortgage. The plaintiffs, if they had any real interest in this property, were bound to protect it by having their names inserted in the putnee pottah, or otherwise in such a manner that an innocent purchaser should not be deceived.

It seems to me, therefore, that the decision must be set aside with costs.

*Shumbhoonath Pundit, J.*—I agree. The parties have themselves to blame in allowing the property to be mortgaged on one occasion only by Hubeeboollah in his own name, without any mention of their interest or names. Had they joined in that transaction, they could have procured their names subsequently registered in the zemindar's sheristah, because the zemindar, on several occasions, had sued only Hybutoollah; and they could moreover have taken other precautions to protect their interests. They cannot be allowed to deal with their property so as to mislead an innocent purchaser, and then to turn round against him and plead their own omissions and negligence.

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The 18th December 1866.

*Present:*

The Hon'ble C. B. Trevor and W. S. Seton-Karr, *Judges.*

**Limitation—Suit to enforce lien on debtor's property.**

Cases Nos. 130, 192, 205, and 227 of 1866.

*Regular Appeals from a decision passed by the Judge of Shahabad, dated the 2nd April 1866.*

Seetul Singh and others (Defendants), *Appellants,*

*versus*

Baboo Sooruj Buksh Singh (Plaintiff), *Respondent.*

*Mr. C. Gregory* and *Baboo Mohesh Chunder Chowdhry* for Appellants.

*Baboos Dwarkanath Mitter, Onookool Chunder Mookerjee,* and *Sreenath Doss* for Respondent.

If a party has a lien on certain property as security for a loan, it is incumbent upon him to obtain a decree

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both for the money and for the realization of it by the sale of the property, within 6 years from the date on which the money became due under a registered bond.

*Trevor, J.*—PLAINTIFF in this case sues defendant No. 1, Reet Bhunjun Singh, to enforce his lien upon two properties, Mouzahs Teek Pokhur and Bughee, under a bond dated 21st October 1858, and he sues the other defendants, inasmuch as they are present possessors of the properties over which he holds the lien. Plaintiff alleges that the defendant No. 1, Reet Bhunjun Singh, borrowed from him 13,000 rupees, and executed a bond for the same, in which he pledged two properties, Teek Pokhur and Bughee, as security for the re-payment of the loan; that the sum lent was re-payable one year after the execution of the bond, *viz.*, on the 21st October 1859; that he, plaintiff, sued and obtained a simple money-decree on the 14th February 1860; that, in execution of this decree, Teek Pokhur was advertised for sale, when defendants Nos. 2, 3, and 4, Kazee Zohoor Abun, Byjnath Sahoo, and Sookhanund, the purchasers of Mehal Ultcar, Pergunnah Bajpore, intervened, stating that the above village was included within the property purchased by them; and that the Court, on this, rejected his application for sale, on the ground that the decree said nothing regarding the sale of the property; that subsequently the villages pledged to him were sold in execution of different decrees to various parties; but, as his lien is prior in point of time to these transactions, they all took place subject to his lien. He, therefore, sues to have the same declared, and the properties sold to realize the debt due to him.

The defendants, in their several answers, plead that plaintiff's suit is untenable, either on the ground of limitation or on other legal grounds, and assert that their different titles are good and indefeasible.

The Judge, in his judgment, remarks that the case turns upon a point of law, there being no dispute about the facts. Defendant's contention is—

I. That the suit is barred under Sections 3 and 7 of Act VIII. of 1859.

II. That the plaintiff, by proceeding against the property of a judgment-debtor, other than that pledged in his bond, has thrown up his lien on the property pledged; and

III. That, one of the villages pledged having been sold at the instance of plaintiff in an execution-case, he cannot sue that it may be re-sold.

The plaintiff urges that his bond is of a prior date, that the titles of the defendants are of a subsequent date, and that, consequently, his lien overrides their rights.

On the two first issues of law raised by the defendants, the Judge found in plaintiff's favor, remarking that the plea that the action cannot be sustained is not good in law; that the Full Bench ruling, 14th December 1864, reported in Volume 1, Weekly Reporter, page 315, has determined that, when a person to whom property is pledged from a debt has obtained a simple money-decree against his debtor, he is not entitled to execute his decree against the property in the hands of a subsequent purchaser, but may enforce his lien by separate action against the party in possession of the property pledged to him.

On the substantial issue in the case, the Judge found that the plaintiff was clearly entitled to a decree, on the ground that his lien on the properties was anterior to the titles acquired by the different defendants; that, consequently, it overrides the right of the defendants. He, therefore, gave plaintiff a decree with costs against all the defendants, declaring the properties liable to sale in execution of his decree.

From this decree, four appeals have now been preferred to this Court by all the defendants, except the debtor, Reet Bhunjun, and it has simply been contended before us by the appellants that, though, doubtless, as ruled by the Judge, the plaintiff was competent to sue to enforce his lien on the properties pledged to him as collateral security for the debt due by Reet Bhunjun Singh, notwithstanding his previous suit, simply for the money lent by him, still, under the precedents of this Court, the plaintiff was bound to bring his second action within six years from the accruing of his cause of action, *viz.*, 21st October 1859; that the present suit, however, was instituted on the 12th March 1866, more than six years after his cause of action; that consequently he is out of Court under the Statute of Limitation. On the part of the plaintiff, it was urged that, if the limitation in a suit like the present be six years, then the plaintiff is within time, his cause of action having accrued, not on the date on which the debt became payable, but when his claim to have the property sold

was rejected by the Court below; that, however, six years is not the proper term for the limitation of a suit like the present; that the present suit is one for the recovery of an interest in land, or for the declaration of an interest in the property of the debtor to the amount of the debt due; that, under Clause 12, Section 1, Act XIV. of 1859, the period of 12 years is allowed from the time the cause of action arose for bringing it; that, consequently, plaintiff is fully within time, and the decision of the Lower Court should be affirmed.

The first point which we have to determine in this case is whether limitation applies or not. This point was raised, we observe, by one of the defendants below, but seems to have been overlooked by the Lower Court. We think that the contentions of the plaintiff, respondent, are not tenable. There can be no question that, if a person holds a bond for money lent, payable at a certain period, with a lien on certain property as collateral security for the money lent, that deed in its entirety forms one and only one transaction, and, on the failure of the borrower to pay the sum borrowed, the cause of action accrues to the lender, and he must, within the period allowed by law, sue, not only for his money, but for the realization of it by the sale of the property pledged to him. On this point we agree entirely with the principle laid down by a Division Bench of this Court* to the effect that, if a party has a lien on certain property as security for a loan, it is incumbent upon him to obtain both a decree for the money and for the realization of it by the sale of the property pledged within three years from the date on which the money became due under an unregistered bond; and, if he does not obtain both within that time, he is out of Court under the Statute of Limitations. In this case we have a registered bond, and the period of limitation is six years; but, in all other particulars, the precedent applies, and, as before observed, it has our concurrence. On this view, as plaintiff's case is admittedly brought after six years from the date on which the debt became payable, and the lien became enforceable, he is out of Court.

* Poreshnath Mitter, Plaintiff, Appellant,
*versus*
Shaikh Bundah Ali and others, Defendants, Respondents, page 162, Civil Rulings, Volume 6, Weekly Reporter.

But it has been contended before us that a suit like the present to enforce a lien on certain property pledged as security for a debt is a suit for the recovery of an interest in immoveable property to which no other provision of Act XIV. of 1859 applies; that, consequently, the period of limitation in it is 12 years from the time at which the cause of action arose under Clause 12, Section 1 of the Act just cited. But we cannot assent to this contention, and think that, having regard both to the wording of the law itself and to reason, it is not tenable. In a transaction like the present, the collateral security, the lien on the debtor's property, is in no sense an interest for the recovery of which a plaintiff can sue. The words of the law refers, it appears to us, to an interest residing of right in the party suing for which he may sue. In a suit like that before us, he has simply a lien on the property for the amount of his debt; but he has no interest of right in the property, and in this view the Section of the law cited does not apply. But, again, the security is a mere incident to the bond. The debt acknowledged in the deed signed by the debtor and to be payable at a certain time is the principal, and the collateral security an incident in the transaction; it follows on legal principle that the latter must follow the former, and not the reverse; in other words, the incident must be sued for within the same time with the principal, or the collateral security be declared enforceable against property pledged within the same time that the debt can be declared due by a Court of Justice. Moreover, looking to the argument drawn from inconvenience, the interpretation attempted to be set upon Clause 12, Section 1 of Act XIV. of 1859, is inadmissible, for, if it were allowed, a suit for a debt due would have to be instituted within six years from the date on which the cause of action arose; whereas, for the enforcement of the security for that debt, twelve years would be the period within which a suit might be brought in the Civil Court, a result so inconvenient, not to say absurd, as at once to shut out an interpretation which leads to it.

For the above reasons, then, we are clearly of opinion that the plaintiff is out of Court under the Statute of Limitation, more than 6 years having elapsed since the time at which his cause of action arose up to the date of the institution of the present suit.

We, therefore, decree the appeals of the defendants, and dismiss the plaintiff's suit against them, with costs, thus reversing the orders of the Court below in his favor.

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The 18th December 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Putnee Sale (Reversal of).**

Case No. 1902 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 15th April 1866, reversing a decision passed by the Moonsiff of that District, dated the 7th September 1865.*

Shaikh Abdoollah (Defendant), *Appellant,*

*versus*

Oomed Ali and others (Plaintiffs), and others (Defendants), *Respondents.*

*Baboos Nil Madhub Bose* and *Roopnath Banerjee* for Appellant.

*Moulvie Syed Murhumut Hossein* for Respondents.

The decree of a Court, reversing a putnee-sale on the ground of non-service of due legal notice, should make allusion to the return of the purchase-money, and also decide whether the purchaser is entitled to obtain further damages and costs from the zemindar who had caused the sale.

*Shumbhoonath Pundit, J.*—THE plea of the special appellant, that the putneedar, defendant (present here as respondent), had no right to sue for the reversal of the sale, because he failed to prove his allegation that he had before the sale paid his rents to the zemindar, is not, in our opinion, valid.

The putnee-sale in which the special appellant purchased is set aside by the Lower Appellate Court, on proof of its being held without due service of the notice required by law. Thus, as regards the putneedar, the appeal of the special appellant is dismissed with costs.

The special appellant, however, complains that the Lower Appellate Court, when passing judgment in reversal of the sale, should have, as required by Clause I, Section 14, Regulation VIII. of 1819, taken care to provide for compensating him, and should have taken into consideration whether the special appellant was entitled to obtain further damages and costs against the zemindar who had caused the sale.

As we find that the decree passed in this case makes no allusion to the return of the purchase-money of the special appellant, and as it does not decide whether the special appellant is entitled to obtain any, and, if any, what damages from the zemindar, and as the Lower Appellate Court gives no reasons for saddling the special appellant with the putneedar's costs of this suit, or for refusing the special appellant his costs against the zemindar, we remand the case to the Lower Appellate Court, that it may take these matters into its consideration, and pass such a decision regarding them as it may think just and proper.

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The 19th December 1866.

*Present:*

The Hon'ble H. V. Bayley and F. A. Glover, *Judges.*

**Limitation—Fraudulent deed of sale—Minor.**

Case No. 214 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 18th June 1866, reversing a decision passed by the Moonsiff of that District, dated the 29th January 1866.*

Kulyan Churn Mookerjee (Defendant), *Appellant,*

*versus*

Bipro Churn Purail (Plaintiff), *Respondent.*

*Baboos Issur Chunder Chuckerbutty* and *Umurnath Bose* for Appellant.

*Baboo Onookool Chunder Mookerjee* for Respondent.

Where a deed of sale is found to be a forgery executed in fraud of a person during his minority, the date from which to compute his knowledge of the fraud practised, on him, in the absence of proof that he had before majority the knowledge required by Section 10, Act XIV. of 1859, is the date on which he attained majority.

*Glover, J.*—THIS was a suit to recover possession of certain lands on the allegation that defendant had, during plaintiff's minority, forged a deed of sale purporting to have been executed by the plaintiff's father, and so had taken and retained fraudulent possession of his ancestral property.

The answer was that the deed of sale executed in 1259 B. S. by the plaintiff's father to defendant was genuine, and that in any case the plaintiff had been out of possession for more than 12 years, and was barred by limitation under Section 11 of Act XIV. of 1859.

The Court of first instance dismissed the suit, both on the issue of limitation and on the merits.

But the Principal Sudder Ameen on appeal decreed the claim, on the ground that the kobalah was a forgery; and that, as

the plaintiff brought his suit within 12 years of his attaining to a knowledge of the fraud practised against him, he was not barred by Act XIV. of 1859.

It is now argued in special appeal before us that, as no sufficiently distinct allegation of fraud is made by the plaintiff, and no precise date fixed on which the fraud was discovered, the Principal Sudder Ameen was wrong in arbitrarily fixing such date and taking the case out of the purview of Section 11 of Act XIV. of 1859, under which it properly came.

Further, special appellant contends that, admitting himself to be bound by the Lower Appellate Court's finding of fact that the kobalah is a forgery, it is clear that the special respondent knew of the fraud so far back as 1260 B. S.; and that, as the cause of action accrued whilst he was under a legal disability, he would be, under Section 11 of the Act, entitled to three years' grace only after the date of his majority; and that, as this suit was brought at least a month beyond that time, plaintiff must be barred.

This argument, we observe, would have weight if we had to look only to the terms of Section 11; but that Section applies only to cases where a suitor has known all along of his rights, but has neglected to pursue them, either through a legally appointed guardian during his minority, or in his own person, within three years of his attaining majority. The case is distinct, however, where fraud is established. Then Section 10 applies, and not Section 11; and, as the Principal Sudder Ameen has held the kobalah to be a forgery executed in fraud of the special respondent during the time of his minority, the only point for consideration is the date from which to compute the special respondent's knowledge of the fraud practised on him.

It is urged by the special appellant that the special respondent's recitals in his plaint show him to have had the requisite knowledge so far back as the year 1261 B. S.; but we see no reason for supposing this to be the case. The document in question merely sets forth the occurrences that took place during his minority (which he might very naturally have become acquainted with long afterwards), and the part taken by his mother (who died whilst special respondent was still under age) to counteract the machinations of the special appellant. There is no proof that he had before majority the knowledge required by Section 10; and this being wanting, and special respondent being a minor at the time and with no guardian living, the legal presumption is, as it ought to be in such cases in his favor, that he was ignorant of what was going on, and did not acquire the necessary information until he arrived at majority in the year 1268 B. S. But, even if the *onus* of showing when he obtained the requisite knowledge be thrown heavily on the special respondent, it is impossible to date it further back than his mother's protest in 1261 B. S., when the special respondent was a boy of some 7 or 8 years of age, and, even according to that calculation, this suit brought in 1865 is still within 12 years, and consequently in time.

We, therefore, dismiss this special appeal with costs.

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The 19th December 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Jurisdiction—Specific performance of contract.**

Case No. 1966 of 1866.

*Special Appeal from a decision passed by the Judge of Sylhet, dated the 17th May 1866, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 24th January 1866.*

Nilkanth Surmah and others (Plaintiffs). *Appellants,*

*versus*

Bishen Bashee and others (Defendants), *Respondents.*

*Babao Grish Chunder Ghose* for Appellants.

*Baboo Nil Madhub Bose* for Respondents.

A suit (valued at 500 rupees) for specific performance of a contract is not cognizable by a Small Cause Court. Consequently a special appeal will lie in such a case.

*Shumbhoonath Pundit, J.*—The respondent contends preliminarily that, as the suit is valued only at 500 rupees, there cannot be, under Section 27 of Act XXIII. of 1861, any special appeal to this Court; but, as this case is for a specific performance of a contract, it is clear it is not a suit which, under Section 6 of Act XI. of 1865, could be tried by a Small Cause Court, we overrule this objection.

The Lower Appellate Court, without trying the genuineness of the contract upon which special appellant has sued, and which defend-

ant denied, decreed the appeal of the defendants, respondents, on the ground that the latter were not bound to perform work according to a contract which, in the opinion of the Lower Appellate Court, was *ab initio* illegal, as it bound, not only those who had signed the deed, but also their heirs, and also others who were no parties to it.

We do not see that because special appellant has no right to enforce the contract against those who are not actually parties to it, therefore the special appellant cannot enforce the same against those who executed it, received money as consideration, and worked under the provisions of the deed for three years on receipt of proper wages.

The Lower Appellate Court remarks that the special appellant has a right to send for the defendants, but does not bind him to find work for them. If a case arises in which this question is to be tried, it is clear that Courts will not refuse to decide in favor of the defendants that they are entitled to obtain proper wages when they may be sent for, and no work be provided for them.

As the Lower Appellate Court has not tried the case in the proper light, we remand the case to it to re-try it, that is, to try whether the deed was ever executed, and whether the consideration was received by the defendants; and, if so, to decree that they are liable to complete the contract, or to release themselves from all liability under it by returning the bonus received by them, or any portion of it which may not have been duly credited to them towards payment of their former wages, if any such deduction was made with interest at 12 per cent. from the date that the defendant refused to work.

We, accordingly, remand the case to be re-tried with reference to the above remarks.

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The 19th December 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Sale by Hindoo Widow—Evidence of Necessity.**

Case No. 1691 of 1866.

*Special Appeal from a decision passed by the Judge of Hooghly, dated the 28th March 1866, modifying a decision passed by the Second Principal Sudder Ameen of that District, dated the 25th June 1864.*

Nund Coomar Mundul and others (Defendants), *Appellants,*

*versus*

Gayetra Dossee and others (Plaintiffs), and others (Defendants), *Respondents.*

*Baboo Bama Churn Banerjee* for Appellants.

*Baboos Romanath Bose* and *Mohendro Lal Shome* for Respondents.

In the case of an alienation by a Hindoo widow, the mere fact that a sale *istahar* is proved to have been issued about the time of the transfer is not evidence of necessity.

*Macpherson, J.*—In this case the Lower Court finds as a fact that no necessity for the alienation by the widow is proved, and also finds as a fact that the appellants (or those through whom they claim) never made any enquiry. The mere fact that a sale-istahar is proved to have been issued about the time of the transfer, is no sort of evidence of any "necessity." In the absence of any necessity, and of any enquiry or care on the part of those who dealt with the widow, they cannot benefit by the rule as laid down in Hunooman Pershad Pandey's case.

The appeal is dismissed with costs.

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The 19th December 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**False deed—Appeal.**

Case No. 1971 of 1866.

*Special Appeal from a decision passed by the Additional Principal Sudder Ameen of Chittagong, dated the 17th April 1866, reversing a decision passed by the Moonsiff of that District, dated the 9th March 1865.*

Sufur Ali Sowdagur (Plaintiff), *Appellant,*

*versus*

Buseeroolla Sowdagur (Defendant), *Respondent.*

*Baboo Nursing Chunder Mitter* for Appellant.

*Baboos Nil Madhub Bose* and *Roopnath Banerjee* for Respondent.

Where, on the appeal of one of several judgment-debtors, the bond on which the plaintiff sued is found to be false and not binding at all, all the other parties to the bond are also released, notwithstanding that they did not appeal.

*Bayley, J.*—THE special appeal is that, as there was a judgment-debtor who did not appeal, the Lower Appellate Court was wrong in not giving to plaintiff a decree as against that party not appealing.

We think this plea is untenable.

The purchaser of the judgment-debt was the party who alone appealed. The contention before the Lower Courts was whether the bond of mortgage, on which plaintiff sued, could bind those who executed that deed, and those who by purchase or otherwise stood in their place.

The deed is now found as a fact to be false. We think, then, that in this case a decree in favor of the party, appealing to the effect that the bond is not a binding bond at all, must release the other parties to the bond; for no bond denied and found to be a false bond could bind him.

We, accordingly, dismiss this appeal with costs.

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The 20th December 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

**Examination of Witnesses—Separate Costs—Local Investigation (under Section 186, Act VIII. of 1859.**

Case No. 2089 of 1866.

*Special Appeal from a decision passed by Mr. F. C. Fowle. Judge of Rungpore, dated the 28th May 1866, affirming a decision passed by Baboo Russick Lall Bose, Officiating Principal Sudder Ameen of that District, dated the 6th March 1866.*

Nilkanth Surmah and others (Plaintiffs), *Appellants,*

*versus*

Soosela Debia and others (Defendants), *Respondents.*

*Baboos Kissen Dyal Roy* and *Obhoy Churn Bose* for Appellants.

*Baboos Greeja Sunker Mozoomdar* and *Bhuggobutty Churn Ghose* for Respondents.

**As a general rule, all the witnesses brought forward by a party ought to be examined. But, when an objection is made in special appeal that the Judge below has omitted to examine certain witnesses, it ought to be shown that the evidence of those witnesses would have been material to the case.**

**Under a charge against several defendants for having jointly misappropriated property, one defendant is not bound to entrust his defence to the Counsel of the others, but each has a right to defend himself, and is entitled to separate costs if successful.**

**A local investigation under Section 180, Act VIII. of 1859, should only be ordered for the purpose of elucidating matters which cannot conveniently be gone into by the Court itself (*Jackson, J.*).**

*Peacock, C. J.*—As to the first ground of appeal, the Principal Sudder Ameen says it was unnecessary to overload the record or delay the case for the examination of unimportant witnesses. One ground of objection is, that he ought to have examined all the plaintiff's witnesses. But the pleader is unable to state what any one of these witnesses was likely to have proved, or that the evidence of any one of them was likely to have influenced the Judge to come to a different conclusion from what he came to. It does not appear that the fourth ground of appeal to the Judge, which is similar to that now urged before us, was pressed or relied upon in the Lower Appellate Court. That being so, I think it unnecessary to remand the case for the purpose of the Judge deciding upon that objection.

As a general rule, I am of opinion that all the witnesses brought forward by a party ought to be examined. But, when an objection is made before us in special appeal that the Judge below has omitted to examine certain witnesses, it ought to be shown to us that the evidence of those witnesses would have been material to the case.

With regard to the *second* objection that the Judge failed to notice the Ameen's report, it appears to me that the Ameen's report was very unimportant; and that, if the Judge had referred to it, it was not such as ought to have influenced his decision in the case.

As to the *third* objection with regard to costs, this was a charge against several defendants, charging them jointly with misappropriating property. One defendant was not bound to entrust his defence to the Counsel of the others, but each had a right to defend himself. Under a charge against several defendants for having jointly misappropriated property, one of them might have been held liable to damages, although the others might have obtained a decree in their favor. I think, therefore, that the Judge was right in awarding separate costs to the several defendants.

The decision of the Judge is affirmed with costs.

*Jackson, J.*—I entirely concur. I only wish to add that this does not appear to me to

be a case in which it was consistent with the exercise of sound discretion to order a local investigation. A local investigation under Section 180 of the Code of Civil Procedure should only be ordered for the purpose of elucidating matters which cannot conveniently be gone into by the Court itself. Where the facts are such as can be conveniently ascertained from witnesses in open Court, it is far better and more in consonance with the Procedure Code that they should be so examined.

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The 20th December 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

**Jurisdiction—Hindoos—Custom (as to dinners).**

Case No. 1356 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 21st February 1866, reversing a decision passed by the Moonsiff of Sundeep, dated the 14th June 1865.*

Joy Chunder Sirdar and another (Plaintiffs), *Appellants,*

*versus*

Ramchurn and others (Defendants), *Respondents.*

*Baboo Nullit Chunder Sein* for Appellants.

*Baboo Sreenath Banerjee* for Respondents.

Civil Courts cannot compel Hindoos, against their will, to ask other Hindoos to their houses or their entertainments.

*Seton-Karr, J.*—THERE is no good ground of special appeal. The Principal Sudder Ameen finds clearly that, though the plaintiff is admitted to the dinners of the fraternity, the evidence does not show that all the members of the four fraternities on the island of Sundeep are invited to the dinners. On the evidence and facts, there is nothing illegal in the decision of the Principal Sudder Ameen.

But we go further, and do not think that this case is one cognizable by the Civil Courts at all. The case quoted from page 535 of the S. D. A. Decisions for 1859 does not go so far as the case before us. It rules that suits may be, and have been, instituted for restoration to caste or to membership of religious associations. But it nowhere rules that Civil Courts can compel Hindoos, against their will, to ask other Hindoos to their houses or their entertainments. Neither does the case come under the general description of caste provided for in Section 8, Regulation III. of 1793.

We think that the action was untenable, and that the plaintiff ought to have been put out of Court at once. As it is, we have only to dismiss the special appeal with costs.

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The 21st December 1866.

*Present:*

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

**Jurisdiction (of Small Cause Court)—Suit for Contribution (on account of Government Revenue paid by one partner for another)—Special Appeal.**

Case No. 2058 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Furreedpore, in Dacca, dated the 17th May 1866, reversing a decision passed by the Moonsiff of Bhangah, dated the 29th December 1865.*

Ram Money Dossia (one of the Defendants), *Appellant,*

*versus*

Pearee Mohun Mozoomdar (Plaintiff) and others (Defendants), *Respondents.*

*Baboos Issur Chunder Chuckerbutty* and *Bungshee Dhur Sein* for Appellant.

No one for Respondents.

A claim for money below 500 rupees paid as revenue by one partner in an estate on account of another, in order to save the whole estate from sale, is due under an implied contract between them, and therefore is cognizable by a Small Cause Court. No special appeal lies in such a case under Section 27, Act XXIII. of 1861.

*Trevor, J.*—PLAINTIFF in this case sued defendant to recover from him Rs. 129-6-6. He alleges that he and the defendant are co-parceners in an estate, that he paid the revenue on account of defendant to the amount sued for, and he therefore sues him for a contribution.

The defendant admits that plaintiff paid the revenue on her behalf, but asserts that the money had been previously supplied to the plaintiff by her for the purpose of being so paid in.

The first Court dismissed the plaintiff's suit. On appeal the second Court decreed the same.

Defendant now appeals specially. But, before entering upon his special appeal, we have to determine whether this suit, which is for a demand under 500 rupees, is of the nature of those cognizable by Small Cause Courts, for, if it be, this Court is without jurisdiction in special appeal.

The suit is for a sum of money paid as revenue by one partner in an estate on account of another. Now, we think there can be no doubt that one co-sharer is entitled to recover from his co-sharers any portion of the total jumma which he was obliged to pay for them to Government, in order to save the whole estate from sale; and that this claim for money due under an implied contract is cognizable by the Court of Small Causes. We are, therefore, under Section 27 of Act XXIII. of 1861 altogether without jurisdiction. The special appeal is consequently dismissed.

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The 21st December 1866.

*Present:*

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

**Ghatwalee lands (included in a decennially-settled estate)—Suit for khas possession.**

Case No. 215 of 1866.

*Regular Appeal from a decision passed by the Principal Sudder Ameen of Maunbhoom, dated the 23rd April 1866.*

Gudadhur Banerjee and others (some of the Defendants), *Appellants,*

*versus*

The Government ((Plaintiff) and another (Defendant), *Respondents.*

*Baboos Dwarkanath Mitter* and *Bungshee Dhur Sein* for Appellants.

*Baboos Kishen Kishore Ghose* and *Jugodanund Mookerjee* for Respondents.

Suit laid at Rupees 6,500.

A suit for khas possession by Government will not lie in respect of ghatwalee lands admittedly included in a decennially-settled estate.

*Trevor, J.*—THIS was a suit instituted by Government for the possession of the village of Kasijorah.

The plaintiff, Government, alleges that the whole of Mouzah Kasijorah in Turuf Jhoopha, Pergunnah Chattra, is the Government ghatwallee property, and had been held by the ghatwals in ghatwalee right down to the year 1237, in the course of which year the ancestor of the principal defendant, *viz.*, the zemindar Buloram Narain Deo, deceased, and Lal Mohun Banerjee, dispossessed the ghatwals under color of a decree secured in the civil suit collusively brought by them: that the ghatwals subsequently sued to recover possession of their land, but their suit was declared to be inadmissible. Hence the present suit of Government.

The defendants, Gudadhur Banerjee and others, plead that the Mouzah Kasijorah is mâl property belonging to the zemindar of Pergunnah Chattra, who granted a putnee talook in 1237 or 1830 to the putneedar defendant; that they have ever been in possession of it through their lessee, and that Government has no right in the village. The putneedar corroborates the zemindar's statement.

The mokurrureedar under the putneedar, Moodoosoodun Chatterjee, in his written statement, asserts his rights to the village.

The ghatwals, Khetoo Ram and Kalee Churn Roy, defendants, put in a written statement, alleging that the whole of Mouzah Kasijorah is the Government ghatwalee property, and has been held by them since the time of their ancestor; that some years ago, Lal Mohun Banerjee, since deceased, having taken a putnee from the Rajah, dispossessed them; that they took steps to regain possession, but, through the fraud of the Banerjee, who concealed the issumnovisee papers of 1808, they did not succeed. They, therefore, pray the Court to maintain the Government right.

The Lower Court overruled the plea of limitation, and was of opinion that the ghatwalee tenure of Kasijorah was not included within the Decennial Settlement of Pergunnah Chattra; that, consequently, defendants cannot have any title to it, but that this is

clearly proved to be with the plaintiff. It, therefore, decreed to plaintiff possession of Kasijorah as a ghatwallee tenure with costs and interest at 12 per cent. per annum.

An appeal has now been preferred to this Court by the putneedars, defendants below, and it is urged by their pleader that, as the whole of Pergunnah Chattra within which the village of Kasijorah is situated was admittedly included within the Decennial Settlement, Government can have no right to the village; and, though it may have a right to certain services by ghatwals holding all or particular lands in the village, and can sue to have those services performed, and for a declaration of its right, either to nominate itself immediately, or in default of nomination within a reasonable time by the zemindar to nominate a ghatwal to those lands for the performance of those services. it can never be entitled to khas possession of the lands of a village admittedly included within the decennially-settled estate which he holds in putnee; that, consequently, the plaintiff's present suit is not maintainable; moreover, that, by this suit being brought in the present mode, various questions as to the exact nature of the Government right, and whether, when they are determined, they are governed by the limitation prescribed in Regulation II. of 1805, or otherwise, are shut out; that, consequently, the present suit should be dismissed.

It is contended on the part of Government that, although the suit is not correctly brought, yet the Court can allow the Government to amend its plaint, and can do justice between the parties in this suit.

There is no question that in this case the suit is wrongly laid, and that in the Lower Court in consequence justice has miscarried, for the Principal Sudder Ameen has ruled that the ghatwalee village of Kasijorah is not included in the settlement of Pergunnah Chattra, an allegation which is not suggested by the Government pleader to us; in fact, the proof on behalf of Government, to show that the village of Kasijorah is a ghatwalee village, shows also that it pays a quit-rent to the zemindar, thus conclusively negativing any plea of this nature, even had it been raised. The result is, that the decision of the Principal Sudder Ameen in Government's favor for possession as owner of the ghatwalee village of Kasijorah cannot stand; but it remains for us to consider whether justice can be done between the parties in the present case or not. We think that there is great reason in the contention of the pleader for the appellant, and that, by its present form of action, plaintiff has shut out pleas both in bar and pleas going to the merits, which it is of the greatest importance to have fully and finally determined. If the Government claim is only a claim to service from the ghatwals, then how that claim can be enforced as against the zemindar or his representative, the ghatwal being a party to the suit, and within what time are points on which we think a decision by two Courts should be had? Inasmuch, then, as the Government's present suit for khas possession is admittedly erroneous, and as full justice cannot be done between the parties in this suit, we dismiss the present claim of Government with costs.

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The 22nd December 1866.

*Present:*

The Honble J. P. Norman and W. S. Seton-Karr, *Judges.*

**Recovery of possession—Limitation—Onus probandi.**

Case No. 1393 of 1866.

*Special Appeal from a decision passed by the Officiating Judge of Tipperah, dated the 16th February 1866, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 16th June 1865.*

Jugodumba Chowdhrain and others (Defendants), *Appellants,*

*versus*

Ram Chunder Deo Bukshee and others (Plaintiffs), and others (Defendants), *Respondents.*

*Baboos Onookool Chunder Mookerjee* and *Romesh Chunder Mitter* for Appellants.

*Baboo Sreenath Doss* for Respondents.

In a suit to recover possession of property of which the plaintiff alleges he has been illegally dispossessed by the defendant, in which the defendant pleads limitation,

the *onus* is on the plaintiff to prove that the cause of action accrued to him on a dispossession within 12 years of the commencement of suit.

*Norman, J.*—It is quite clear that this case must be remanded. The plaintiff brought his suit some time in September 1864, alleging that he had been dispossessed of different portions of the property in suit in the years 1853, 1857, and 1858. The defendant contends that the suit is barred by limitation.

In trying the issue on this point, the Judge finds that, in a proceeding by the Collector upon a butwarah in 1851, the Collector found that the plaintiff was in possession.

It is clear that the dispossession, according to the plaintiff's own story, took place some time between 1851 and 1853 or the subsequent years. Upon his evidence, the plaintiff appears to have left it quite doubtful, or, at least, the Judge has not determined whether the dispossession took place subsequent to 1851 and within 12 years from the date of suit, so as to give plaintiff a right of action.

The case must be remanded for trial to the Judge, who will remember that the *onus* lies on the plaintiff, who must prove satisfactorily that the cause of action accrued to him on a dispossession within 12 years of the commencement of suit.

The law on the subject is clearly stated in Volume VIII. of Moore's Indian Appeals, page 199, in the case of Moharajah Koonwar Baboo Nitrasur Singh against Baboo Nund Lal Singh.

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The 22nd December 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

**Limitation—Suit on account.**

Case No. 1300 of 1866.

*Special Appeal from a decision passed by the Judge of the Court of Small Causes, exercising the powers of a Principal Sudder Ameen of Dacca, dated the 31st January 1866, modifying a decision passed by the Sudder Ameen of that District, dated the 26th July 1865.*

Nobin Chunder Sahoo and another (Plaintiffs), *Appellants,*

*versus*

Suroop Chunder Dass and others (Defendants), *Respondents.*

*Baboo Otool Chunder Mookerjee* for Appellants.

*Mr. R. T. Allan* and *Baboo Dwarkanath Sein* for Respondents.

When the cause of action as laid in the plaint arises upon a statement and settlement of accounts, the suit must be brought within 3 years, a suit on account stated being an action upon a breach of contract under Clause 9, Section 1, Act XIV. of 1859.

*Norman, J.*—This is a suit to recover the balance of a partnership-account. It appears that balances were struck at the end of the years 1266, 1267, and 1268. The present suit was instituted in the year 1270. The Principal Sudder Ameen held that the suit, so far as it relates to the balances for the years 1266 and 1267, is barred by limitation, and from that decision the plaintiff appeals.

We are of opinion that the decision of the Principal Sudder Ameen is perfectly correct, and it is in accordance with two decisions of this Court on Small Cause Court References, one passed on the 8th of September 1865 (Doyle *versus* Ahun Biswas), and the other on the 26th May 1865 (Doyal *versus* Khooseeal Khan). These cases show that, when the cause of action, as laid in the plaint, arises upon a statement and settlement of accounts, the suit must be brought within three years, a suit on account stated being an action upon a breach of contract under Clause 9, Section 1 of Act XIV. of 1859.

We do not, and cannot, enter into the question, as to what would have been the period of limitation in the present case had the plaint been framed, as a general prayer, for a partnership-account. That is not the nature of the suit before us. We dismiss the appeal with costs and interest.

The 12th June 1866.

*Present:*

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

**Appeal—Section 77, Act X. of 1859.**

Case No. 418 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 21st November 1865, reversing a decision passed by the Deputy Collector of that District, dated the 27th March 1865.*

Moha Moya Chowdhrain (one of the Defendants), *Appellant,*

*versus*

Ramnath Chowdry and others (Plaintiffs) and others (Defendants), *Respondents.*

*Baboo Romanath Bose* for Appellant.

*Baboos Ashootosh Dhur* and *Tarucknath Sein* for Respondents.

**An appeal lies to the Judge in a suit for rent below 100 rupees, in which a third party intervenes under Section 77, Act X. of 1859, if the Deputy Collector does not confine his enquiries to the mere fact of the receipt and enjoyment of rent, but enters upon the consideration of, and decides, various questions of title.**

It is contended in special appeal that the Lower Court had no jurisdiction to deal with the case (which was one falling under Section 77 of Act X. of 1859). The appellant urges that, as the suit was for a sum less than Rupees 100, there was no appeal to the Judge; and he relies on a Full Bench decision in Syud Hameedooddeen *versus* Syud Razeeoodeen Ahmed (3 Weekly Reporter, Act X. Rulings, page 21). In that case, it was decided that, when the only matter enquired into is the fact of the receipt and enjoyment of rent up to the institution of the suit, there is no appeal to the Judge. (*See* also Chundro Kalla Dossee *versus* Dhookeet Ram Chung, 5 Weekly Reporter, Act X. Rulings, page 18.) But in a variety of subsequent cases (which do not clash in any way with the decision of the Full Bench), it has been held by different Division Courts that, when the Court of first instance does not confine itself to the mere question of fact as to the receipt and enjoyment of rent, but goes into questions of title and disposes of them, then an appeal does lie to the Judge. Bibee Jumeerun *versus* Bhichuk Thakoor, 3 Weekly Reporter (Act X.) 27; Punchanun Koonwur *versus* Luckhee Preah Debia, 3 Weekly Reporter (Act X.) 154; Noor Mahomed *versus* Khateeja Bewa, 4 Weekly Reporter (Act X.) 34; Syud Jeshan Hossein *versus* Narain Doss, 5 Weekly Reporter (Act X.) 56. *See* also Futeek Chunder Gooho *versus* Mungul, 4 Weekly Reporter (Act X.) 40.

Following the latter class of decisions, we dismiss this appeal with costs, because the case is one in which the Deputy Collector did not confine his enquiries to the mere fact of the receipt and enjoyment of rent, but entered upon the consideration of, and decided, various questions of title.

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The 13th June 1866.

*Present:*

The Hon'ble G. Campbell and A. G. Macpherson, *Judges.*

**Jurisdiction—Suit for rent or revenue of proprietary talook subordinate to the zemindar.**

Case No. 33 of 1866, under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of East Burdwan, dated the 14th December 1865, reversing a decision passed by the Deputy Collector of that District, dated the 30th June 1865.*

Chunder Kant Chuckerbutty (Plaintiff), *Appellant,*

*versus*

Moulvie Mahomed Hossein (Defendant), *Respondent.*

*Mr. R. E. Twidale* for Appellant.

*Moulvie Syud Murhumut Hossein* for Respondent.

**Rent or revenue assessed upon a proprietary talook subordinate to the zemindar may be the subject of a suit under Act X. of 1859.**

This is a suit for the rent or revenue of land which is found to be held by the defendant as a proprietary talook subordinate to the plaintiff. The defendant is liable to pay to the plaintiff, and the plaintiff is liable to

pay the Government revenue, the money receivable from the defendant being part of the assets of his estate, and the whole estate being liable for default of revenue.

The Lower Appellate Court threw out the suit upon the ground that it could not lie under Act X. of 1859, because the defendant is not a ryot or tenant, but a proprietor.

We think that the case is governed by the decision passed in the case of Chunder Kant Chuckerbutty *versus* Joy Gopal Chuckerbutty (4 Weekly Reporter, Act X. Rulings, page 41), by Mr. Justice Bayley and Mr. Justice E. Jackson, on the 11th December 1865. We ourselves entirely concur in that decision. It is true that one shareholder cannot sue another shareholder for his share of revenue, but, as held by these learned Judges, "if the shikmee talooks were at "the Permanent Settlement comprised with-"in the zemindar's estate, then these talooks "will not be borne upon the Collectorate "Toujee, and the talookdars will be subordi-"nate to the zemindar. The revenue which "was assessed upon them is paid in the shape "of rent to the zemindar, and the zemindar's "estate is liable for sale if the revenue is "not paid. The zemindar, standing in the "position of landlord to the subordinate "talookdars, can take the same measures to "enforce the payment of the rents as he "could take against any other under-"tenant."

In this sense, we think that the defendant stood in the position of tenant towards the plaintiff, and that the definite rent or revenue assessed upon the talook and payable to the plaintiff may be the subject of a suit under Act X. of 1859.

We therefore decree the appeal, and remand the case for trial on the merits.

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The 14th June 1866.

*Present:*

The Hon'ble L. S. Jackson and J. B. Phear, *Judges.*

**Enhancement (of Talook)—Section 15, Act X. of 1859—Decree for rent at ordinary rate.**

Case No. 142 of 1866 under Act X. of 1859.

*Application for a review of judgment passed on the 15th January 1866, in Regular Appeal No. 301 of 1865.*

Huronath Roy and others (Respondents), *Petitioners,*

*versus*

Gobind Chunder Dutt (Appellant), *Opposite Party.*

*Mr. W. A. Montriou* and *Baboos Kali Mohun Doss* and *Sreenath Doss* for Petitioners.

*Messrs. R. V. Doyne* and *G. C. Paul* and *Baboo Dwarkanath Mitter* for Opposite Party.

A talookdar, who has paid an unchanged rent from the time of the Permanent Settlement, is protected from enhancement under Section 15, Act X. of 1859, notwithstanding the zemindar's right to enhance under a decree passed before that Act, in pursuance of which decree no steps were taken before the passing of the Act to vary the rent of the talook.

In a suit to enhance, a decree cannot be given for rent at the ordinary rate.

*Jackson, J.*—I AM bound to say, after hearing the able argument which has been addressed to us by Mr. Montriou, Counsel for the respondent in this case, that I entirely adhere to the judgment which we originally passed in this matter. It is as well to explain that, in admitting the application to review our judgment when Mr. Montriou submitted to me a sketch of the argument which he proposed to lay before us if his application was admitted, I did not feel that either the judgment which we passed, or the grounds on which that judgment was based, were in any degree shaken. But, as the respondent had employed Counsel, in addition to the able vakeel who appeared, and as by accident the Counsel had been unable to lay his argument before the Court, and as the judgment, though very fully considered and concurred in by both of us, was yet my judgment, I thought it due to the respondent and to my learned brother Phear that Mr. Montriou should have an opportunity of laying his argument before the Judges who heard the appeal. The result, however, is that I myself entirely adhere to the judgment which was passed.

I did not wish to interrupt Mr. Montriou in the latter part of his argument. But I think it proper to advert to one matter, and that is that Mr. Montriou did not, according to my view, state correctly the effect of the decision of the Sudder Court in 1821. I may refer to the description of that decree which we gave in our own judgment, as I still think it a correct description, namely, that it was a decree by which the Sudder Court finally dismissed the zemindar's suit for rent at a rate increased by the difference

between the old talookdary jumma and the sudder jumma which the zemindar had to pay the Government. The decree added a direction that, unless the parties came to terms, the talook should be assessed at Pergunnah rates. It does not appear to me that there was the least judicial determination by the Court, that the talookdar did or ought to hold at rents larger than he had previously held at. The Court merely thought fit to interpose in a paternal way—that is to say, by saying that, unless you put an end to your differences, we shall do something serious—that is, we shall assess you at Pergunnah rates. That was merely a *brutum fulmen*, and nothing more.

Then, again, as to the character of the litigation throughout, from its commencement to its termination in 1860, as I have said before, it appears to me that the contention between the parties until the very latest stage of it always was—not in the form of an attempt by the zemindar to prove that, upon particular circumstances arising, he was competent to enhance the rent of the talookdar—but a dispute as to the basis of the original arrangement between them, whether the talookdar was to pay at a fixed rent or to pay the zemindar a sum equal to that which the zemindar had to pay the Government, so that the zemindar should not be a loser by the talook. I do not think that, from first to last, until the suit which ended in 1860, there was even an attempt by the zemindar to enhance the jumma; and, in point of fact, the whole of the pleadings and the circumstances of the case make it clear that there never was any change in the rent which the talookdar paid. That being so, I think we are bound by the terms of Section 15.

We are now asked, even if we are against the plaintiff on the question of enhancement, to decree the amount admittedly due at the old rent. But, looking at the shape which the case took below and in the appeal before us, I do not think that, in a suit which was clearly a suit to enhance, we are called upon to give a decree for rent at the ordinary rate. If I am to add anything as to the merits of the case, I will say this, that whatever reluctance we may feel in declaring that a party has lost, as it were by an accident beyond his control, a right which he seemed almost to have in his hand, that reluctance is infinitely diminished when we find that our decision is in accordance with the real justice of the case; and I am very strongly of opinion, looking at the whole case, that the action of the Courts in 1821 and 1860 came near producing a very serious infraction of rights which ought to have been respected. I do not believe that, at the making of the contract between these parties or those whom they represent, there was any contemplation of the possibility of an increase in the rent; and thus what has actually taken place is in entire accordance with the intention of the original contracting parties.

The application must be rejected with costs.

*Phear, J.*—I am entirely of the same opinion. Mr. Montriou has failed to convince us that a review is necessary to correct either an evident error or omission in our judgment, or is otherwise requisite for the ends of justice; and on no other ground do I feel that I ought to consent to the application that is now made on behalf of his client. It seems to me that, as we held before, it is clear that this case is one in which *primâ facie* the rights of the parties in regard to the subject-matter of the suit are governed by Act X. of 1859. If that be so, the first question (and a very simple one it is) that presents itself to us is this: Has the defendant held at an unchanged rent within the words of Sections 15 and 16, Act X. of 1859, during either of the periods covered by those Sections? The first is from the time of the Permanent Settlement; the second is a period of 20 years immediately antecedent to the suit.

At the hearing of the case before us (and it was a regular appeal), we were persuaded, as a matter of fact, that the same rent actually was paid every year since the Permanent Settlement; and to me that fact by itself seems very powerfully convincing that the payment of that rent was the term upon which the talookdar held. Doubtless, it might be shown that, although for the last 70 years the same rent had been paid as a matter of fact, yet that was not the rent at which the talook was held. There was nothing to show us that it was not the rent at which it was held, unless the judicial result of the litigation which was then going on was enough to do so; and the farthest extent to which the decree went, as I understand Mr. Montriou to argue now, and as was argued before us on the former occasion, is this, that the zemindar had a right to enhance. This is the extreme construction which we can put upon the decree of 1860, and the previous decrees do not go even to that extent.

It appears to me that the declaration that the zemindar had a right to enhance is, if anything, adverse to the supposition that he had enhanced; and, until he did enhance, the holding was at the rent which actually existed at the time of enhancing; and therefore I see no more reason now, than I did when the case was first before us, to think that the payment of a constant rent was anything other than the payment of the rent due under the holding; and therefore I am bound by the words of Section 15 of Act X. of 1839 to say now that the talookdar is not liable to enhancement.

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The 15th June 1866.

*Present:*

The Hon'ble C. B. Trevor and H. V. Bayley, *Judges.*

**Measurement and ascertainment of rates by Collector—Section 10, Act VI. of 1862 B. C.—Combination of ryots—Single suit.**

Cases Nos. 3389 and 3407 of 1865 under Act X. of 1859.

*Special Appeals from a decision passed by the Judge of Patna, dated the 31st August 1865, affirming a decision passed by the Deputy Collector of that District, dated the 17th May 1865.*

Mr. R. Solano (Plaintiff), *Appellant,*

*versus*

Soobrun Roy and others (Defendants), *Respondents.*

*Baboos Juggodanund Mookerjee* and *Bungshee Doss Sein* for Appellant.

*Baboo Kishen Succa Mookerjee* for Respondents.

**Where ryots combine to withhold from the landlord information requisite to enable him to collect his due rents, one suit may be brought against a number of them, under Section 10, Act VI. of 1862 B. C., for measurement and ascertainment by the Collector of the details of the tenures of each ryot.**

In these two cases, plaintiff sued, under the provisions of Section 10, Act VI. of 1862, Bengal Council, to have the areas, rates, and tenures of two villages held in lease by him ascertained and defined by the Collector, on the allegation that the ryots withheld such information from him, and he was unable to obtain it except by recourse to the law above mentioned.

Defendants did not state in their answers that they had offered to plaintiff all or any of the necessary information which he alleged they had withheld.

The Deputy Collector gave plaintiff a decree against all the defendants (some seventy persons).

There was an appeal by plaintiff to the Judge merely on the question of the rates as fixed by the Deputy Collector, but not on the point of law, that the plaintiff's *one* suit could not lie against *all* the defendants.

The Judge, however, considered that, as each ryot had his own independent tenure, and each tenure had its separate area, classification, and rates, the *one* suit brought by plaintiff against *all* the defendants was irregular and could not proceed as it stood. The Judge accordingly dismissed plaintiff's suit on this *one* ground, not going any further into the merits.

The plaintiff appeals specially, and urges that the provisions of Section 10, Act VI. of 1862, contemplate a single suit against any number of defendants in cases of this character; inasmuch as, by the general tenor and terms of the Section, it is clear that the Legislature contemplated that, when a land-owner might, owing to *a combination* of the ryots to withhold the necessary information, should be unable to obtain the same, or should thus be impeded in collecting his due rents, the Collector should assist in order to defeat the objects of such a combination by himself measuring or ascertaining the rates of all the tenures and under-tenures in the village.

After a careful perusal of the law, we think the objection valid, and accordingly remand the case in order that the suit may proceed and be tried on its merits.

We observe that, in our view, the law cited provides for the interference of the Collector only when it has been shewn to be a fact that the land-owner was really unable to measure or acquire the necessary information as to the assets of the village. But, in this case, the allegation, in the plaint, of such inability, not being denied by defendants in their pleadings, must be taken to be a correct allegation.

The case is accordingly remanded to be re-tried on the merits, with reference to the above remarks.

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The 18th June 1866.

*Present :*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Khas Mehal—Notice of Enhancement—Section 9, Regulation VII., 1822, is for settlement, not for collection of rents.**

Case No. 374 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Officiating Judge of Moorshedabad, dated the 21st November 1865, affirming a decision passed by the Deputy Collector of that District, dated the 14th July 1865.*

The Nawab Nazim of Bengal (Defendant), *Appellant,*

*versus*

Ram Lal Ghose *alias* Jugobundhoo Ghose (Plaintiff), *Respondent.*

*Baboos Kishen Kishore Ghose, Onoocool Chunder Mookerjee,* and *Obhoy Churn Bose* for Appellant.

*Baboo Uprokash Chunder Mookerjee* for Respondent.

Section 9, Regulation VII., 1822, relates only to settlement, not to collection of rents; and does not entitle a person claiming from Government as a private zemindar to have enhanced rents without proceeding under the law for the collection of rent, and without giving notice of enhancement under Section 13, Act X. of 1859.

In this case the plaintiff sued for rent upon the basis of a jummabundee made by a Deputy Collector, when settling the lands of the mehal which was one then held khas by Government.

The defendant denied his liability to be bound by a jummabundee to which his assent was not recorded, and the question also was raised that legal notice to enhance, as under Section 13. Act X. of 1859, was necessary to enable plaintiff to sue successfully in this case.

The first Court held that there was nothing to rebut the presumption that the Deputy Collector making the settlement did everything correctly and according to law, and therefore the due notice of the settlement and its jummabundee must be considered to have been issued; and the defendants were therefore bound by the jummabundee, though not assenting to it, if they could not shew that they obtained from the proper authorities who confirmed the settlement a modification of that jummabundee in respect to themselves. The first Court accordingly gave plaintiff a decree.

On appeal, the Judge held that, under Clause 1, Section 9, Regulation VII. of 1822, the ryot not seeking or obtaining an alteration of the jummabundee rates according to the provisions of that law, was bound to pay the rents according to that jummabundee without further special notice under Section 13. Act X. of 1859.

The Judge, in this view, dismissed the defendant's appeal.

Defendant now appeals specially, and urges—

I. That notice under Section 13, Act X. of 1859, is a condition precedent to any suit to enhance under the Rent Lews in force when plaintiff brought this suit for that purpose.

II. That Section 9, Regulation VII. of 1822, merely indicates the remedy to those parties who may object to the procedure or acts of the Revenue Officers *making settlements*, but in no way affects the law relating to the right to *sue for or collect enhanced rents.*

It is an undisputed fact in this case that the lands, the rents of which plaintiffs sue to collect without further notice at the rates of the jummabundee, were originally those of a khas mehal of Government; that, some time afterwards, Government made a settlement and jummabundee (as part of that settlement), and then transferred its own rights to plaintiff by sale. This being so, the question arises, What was the right of Government in its khas mehal so settled? We hold, as it has always been held, that such right was no more than that of any other zemindar. Would, then, any other zemindar, by making a jummabundee, be relieved of the necessity of serving a notice under Section 13, Act X. of 1859? We think not; and that, consequently, as Government did not transfer to plaintiff any more than the rights of an ordinary zemindar, plaintiff cannot avoid the legal duties of an ordinary zemindar in this case, *viz.*, that of giving notice to enhance, as the law, Section 13. Act. X. of 1859, requires. The Lower Appellate Court, we observe, relies on Section 9, Regulation VII. of 1822. But that law is one for *settlements, not one for collections of rents,* and specifies how remedies are to be sought against the *acts of Settlement Officers,* as such, and does not

provide that private zemindars seeking enhanced rents are to have them without giving notice to enhance. We think, then, that the plaintiff, claiming from Government as a private zemindar, and being, of course, in no better position than that, can only have his enhanced rents when he sues for them under the provisions of the Rent Law in force when he sues, *viz.*, by notice under Section 13, Act X. of 1859.

We, accordingly, reverse the orders of the Lower Appellate Court, and decree this special appeal with costs, dismissing the plaintiff's suit with costs.

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The 18th June 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Verification of plaint—Examination and cross-examination of parties or their agents—Settlement of Issues.**

Case No. 51 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by Mr. S. Wauchope, Additional Judge of Hooghly, dated the 30th October 1865, reversing a decision passed by the Deputy Collector of that District, dated the 13th April 1865.*

Sreenath Dutt Chowdhry and others (Plaintiffs), *Appellants,*

*versus*

Gokool Chunder Sein and others (Defendants), *Respondents.*

*Baboos Kalee Prosunno Dutt* and *Gopal Lal Mitter* for Appellants.

*Baboo Tarucknath Sein* for Respondents.

The defective procedure in the trial of this case by the Deputy Collector pointed out (1) as to the non-verification of the plaint, (2) as to the examination and cross-examination of the parties or their agents, and (3) as to the settlement of issues.

THIS is a suit for arrears of rent which the plaintiffs allege to be due from the defendants on a holding of beegahs 26-6 in Talook Jugdishpore. The defendants deny that they are in possession of any such holding. They state that they are co-sharers with plaintiffs of Talook Jugdishpore, and that constant disputes have been going on between them which is the cause of this false action.

The plaint was put in on the 7th February. No notice was then taken of the fact that it was not properly verified by the plaintiffs or by their zemindaree agents, but by a Mooktar. The case was transferred for trial to the file of Baboo Kisto Chunder Roy. He, on the 11th February, directed summons to be served on defendants to appear and answer the claim on the 27th February. On that day, he recorded that he was engaged in other duties, and adjourned the hearing to the 5th March. On the 6th March, the plaintiff's agent was examined. On the 8th March, the defendant's agent was examined. On the 14th March, the Deputy Collector, not satisfied with the verification of the plaintiffs' Mooktar, summoned the plaintiffs to appear in person. On the 18th March, one of them appeared. On the same day, a petition was filed on the part of the plaintiffs, stating that they relied for proof of their case on the evidence of one of the defendants, Sreenath Dutt, and requesting that he might be summoned. But Sreenath Dutt sent in a medical certificate, stating that he was an old sickly man, and physically unable to attend Court, and his attendance was not required. On the 18th March, issues were fixed, the issue laid down being whether defendants owed plaintiffs any arrears of rent or not. No date was fixed for the hearing of the oral evidence which the two parties might wish to adduce on this issue. The plaintiffs were told to prove their zemindaree books. They summoned witnesses for this purpose, who, however, did not attend. Nothing more appears to have been done in the case, and on the 14th April the Deputy Collector dismissed the claim. He distrusted the Jumma Wasil Bakee papers in which mention was made of the jumma as being held by the defendants. In appeal, the Additional Judge reversed that decision. He considered that there was no good reason for distrusting those papers, and pointed out that one of the plaintiffs had come forward and deposed to the defendants holding the tenure, while the defendants had one and all declined to appear and depose to the same effect.

One ground of special appeal is that the defendants have not had opportunity to produce their oral evidence, and that the Judge is in error in stating that the defendants were summoned as witnesses in the case; that only one defendant was summoned, and the Deputy Collector refused to enforce his attendance, as he considered there was sufficient excuse given for his not attending.

We think the decision cannot stand. There seems to be not only error in the fact

on which the judgment of the Appellate Court is based, but there seems to have been from first to last a defective procedure. The plaint is *not* yet verified. One of the plaintiffs having given a deposition does not cure the defect of non-verification of the plaint by all the plaintiffs. The deposition of the plaintiff, who was examined as recorded in English by the Deputy Collector, amounts almost to a denial that he knows anything about the defendants holding the jumma or being liable for the rent. On the other hand, the Bengalee record of it makes him give a very different account of his knowledge as to the claim.

The law says that, on the date fixed for the hearing of the case, the Collector shall examine the plaintiff or defendant or the agent of each, and each may cross-examine the other. Nothing can be more meagre than the examination in this case by the Deputy Collector, and there is nothing to show that any cross-examination was allowed. The plaintiffs' agent was examined on one day; the defendants' agent was examined on another. It may even be doubted, from the papers on the record, whether they were both present and before the Court on either day, so as to have any opportunity of cross-examination. It appears, however, that the Deputy Collector, not satisfied with the deposition of the plaintiff's agent, summoned the plaintiff and examined him; but even he was not cross-examined.

The Deputy Collector then fixed the issues, but the issue which he fixed was not a proper issue. It is true that the parties were at issue ultimately on the point as to whether defendants owed plaintiffs any rent or not. But the first question which they raised was whether the defendants held any such jumma as was alleged by the plaintiff or not. It is stated before us that the jumma in question had been inherited by the defendants, while the defendants' vakeel denies that his clients are the heirs of the person in whose name the jumma was formerly held, and denies also that they are in possession. The issue whether the defendants hold and are liable for this jumma must be properly laid down, and a certain date fixed for hearing the evidence of both parties upon it.

The attention of the Deputy Collector is called to the procedure laid down in Act X. of 1859 for the trial of such suits, and he is requested to adhere strictly to that procedure.

The decision of the Judge is reversed, and the case remanded to him to be returned to the Deputy Collector, and then properly tried in accordance with the above remarks. Costs to follow the final judgment.

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The 19th June 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Jurisdiction—Act X. of 1859, Section 23, Clause 7—Suit to set aside collusive decree for rent.**

Case No. 433 of 1866.

*Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 25th November 1865, reversing a decision passed by the Moonsiff of Koolnah, dated the 21st March 1864.*

Gopeenath Dutt (one of the Plaintiffs), *Appellant,*

*versus*

Preeonath Sircar (Defendant), *Respondent.*

*Baboo Nilmonee Sein* for Appellant.

*Baboo Nil Madhub Sein* for Respondent.

A suit by *A* to set aside an alleged collusive decree for rent obtained by *B* against *C*, under which decree *A* was ejected from his lands and his crops were seized, is properly brought in the Civil Court as raising a question of title. Such a case is distinguishable from a case of illegal distraint by a landlord provided for by Clause 7, Section 23, Act X. of 1859.

We think the Lower Appellate Court had jurisdiction to hear the appeal which was brought before it in this case, and that the suit was properly instituted in a Civil Court. Clause 7 of Section 23 of Act X. of 1859 relates to cases under Sections 112 and 114 of that Act—cases in which the landlord himself distrains for rent: and Section 139 refers to the same class of cases. Cases of distress for rent by the landlord are quite different from cases where a suit under Act X. has been instituted, a decree has been obtained, and the decree has been executed against the ryot. The suit before us is one brought to set aside a collusive decree under which the defendants (the one suing as landlord and the other allowing himself to

be made defendant as a defaulting ryot) collusively, it is alleged, got a decree under which they seized the appellant's crops, and turned him out of his lands. That being the appellant's case, he, in fact, raises a question of title which may be entertained by a Civil Court.

The case is remanded for trial by the Lower Appellate Court on the merits.

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The 20th June 1866.

*Present:*

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

**Putnee rents—Payments by unregistered purchaser of Dur-putneedar—Liability of registered Dur-putneedar.**

Case No. 145 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by Mr. S. Wauchope, Additional Judge of Hooghly, dated the 28th November 1865, affirming a decision passed by Mr. J. D'Cruze, Deputy Collector of Serampore, dated the 31st May 1865.*

Luckhee Narain Mitter and another (Plaintiffs), *Appellants,*

*versus*

Sitanath Ghose and others (Defendants), *Respondents.*

*Mr. J. L. Reed* and *Baboo Sham Lal Mitter* for Appellants.

*Baboos Dwarkanath Mitter* and *Mohendro Lal Seal* for Respondents.

A registered dur-putneedar is liable for the rent to the putneedar, though the former has sold his tenure to another not acknowledged by the latter. A payment made by the purchaser of the dur-putnee who has not obtained registration, in order to save the putnee from sale, is a voluntary payment which the registered dur-putneedar cannot claim to deduct from the rent due by him to the putneedar.

PLAINTIFF, a putneedar, sues Sitanath Ghose, dur-putneedar, for rent. There is no doubt that Sitanath is the registered dur-putneedar and liable for the rent, though he asserts that he has sold to one Sowdaminee not acknowledged by the putneedar. It appears that the putnee having been advertised for sale for arrears, the balance was paid by Sowdaminee, not on account of Sitanath, but in her own name—her object being, in fact, to establish her position as dur-putneedar. Sitanath Ghose now seeks to deduct from the rent due by him this payment made by Sowdaminee. We think that he cannot do so. Till Sowdaminee establishes her interest in the estate and obtains registration, all payments made by her are those of a mere volunteer, and Sitanath can claim no deduction for payments made by another person not on his account. In fact, the struggle has throughout been to force plaintiff to recognise Sowdaminee; and till Sowdaminee has a legal *status*, whatever she pays otherwise than on account of Sitanath is paid at her own risk. Sitanath cannot have credit for the payments. The decision of the Court below is reversed, and Rupees 2,053-7-9 will be added to the decree already passed in plaintiff's favor.

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The 25th June 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**No appeal (from order of Deputy Collector in execution)—Power of High Court (under Section 35, Act XXIII. of 1861)—Judgment to include value of Stamps.**

Case No. 62 of 1866 under Act X. of 1859.

*Miscellaneous Appeal from an order passed by the Officiating Judge of Dacca, dated the 1st December 1865, reversing an order passed by the Deputy Collector of Fureedpore, dated the 22nd August 1865.*

Mr. R. C. Bell Campbell (Decree-holder), *Respondent,*

*versus*

Cazee Abdool Huq (Judgment-debtor), *Appellant.*

*Mr. R. E. Twidale* for Appellant.

*Baboos Chunder Madhub Ghose* and *Khetter Mohun Mookerjee* for Respondent.

On a question arising under Section 92, Act X. of 1859, the Deputy Collector held that the judgment was for a sum exceeding 500 rupees, by including the value of stamps incurred in taking out execution. The Judge on

appeal held that the value of the stamps should not be taken into account, and reversed the Deputy Collector's order. The Judge had no authority to entertain an appeal from an order of the Deputy Collector passed in execution; and the High Court, under Section 34, Act XXIII. of 1861, and following the principle of Sections 187 and 188 of Act VIII. of 1859 (according to which the value of stamps used in enforcing a decree is required to be included in the judgment), restored the order of the Deputy Collector.

THIS is an application to this Court under Section 35, Act XXIII. of 1861. The Judge of Dacca has entertained an appeal from the order of a Deputy Collector passed in execution of decree in a suit under Act X. of 1859, and has reversed the order of the Deputy Collector. There is no doubt that the Judge had no authority to receive any such appeal. Section 151, Act X. of 1859, lays down that no order of a Deputy Collector passed "after decree and relating to the execution thereof shall be open to revision or appeal otherwise than as expressly provided in this Act." As, then, there is no provision in the Act for such an appeal, it follows that the Judge exceeded his authority in hearing it, and his order must be reversed.

But it is said that this Court has authority by the same Section to pass such other order in the case as to it may seem right; and therefore, if we consider the decision of the Judge right, and that of the Deputy Collector wrong, we may pass the order which the Judge has passed. There are precedents to the effect that this Court has such authority. Without giving any opinion upon the point, we have heard the appellants' pleader on the question which was before the Deputy Collector. It arose under Section 92 of Act X. of 1859, which lays down that "no process of execution of any description shall be issued on a judgment under this Act after the lapse of three years from the date of such judgment, unless the judgment be for a sum exceeding 500 rupees." It is admitted that the judgment in the case was under 500 rupees, if the value of stamps incurred in taking out execution is not included in it, and that the judgment is for a sum exceeding 500 rupees, if the value of those stamps be taken into account. The Deputy Collector was of opinion that it should be taken into account. The Judge held that it should not.

There are no particular Sections of Act X. which can be referred to as ruling this point. Although the provisions of Act VIII. of 1859 do not in their entirety necessarily apply to Act X. on points on which Act X. is silent, and Act VIII. is not distinctly incorporated with it, still we think that, in deciding a general point of law of this description, we cannot do better than be guided by the general principle of law which we find in that Act. Section 187 states that the judgment shall in all cases direct by whom the costs are to be paid. Section 188 explains that "under the denomination of costs are "included the whole of the expenses necessarily incurred by either party on account "of the suit, and in enforcing the decree "passed therein, such as the expense of "stamps," &c., &c. In any suit under Act VIII. of 1859, it is clear from these Sections that the value of stamps required and used in enforcing a decree would be held to be included in the judgment. We would apply the same law to judgments in Act X. suits—the more so as we consider its principle to be reasonable and proper.

Under these circumstances, it is not necessary that we should pass any further order in this case than to restore the original order of the Deputy Collector in its integrity, which we accordingly hereby do.

The costs of this appeal will be paid by the respondent.

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The 26th June 1866.

*Present:*

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

**Endowment—Kubooleut.**

Case No. 509 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Chittagong, dated the 29th November 1865, affirming a decision passed by the Deputy Collector of that District, dated the 26th January 1865.*

Hiddutt Ali (Defendant), *Appellant,*

*versus*

Koleemaalla Meeajee Mutwallee (Plaintiff), *Respondent.*

*Baboo Kishen Succa Mookerjee* for Appellant.

*Baboo Gopeenath Mookerjee* for Respondent.

A suit by the mutwallee of a mosque to obtain a kubooleut from a *khadim* or subordinate servant attached to the mosque will not lie under Act X. of 1859.

The 27th June 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, *Judge*.

**Appeal—Suit for Distraint under 100 Rs.—Procedure.**

Case No. 3174 of 1865 under Act X. of 1859.

*Special Appeal from a decision passed by Mr. F. B. Simson, Judge of Mymensingh, dated the 24th August 1865, affirming a decision passed by Mr. T. Smith, Officiating Deputy Collector of that District, dated the 27th May 1865.*

Raj Chunder Surmah Chuckerbutty (Objector), *Appellant*,

*versus*

Gour Mohun Deb (Plaintiff) and others (Defendants), *Respondents*.

*Baboo Nil Madhub Sein* for Appellant.

*Baboo Luleet Chunder Sein* for Respondents.

Where a third party intervenes in a suit under Rs. 100, and the Deputy Collector substantially determines, not simply the question of possession, but the right of the zemindar to distrain for the rent due from the actual cultivator, the appeal lies to the Judge. In such case, the Court, instead of simply declaring the zemindar's right to distrain upon the person in actual possession, ought to enquire who was the actual cultivator or ryot in possession of the land, and then who was in actual receipt of the rents from that ryot, and to determine the suit according to the result of that enquiry under Section 140, Act X. of 1859.

It appears to us that this case differs from the Full Bench decision of 25th May 1865. In that case, it was held merely that a determination between the plaintiff and the intervenor as to who was in the actual receipt of rent was not a determination of a matter of right or interest in the land which would give an appeal to the Judge instead of to the Collector in a case in which the amount was under Rs. 100. But, in this case, we think that the Deputy Collector did in substance determine, not simply the question who was in possession, but whether the zemindar had the right to distrain for the rent due from the actual cultivators. The plaintiff Gour Mohun Deb complained against the defendant, who was the zemindar, for distraining his property. The defendant justified the distraint by saying that Rumzan and Nowaz were holding the land under her, and that they were the persons in actual possession and cultivation of the land. She, therefore, claimed the right to distrain, not for rent due from the mokurrureedar who intervened, but the right to distrain for rent due from the actual cultivator. The appellant intervened, and he said that "the actual "cultivator of the land is the plaintiff. He, "not Rumzan and Nowaz, is the actual ryot "and cultivator, and he (the plaintiff) holds, "not of you, but of me, who am a mokurru-"reedar and in actual receipt of the rent "from the actual cultivator."

The Deputy Collector determined that the zemindar was entitled to distrain upon the land for any rent, whatever it might be, so that, in substance, he determined that the zemindar was entitled to distrain for the rent due from the actual cultivator. If so, it followed that the intervenor was not entitled to distrain for the rent due from the actual cultivator. The judgment did not thereby decide whether the defendant or the intervenor was in the actual receipt of the rent from the actual cultivators. In substance, it determined against the right of the mokurrureedar (the appellant) to distrain, whereas the Deputy Collector ought to have determined the simple question of who was in actual receipt of rent from the cultivator. If he had done so, the appeal might have gone to the Collector according to the Full Bench decision. But he has substantially determined a question of right, and the appeal was properly preferred to the Judge.

Then, with reference to the merits of the case, it appears that both the Deputy Collector and the Judge were wrong, because they held that the zemindar was entitled to distrain upon the person in actual possession. Instead of doing that, they ought to have ascertained who was the person in actual possession, and, in the next place, who was in actual receipt of the rent from that person.

It appears to us that the appeal must be allowed and the decisions of the Lower Courts reversed, and the case must go back to the first Court to enquire, *first*, who was the actual cultivator or ryot in possession of the land, and then, who was the person in actual receipt of the rent from that ryot, and to determine the suit according to the result of that enquiry in accordance with the provisions of Section 140, Act X. of 1859.

Special appeal No. 3175 of 1865 is governed by this decision, and is remanded with similar directions.

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The 28th June 1866.

*Present:*

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

**Estoppel—Finding of possession in a Miscellaneous proceeding under Section 25, Act X. of 1859.**

Case No. 584 of 1866.

*Special Appeal from a decision passed by the Judge of Shahabad, dated the 6th December 1865, affirming a decision passed by the Sudder Ameen of that District, dated the 11th July 1865.*

Cajee Rumzan Ali (Defendant), *Appellant,*

*versus*

Chowdhry Chuttursal Singh (Plaintiff), *Respondent.*

*Mr. R. E. Twidale* for Appellant.

*Baboo Dwarkanath Mitter* for Respondent.

A finding of possession in a miscellaneous proceeding under Section 25, Act X. of 1859, is not binding on the Civil Court.

THE *onus* has not been placed upon the wrong party. The possession of the special appellant has not been found in any suit but in a miscellaneous proceeding under Section 25, Act X., which is not binding upon the Civil Court.

The finding of the Court below that the long possession of the special appellant has not been established cannot be interfered with in special appeal.

The appeal is dismissed with costs and interest.

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The 28th June 1866.

*Present:*

The Hon'ble G. Loch and L. S. Jackson, *Judges.*

**Measurement (Disputed right to the land)—Jurisdiction (of Collector)—Appeal—Stamp Duty.**

Case No. 13 of 1866 under Act X. of 1859.

*Miscellaneous Appeal from an order passed by the Judge of Tirhoot, dated the 17th November 1865, reversing an order passed by the Collector of that District, dated the 27th May 1865.*

Mr. J. Smith, *Appellant,*

*versus*

Baboo Nundun Lal, *Respondent.*

*Mr. J. S. Rochfort* and *Baboo Nil Monee Sein* for Appellant.

*Baboos Dwarkanath Mitter* and *Unnoda Pershad Banerjee* for Respondent.

A Collector's jurisdiction to allow a measurement, where the proprietary right to the land is contested, is not barred by Sections 9 and 10, Act VI. of 1862 B. C., if he is satisfied that the party seeking his assistance to measure is in receipt of the rents. If the Collector disallows the measurement on the ground that the applicant is not in receipt of the rents, the party aggrieved may appeal to the Civil Court.

Petitions of appeal in such cases may be written on the stamp used for miscellaneous petitions.

*Loch, J.*—THIS was a case to obtain an order from the Collector for the measurement of certain lands under the provisions of Section 10, Act VI. of 1862, Bengal Legislature. The respondent intervened, but the Collector passed an order in favor of the present petitioner, which the Judge reversed in appeal, on the ground that the law gave the Collector no jurisdiction to determine the right to make a measurement where the proprietary right to the land was contested.

A preliminary objection is raised to the special appeal being heard, that this petition of appeal is not written upon a stamp of the proper value, and that the provisions of Section 10, Act VI. of 1862 (B. L.), require that petitions of appeal be written on the stamp prescribed by Act X. of 1862. As, however, we are at a loss to understand how the value of the right to measure is to be estimated, and the pleaders who raise the objection are unable to point out any suitable mode of calculation, we think that the petitioner has done all that is necessary by writing his application on the stamp in use for miscellaneous petitions to this Court.

We think the Judge was wrong in holding that no order for measurement could be legally made when the proprietary right and the fact of possession is in dispute. No doubt, the provisions of Sections 9 and 10, Act VI. of 1862, Bengal Council, relate immediately to disputes between landlord and tenants, and do not distinctly provide for the disposal of cases such as the present. But it cannot be supposed that the law ever intended to leave a party in possession helpless, and to tie his hands, because another person disputed his rights to make a measurement. Where such a dispute does arise, the Collector has to determine whether the party seeking his assistance to measure is in receipt of the rents, *i. e.*, is in possession. If he be satisfied of this, he can give the aid which the law authorizes him to give, leaving the

other party to establish his right by regular suit. If possession be not proved, the Collector will reject the application for assistance.

I would reverse the order of the Judge with costs.

*Jackson, J.*—I am of the same opinion. When application is made to the Collector under Section 9, Act VI. of 1862 (B. C.), for an order allowing a measurement, the Collector is undoubtedly bound to satisfy himself that the person applying is a person who has a right to measure—that is, that he is a "proprietor of an estate or tenure, or "other person in receipt of the rents of an "estate or tenure;" and, if the Collector disallows the measurement, on the ground that the applicant is not a person having such right, the party aggrieved has the right of appeal to the Civil Court under Section 10 of the same Act.

Whether, in such a case, an intervenor, whose objection had been disallowed by the Collector, would be entitled to appeal, is a question which we need not at present determine.

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The 29th June 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Measurement (Disputed right to the land).**

Case No. 115 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Rungpore, dated the 13th December 1865, reversing a decision passed by the Deputy Collector of that District, dated the 28th August 1865.*

Haradhun Dutt and others (Plaintiffs), *Appellants,*

*versus*

Hazee Mahomed and others (Defendants), *Respondents.*

*Baboos Kishen Dyal Roy* and *Issur Chunder Chuckerbutty* for Appellants.

No one for Respondents.

The Revenue Courts have jurisdiction to determine the right to measurement under Section 9, Act VI. of 1862; B. C., where the proprietary right to the land is contested.

THIS was a suit by a plaintiff (alleging that he held certain *khamar* lands of the zemindars by an ikrar from that person) to measure the lands of certain ryots under Section 9, Act VI. of 1862 (Bengal Council).

A putneedar, with a putnee lease from the zemindar, intervened, and claimed the lands sought to be measured by plaintiff as part of his putnee.

The ryots supported the putneedar.

The first Court, finding on the evidence that the ryots paid their rents to plaintiff under a "Roka" from the zemindar, held that the plaintiff was in receipt of rent as landlord; and thus, under Section 77, Act X. of 1859, the first Court rejected the claim of the intervenors.

The putneedar and ryots appealed to the Judge, who held that, as there was a conflicting title to be adjudicated, as between the plaintiff claiming in the place of the zemindar, and the putneedar, the case was not within the cognizance of the Revenue Courts.

Against this decision plaintiff appeals, and urges that this is a wrong view of the law; that he (plaintiff), under his ikrar as in the place of the zemindar, has a right to measure according to Section 9, Act VI. of 1862 (Bengal Council), and that he has this right under the terms of Section 9, Act VI. of 1862, which state that the party thereby authorized to make a general survey or measurement is "every proprietor of an "estate or tenure or other person in receipt "of the rents of an estate or tenure, and "that the right extends to the lands com-"prised in such estate or tenure or any "part thereof, unless restrained from doing "so by express engagements with the "occupants."

Now, it is not contended that there is any express stipulation with the occupants of the land in this case to restrain plaintiff from measuring.

It remains to be decided whether the Judge is right to hold that he has no jurisdiction on the ground that the matter is one of title, and whether the ikrar from the zemindar enables plaintiff to measure the lands.

We think that the Revenue Courts have jurisdiction, for the point is not one of title to be tried in the Civil Court, but whether the plaintiff is in such a position as under the *Revenue* Law (Section 9, Act VI. of 1862, Bengal Code) gives him the power to demand a measurement of the estate from the *Revenue* Courts, *i. e.*, whether he is in receipt of the rents of the estate. It is in fact for the Lower Court to try whether the rents of this *khamar* land are collected by

the plaintiff or the defendant, and to allow or disallw measurement according to his decision on that point.

We remand this case accordingly for re-trial with reference to the above remarks.

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The 3rd July 1866.

*Present :*

The Hon'ble C. B. Trevor and G Loch, *Judges.*

**Transferable Under-tenure (Sale of—in execution for rent)—Suit for kubooleut at neighbouring rates.**

Cases Nos. 491 to 494 of 1866 under Act X. of 1859.

*Special Appeals from a decision passed by the Judge of the 24-Pergunnahs, dated the 5th December 1865, affirming a decision passed by the Deputy Collector of that District, dated the 29th August 1865.*

Srishteedhur Mundul (Plaintiff), *Appellant,*

*versus*

Gobind Suruckar (Defendant), *Respondent.*

*Baboos Hem Chunder Banerjee* and *Bhowanee Churn Dutt* for Appellant.

*Baboo Kishen Succa Mookerjee* for Respondent.

The purchaser of a transferable under-tenure in execution of a decree for rent may void any lease or holding within the tenure not specially protected by law, and consequently may sue for a kubooleut at rates paid for similar lands in the neighbourhood.

PLAINTIFF, the purchaser in Assin 1271 of an under-tenure, under Section 105 of Act X. of 1859 and VIII. of 1835, sues defendant for kubooleut at the rate paid by the same class of ryots for lands of a similar description in the places adjacent.

The defendant pleaded mokurruree pottahs granted by the out-going tenant in 1266, 1264, and 1253.

The Lower Courts both found the pottahs genuine, and, considering that the sale was one in execution of a decree, dismissed the plaintiff's suit, considering him bound by the pottah granted by his predecessor.

Plaintiff now appeals specially, urging that, as he is the purchaser of the tenure, and as the pottahs bear dates severally in 1253, 1264, and 1266, he is not bound either by the nature of his purchase or by length of possession with uniform payments to regard the pottahs, but is entitled to rent at the rate which similar ryots pay for similar lands in the neighbouring places.

We think there can be no doubt that, under the circumstances of this case, the contention of plaintiff is correct, and that he is entitled to what he claims. The Lower Appellate Court seems to have fallen into the error of considering that the rights conveyed to the purchaser were only those of the purchaser in execution of an ordinary decree. This is not the case. Plaintiffs have purchased the tenure, and can avoid any lease or holding within their tenure not specially protected by law. The Judge will enquire into the rates paid by similar ryots of similar lands in the places adjacent to the defendant's lands, and give plaintiff whatever rate of rent may, after such enquiry, seem fair and equitable.

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The 3rd July 1866.

*Present :*

The Hon'ble C. B. Trevor and G. Loch, *Judges.*

**Nowabad and Turruf lands—Resumption and Settlement—Kubooleut.**

Case No. 525 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Chittagong, dated the 29th November 1865, reversing a decision passed by the Deputy Collector of that District, dated the 7th October 1861.*

Huro Doss Raha (Plaintiff), *Appellant,*

*versus*

Traheeram Paul and others (Defendants), *Respondents.*

*Baboo Mottee Lal Mookerjee* for Appellant.

*Baboo Kishen Succa Mookerjee* for Respondents.

Where ryots continue to pay rent to the parties from whom they got their leases of turruf and Nowabad lands, the mere fact that Government resumed and separately settled the Nowabad lands with the turrufdars will not injure the rights of the ryots nor affect the presumption arising from uniform payment of rent for 20 years. All that the purchaser of the Nowabad lands sold for arrears of rent can claim is a kubooleut for the proportion of the rent assessed on the Nowabad lands and hitherto paid to the Turrufdars.

PLAINTIFF purchased a Nowabad Talook sold for arrears of rent. He brings this suit to obtain a kubooleut at certain rates. The defendants pleaded payment of an uniform rate of rent, and the Judge found for the defendant on the presumption arising from their having held the lands for twenty years. The case was remanded to allow the plaintiff an opportunity to rebut this presumption by legal evidence, and the Judge now holds that the plaintiff has entirely failed to do so. He accordingly dismissed the suit, giving a decree for the defendants with costs.

In special appeal, it is urged that the leases under which the tenants hold are derived from the turrufdars; that the turrufs and Nowabad Talooks are separated; and that a lease given for turruf lands cannot be binding against the purchaser of a Nowabad tenure. It appears that the turrufdars, from whom the defendants derive their title, at one time held the Nowabad lands as part of their turrufs, and that the defendants' lease comprised lands both in the turruf and in the Nowabad lands which were subsequently separated from the turruf by Government and separately settled. If the defendants continued to pay rent to the parties from whom they got their lease so long as they continued to hold the turrufs and the Nowabad lands, the mere fact that Government resumed and separately settled the Nowabad lands with the turrufdars will not injure the rights of the defendants, nor affect the presumption arising from the payment of an uniform rate of rent for twenty years. All that the plaintiff can ask is for the defendant to give them kubooleuts for their proportion of the rent assigned on the Nowabad lands which they have hitherto paid to the turrufdars; and this the defendants are willing to do.

The special appellant further objects that the Judge should not have dismissed his claim altogether, but have given him a decree for what the defendants were willing to give. He did not ask for that, and therefore the Judge was right in dismissing his suit. This decision, however, will not prevent plaintiff now obtaining from the defendants what they are willing to give. We dismiss the appeal with costs.

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The 4th July 1866.

*Present:*

The Hon'ble C. B. Trevor and G. Loch, *Judges.*

**Remand—Evidence.**

Case No. 577 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Purneah, dated the 7th December 1865, modifying a decision passed by the Deputy Collector of that District, dated the 2nd October 1860.*

Boola Singh (Plaintiff), *Appellant,*

*versus*

Bibee Reazoonissa (Defendant), *Respondent.*

*Baboos Uprokash Chunder Mookerjee* and *Greesh Chunder Ghose* for Appellant.

*Baboo Romanath Bose* for Respondent.

Where a Judge enters into the merits of a case remanded to his predecessor for a legal judgment, if he admits further evidence on the part of the defendant, he cannot refuse to admit that offered by the plaintiff.

As the former Judge had left the district when the case was remanded for him to draw up a legal judgment, we think it was open to the present Judge to enter into the merits, and pass a fresh decision in the case; but we do not understand why, on the 7th December, he admitted fresh evidence on the part of the defendant, and refused to admit that offered by the plaintiff. We think that, if he gave the one party this advantage, he should have treated the other party in a similar manner.

Another question is raised that the notice such as served was not a legal notice, inasmuch as it did not state, as required by law, the grounds on which enhanced rent was demanded.

We remand the case with direction to the Judge to permit the plaintiff to put in the additional evidence offered on 7th December by him, and to consider the objection taken to the notice.

The 5th July 1866.

*Present:*

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

**Evidence (of rent)—Zemindar's loazima papers.**

Case No. 810 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of West Burdwan, dated the 22nd December 1865, affirming a decision passed by the Collector of that District, dated the 25th August 1865.*

Shibo Soonduree Debia and others (Plaintiffs), *Appellants,*

*versus*

Ram Dhamait Kunnee and others (Defendants), *Respondents.*

*Baboo Bama Churn Banerjee* for Appellants.

*Baboo Nil Madhub Sein* for Respondents.

The mere insertion of the name of the defendant's father in the loazima papers of the zemindar is no sufficient evidence that rent has ever been paid for the lands in dispute.

THIS suit was remanded with permission to the plaintiff, special appellant, to amend his plaint.

The *onus* of starting his case by shewing that the lands were mâl, and that rent had at some time been paid for them, was laid on the plaintiff, who has failed to discharge himself of the same.

The mere insertion of the name of the defendant's father in the loazima papers of the zemindar—papers over which the zemindar has complete control—is no evidence that rent has ever been paid for the lands in dispute.

The appeal must be dismissed with costs and interest.

The 5th July 1866.

*Present:*

The Hon'ble G. Campbell and A. G. Macpherson, *Judges.*

**Right of occupancy—Bhagdaree tenures.**

Case No. 382 of 1866.

*Special Appeal from a decision passed by the Judge of Hooghly, dated the 20th November 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 17th December 1864.*

Hureehur Mookerjee (Plaintiff), *Appellant,*

*versus*

Biressur Banerjee and others (Defendants), *Respondents.*

*Mr. R. T. Allan* and *Baboo Bama Churn Banerjee* for Appellant.

*Baboo Mohendro Lal Shome* for Respondents.

Ordinarily, a holding under a Bhagdaree tenure (*i. e.*, upon a rent consisting of a portion of the produce) would establish a right of occupancy under Section 6, Act X. of 1859.

THE special appellant in this case claims khas possession of certain shares in certain tanks. The defendant *first* denied the extent of the shares claimed, and, *secondly*, pleaded that, even admitting that plaintiff is the zemindar of a small share, he has a right of occupancy, and that he is entitled to rent, but not to khas possession.

It is alleged by the plaintiff that he was in possession, and that he has been dispossessed by defendant, and he prays to recover possession.

The Lower Appellate Court finds as a fact that plaintiff has not proved title or possession of the share claimed by him, and that his share is something very small, as admitted by the defendants, namely, a moiety of 1 anna and 5 gundas. The Judge further finds that the defendants have been in possession for very many years, for some time as Bhagjotedars, and latterly under a pottah from a great majority of the shareholders.

No doubt, ordinarily speaking, a holding under a bhagdaree tenure—that is, upon a rent consisting of a portion of the produce—would establish a right of occupancy as much as if held upon payment of rent of any other kind. But the special appellant contends that the defendants by their pottah from the other shareholders have admitted the land to be *khamar* lands, and can acquire no right of

*Baboo Kishen Succa Mookerjee* for Respondents.

Where ryots continue to pay rent to the parties from whom they got their leases of turruf and Nowabad lands, the mere fact that Government resumed and separately settled the Nowabad lands with the turrufdars will not injure the rights of the ryots nor affect the presumption arising from uniform payment of rent for 20 years. All that the purchaser of the Nowabad lands sold for arrears of rent can claim is a kubooleut for the proportion of the rent assessed on the Nowabad lands and hitherto paid to the Turrufdars.

PLAINTIFF purchased a Nowabad Talook sold for arrears of rent. He brings this suit to obtain a kubooleut at certain rates. The defendants pleaded payment of an uniform rate of rent, and the Judge found for the defendant on the presumption arising from their having held the lands for twenty years. The case was remanded to allow the plaintiff an opportunity to rebut this presumption by legal evidence, and the Judge now holds that the plaintiff has entirely failed to do so. He accordingly dismissed the suit, giving a decree for the defendants with costs.

In special appeal, it is urged that the leases under which the tenants hold are derived from the turrufdars; that the turrufs and Nowabad Talooks are separated; and that a lease given for turruf lands cannot be binding against the purchaser of a Nowabad tenure. It appears that the turrufdars, from whom the defendants derive their title, at one time held the Nowabad lands as part of their turrufs, and that the defendants' lease comprised lands both in the turruf and in the Nowabad lands which were subsequently separated from the turruf by Government and separately settled. If the defendants continued to pay rent to the parties from whom they got their lease so long as they continued to hold the turrufs and the Nowabad lands, the mere fact that Government resumed and separately settled the Nowabad lands with the turrufdars will not injure the rights of the defendants, nor affect the presumption arising from the payment of an uniform rate of rent for twenty years. All that the plaintiff can ask is for the defendant to give them kubooleuts for their proportion of the rent assigned on the Nowabad lands which they have hitherto paid to the turrufdars; and this the defendants are willing to do.

The special appellant further objects that the Judge should not have dismissed his claim altogether, but have given him a decree for what the defendants were willing to give. He did not ask for that, and therefore the Judge was right in dismissing his suit. This decision, however, will not prevent plaintiff now obtaining from the defendants what they are willing to give. We dismiss the appeal with costs.

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The 4th July 1866.

*Present:*

The Hon'ble C. B. Trevor and G. Loch, *Judges.*

**Remand—Evidence.**

Case No. 577 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Purneah, dated the 7th December 1865, modifying a decision passed by the Deputy Collector of that District, dated the 2nd October 1860.*

Boola Singh (Plaintiff), *Appellant,*

*versus*

Bibee Reazoonissa (Defendant), *Respondent.*

*Baboos Uprokash Chunder Mookerjee* and *Greesh Chunder Ghose* for Appellant.

*Baboo Romanath Bose* for Respondent.

Where a Judge enters into the merits of a case remanded to his predecessor for a legal judgment, if he admits further evidence on the part of the defendant, he cannot refuse to admit that offered by the plaintiff.

As the former Judge had left the district when the case was remanded for him to draw up a legal judgment, we think it was open to the present Judge to enter into the merits, and pass a fresh decision in the case; but we do not understand why, on the 7th December, he admitted fresh evidence on the part of the defendant, and refused to admit that offered by the plaintiff. We think that, if he gave the one party this advantage, he should have treated the other party in a similar manner.

Another question is raised that the notice such as served was not a legal notice, inasmuch as it did not state, as required by law, the grounds on which enhanced rent was demanded.

We remand the case with direction to the Judge to permit the plaintiff to put in the additional evidence offered on 7th December by him, and to consider the objection taken to the notice.

The 5th July 1866.

*Present:*

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

**Evidence (of rent)—Zemindar's loazima papers.**

Case No. 810 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of West Burdwan, dated the 22nd December 1865, affirming a decision passed by the Collector of that District, dated the 25th August 1865.*

Shibo Soonduree Debia and others (Plaintiffs), *Appellants,*

*versus*

Ram Dhamait Kunnee and others (Defendants), *Respondents.*

*Baboo Bama Churn Banerjee* for Appellants.

*Baboo Nil Madhub Sein* for Respondents.

The mere insertion of the name of the defendant's father in the loazima papers of the zemindar is no sufficient evidence that rent has ever been paid for the lands in dispute.

THIS suit was remanded with permission to the plaintiff, special appellant, to amend his plaint.

The *onus* of starting his case by shewing that the lands were mâl, and that rent had at some time been paid for them, was laid on the plaintiff, who has failed to discharge himself of the same.

The mere insertion of the name of the defendant's father in the loazima papers of the zemindar—papers over which the zemindar has complete control—is no evidence that rent has ever been paid for the lands in dispute.

The appeal must be dismissed with costs and interest.

The 5th July 1866.

*Present:*

The Hon'ble G. Campbell and A. G. Macpherson, *Judges.*

**Right of occupancy—Bhagdaree tenures.**

Case No. 382 of 1866.

*Special Appeal from a decision passed by the Judge of Hooghly, dated the 20th November 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 17th December 1864.*

Hureehur Mookerjee (Plaintiff), *Appellant,*

*versus*

Biressur Banerjee and others (Defendants), *Respondents.*

*Mr. R. T. Allan* and *Baboo Bama Churn Banerjee* for Appellant.

*Baboo Mohendro Lal Shome* for Respondents.

Ordinarily, a holding under a Bhagdaree tenure (*i. e.*, upon a rent consisting of a portion of the produce) would establish a right of occupancy under Section 6, Act X. of 1859.

THE special appellant in this case claims khas possession of certain shares in certain tanks. The defendant *first* denied the extent of the shares claimed, and, *secondly*, pleaded that, even admitting that plaintiff is the zemindar of a small share, he has a right of occupancy, and that he is entitled to rent, but not to khas possession.

It is alleged by the plaintiff that he was in possession, and that he has been dispossessed by defendant, and he prays to recover possession.

The Lower Appellate Court finds as a fact that plaintiff has not proved title or possession of the share claimed by him, and that his share is something very small, as admitted by the defendants, namely, a moiety of 1 anna and 5 gundas. The Judge further finds that the defendants have been in possession for very many years, for some time as Bhagjotedars, and latterly under a pottah from a great majority of the shareholders.

No doubt, ordinarily speaking, a holding under a bhagdaree tenure—that is, upon a rent consisting of a portion of the produce—would establish a right of occupancy as much as if held upon payment of rent of any other kind. But the special appellant contends that the defendants by their pottah from the other shareholders have admitted the land to be *khamar* lands, and can acquire no right of

occupancy under Section 6 of Act X. of 1859.

We observe, however, that the plaintiff did not sue to dispossess a tenant-at-will in due course after due notice given. There is no allegation that he gave the defendants any notice to quit. His case was that he had been dispossessed by the defendants, and this has been found to be false. We also find in the grounds of special appeal that the objection that the land was *khamar* has not been taken, and under these circumstances we do not think we are bound to enter upon the question of the *khamar* character of the land, or of the right of one small shareholder to khas possession when the tenant holds by lease from the other shareholders; and therefore we dismiss the special appeal with costs and interest.

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The 6th July 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Enhancement—Onus probandi (as to rate claimed).**

Case No. 486 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Dinagepore, dated the 30th November 1865, modifying a decision passed by the Deputy Collector of that District, dated the 14th September 1865.*

Khola Mundul and another (Plaintiffs), *Appellants,*

*versus*

Piroo Sircar and others (Defendants), *Respondents.*

*Baboo Greeja Sunkur Mojoomdar* and *Kishen Dyal Roy* for Appellants.

*Baboo Issur Chunder Chuckerbutty* for Respondents.

Where a plaintiff sues, not under Section 8, but under Section 17, Act X. of 1859, he is bound to prove the alleged rate he claims. On his failure to do so, the Judge is not obliged to order the Ameen who measured the lands to fix the rates.

PLAINTIFF in this case sued to enhance on the grounds specified in Section 17, Act X. of 1859, alleging that the rate he should receive under that law was Rs. 2 per beegah.

Defendant pleaded non-liability to enhancement.

The Lower Appellate Court found defendant was liable, but, as plaintiff gave no proof of his allegation of the proper rate being 2 rupees, the Lower Appellate Court dismissed that part of plaintiff's case.

Plaintiff appeals specially, and now urges that, under Section 8, Act X. of 1859, the defendant, being found not to have a right of occupancy, was liable to pay rates at discretion, and that the Lower Appellate Court should have ordered the Ameen who measured the lands to fix the rates.

On the first plea, we observe that, as plaintiff did not sue under Section 8, but under Section 17, Act X. of 1859, he was bound to prove the alleged rate he sued for on the ground of that Section; and, the plaintiff failing to give evidence, the Judge was not obliged to order the Ameen to investigate the rates.

We dismiss this appeal with costs.

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The 9th July 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Enhancement—Lakheraj—Onus probandi.**

Case No. 603 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by Mr. H. Richardson, Officiating Additional Judge of Jessore, dated the 10th December 1865, modifying a decision passed by the Deputy Collector of that District, dated the 30th May 1865.*

Mirtoonjoy Chuckerbutty (Defendant), *Appellant,*

*versus*

Rajah Buroda Kant Roy (Plaintiff), *Respondent.*

*Baboo Bungshee Dhur Sein* for Appellant.

No one for Respondent.

To entitle a plaintiff to recover enhanced rent for that portion of the land which the defendant pleads is lakheraj, the *onus* is on the plaintiff to prove that it is

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**his mâl land. If the plaintiff makes out a *primâ facie* case, then the Court is to look, not to the validity of the defendant's title, but to his possession of the land as lakheraj.**

THIS case must be remanded to the Lower Court. The plaintiff sued for enhancement of rent on lands held by his tenant, who, as regards a portion of those lands, urged that they were lakheraj lands. The Judge on appeal, in trying this point, has thrown the whole *onus* of proof on the tenant. and he has required defendant to go into the validity of his title, as well as into the fact of his possession of the lands as lakheraj.

This is wrong, as already ruled by this Court, page 44, Act X. Rulings, Sutherland's Weekly Reporter, Volume II.; and Marshall, page 526. In such a case, the Court has no power to try the validity of the tenure. To entitle the plaintiff to recover enhanced rent for that portion of the land which the defendant states is his lakheraj, the plaintiff ought to show that it is his mâl land. The Judge must throw the *onus* of proof, in the first place, on him, and go into the defendant's evidence only if plaintiff makes out a *primâ facie* case, and then not look to the validity of defendant's title, but his possession of the land as lakheraj.

Costs to follow the final judgment.

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The 10th July 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Jurisdiction—Suit for rent of excess land—Section 17, Act X. of 1859.**

Case No. 628 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Dacca, dated the 16th November 1865, affirming a decision passed by the Deputy Collector of that District, dated the 4th August 1865.*

Raj Mohun Bose and another (Plaintiffs), *Appellants,*

*versus*

Issur Chunder Shaha and others (Defendants), *Respondents.*

*Baboo Umbika Churn Banerjee* for Appellants.

*Baboo Kalee Prosunno Dutt* for Respondents.

**A suit for rent of land, which the plaintiff alleges is held by the defendant in excess of the area leased to him, but which the defendant pleads is included in the area of his meeras pottah, the rent due under which has been paid, is maintainable in the Revenue Courts, whose province it is to see whether an excess is or is not held by the defendant, and, if so, whether it is liable to assessment under Section 17, Act X. of 1859.**

PLAINTIFF sued for rents of land, under Section 13 and Section 17, Act X. of 1859. on account of a certain area alleged by plaintiff to be in excess of the area which plaintiff leased to defendants.

Defendant's answer was that the land was not any land held in excess, but was included in the area of his meeras pottah, and that the rent due was paid for it under that tenure.

The first Court seems to have accepted defendant's plea, without stating any reasons for so doing.

The Lower Appellate Court held that the suit was not maintainable in a Revenue Court, because the meeras pottah included the excess area the rents of which were sued for.

The special appeal is on the ground that, under Section 17, Act X. of 1859, the suit was maintainable in the Revenue Courts; and it was for those Courts to see on *the evidence* whether an excess area was or was not held by defendant, and then to apply the provisions of Section 17.

This objection appears to us to be valid, and we accordingly reverse the decisions of the Lower Courts, and decree that both Courts try the issue whether there is an excess area held by defendant or not; and, if so, whether it is liable to assessment under Section 17, Act X. of 1859.

Remand accordingly.

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The 11th July 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

**Jurisdiction—Ejectment (of ryot by Lessor and other ryots).**

Cases Nos. 1682 and 1683 of 1865.

*Special Appeal from a decision passed by Moulvie Itrut Hossein, Principal Sudder Ameen of Sarun, dated the 22nd March 1865, affirming a decision passed by the Moonsiff of that District, dated the 29th November 1864.*

Mugnee Roy and others (Defendants), *Appellants,*

*versus*

Lalla Khoonee Lall (Plaintiff), *Respondent.*

*Baboo Khetter Mohun Mookerjee* for Appellant.

*Baboo Tarucknath Sen* for Respondent.

A suit by a ryot, who had been dispossessed of his holding, against his lessors and two other ryots claiming under a lease granted to them by the lessors, should be brought in the Civil Court.

WE have referred to the Full Bench decision which was cited,* and have found that it does not apply to the present case. This case, therefore, will be determined irrespectively of that decision.

* Regular Appeal No. 137 of 1864. Gooroo Doss Roy *versus* Ramnarain Mitter (orally delivered on 20th June 1865).

The action was brought by a ryot who had been dispossessed of his holding, against the lessors, five of them, as well as against two other ryots, who had dispossessed him. The two ryots claimed under a lease which had been granted to them by the lessors.

The question is whether that suit could be lawfully maintained in the Civil Court, or whether it was a suit which must necessarily be brought before the Collector.

Two cases were cited which show that a suit brought under these circumstances against the lessors alone might be supported in the Collector's Court; and there was also one decision cited from Marshall's Reports, p. 604, in which Mr. Justice Morgan and Mr. Justice Shumbhoonauth Pundit held that, when the occupancy of the ousting ryot is merely nominal, he, in fact, holding for the landlord, the action might be maintained in the Collector's Court. But it does not follow that, because the suit could be maintained in the Collector's Court against the lessors if the plaintiff had chosen to sue them alone, he has no right to bring a suit against them and the two dispossessing ryots jointly in the Civil Court. If he sued in the Collector's Court against the lessors alone, he could not recover possession under the decree of the Collector's Court: therefore, he would not have his full remedy by bringing a suit before the Collector. His full remedy could only be had by bringing a suit in the Civil Court against the dispossessing ryots. If the dispossessing ryots and the others were co-trespassers, it appears to us that there is no objection to the plaintiff's joining the lessors as defendants in the Civil Court, when he could not get his full remedy against all the parties without suing in that way. The policy of Act X. of 1859 is to give a Collector exclusive jurisdiction where he had jurisdiction over all the parties to the suit. But where the Collector has not jurisdiction over all the parties to the suit, it would be causing a multiplicity of actions if we were to hold that one suit should be brought in the Collector's Court against five of the trespassers, and another suit in the Civil Court against two other joint trespassers. There have been cases cited which show that such a suit as the present may be brought in the Civil Court.

Under these circumstances, we think that this suit was properly brought, and that the Civil Court had jurisdiction.

With regard to the other point, we determined, in the course of the argument, that all the lessors had joined in the lease to the plaintiff. It was found by the Lower Court that the defendant who made that objection had given authority, and was therefore bound by the lease. Therefore no special appeal lies on that point, which turns on a mere question of fact.

The decision of the Lower Appellate Court will be affirmed with costs.

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The 17th July 1866.

*Present:*

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

**Suit against agent—Limitation (Section 33, Act X. of 1859)—Proof of fraud.**

Case No. 539 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Chittagong, dated the 25th November 1865, affirming a decision pussed by the Deputy Collector of that District, dated the 24th January 1865.*

Ram Kant Chowdhry (Plaintiff), *Appellant.*

*versus*

Brojo Mohun Mojoomdar (Defendant), *Respondent.*

*Baboo Kishen Succa Mookerjee* for Appellant.

*Baboo Romesh Chunder Mitter* for Respondent.

In a suit against an agent under Section 33, Act X. of 1859, where fraud is alleged, before applying the limitation prescribed by that Section, the plaintiff should have an opportunity of proving that, by the fraud of the defendant, he was kept from a knowledge of his rights.

THIS is a suit against an agent, under Section 33, Act X. of 1859, instituted a little over one year from the determination of the

agency. It has been thrown out on the limitation of one year. But we think that, fraud being alleged, plaintiff should have an opportunity of proving that, by the fraud of the defendant, he was kept from a knowledge of his rights. A general suspicion or knowledge that there has been malversation does not, of itself, constitute the cause of action for the recovery of specific sums due by the agent. The cause of action in case of fraud arises from the time when the plaintiff becomes aware of the receipt by the agent of the money claimed. Knowledge and means of knowledge must be considered to be in some sense the same thing. If plaintiff, through mere negligence, omitted to inform himself from accounts in his possession, that would be his *laches*. But, if the accounts were falsified by defendant, or not rendered, that would be a fraud on defendant's part. And, even if the accounts were rendered, plaintiff must be considered entitled to such a time as would, with ordinary diligence, enable him to discover the fraud; and the cause of action would arise from such discovery. The case is remanded to find whether plaintiff's cause of action, being kept from his knowledge by fraud of defendant without *laches* on plaintiff's part, arose within one year of suit.

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The 17th July 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Enhancement—Onus probandi—Evidence—Judgment (Reasons of).**

Case No. 740 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of West Burdwan, dated the 29th December 1865, affirming a decision passed by the Deputy Collector of that District, dated the 29th August 1865.*

Juggessuree Debia (Defendant), *Appellant,*

*versus*

Gudadhur Banerjee (Plaintiff), *Respondent.*

*Baboo Nil Madhub Sein* for Appellant.

*Baboo Jugodanund Mookerjee* and *Bungshee Dhur Sein* for Respondent.

Nature of proof required to be given by the plaintiff in a suit for enhancement, to enable him to start his case.

For the Court to say that such a plea is absurd and such ridiculous, without giving any reasons, is not complying with the requirements of Section 185, Code of Civil Procedure.

THIS suit must be remanded. The plea of the defendant is that the land, the rent of which the plaintiff seeks to enhance, is rent-free land. The Judge has not pronounced a satisfactory decision on this point; indeed, his judgment is a very careless and summary one. The *onus* is on the plaintiff; he must start his case by shewing that he has received rent from the defendant for the lands which are the subject of suit. If he prove this, and establishes the relation of landlord and tenant between himself and the defendant, then the Judge will decide upon the right to enhance, the adequacy of the rates, and the quantity of land liable to assessment —for this point, we observe, is also in contention.

We also call the attention of the Judge to the very improper way in which he has dealt with the pleas of the appellant. Section 185 of the Code enacts that the judgment shall contain the point or points for determination, the decision thereupon, and the reasons for the decision. To say curtly that such a plea is absurd, and such ridiculous, without giving any reasons, is not complying with the requirements of the law. We shall expect a full and proper decision from the Judge. The case to be taken up as soon as possible.

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The 19th July 1866.

*Present:*

The Hon'ble C. B. Trevor and H. V. Bayley, *Judges.*

**Jurisdiction—Illegal ejectment by zemindar of ryot with right of occupancy.**

Case No. 2891 of 1865.

*Special Appeal from a decision passed by the Judge of Dinagepore, dated the 21st July 1865, affirming a decision passed by*

*the Principal Sudder Ameen of that District, dated the 12th December 1864.*

Ram Bhujun Bhukut (Plaintiff), *Appellant,*

*versus*

Ketaye Ram Chowdhry and others (Defendants), *Respondents.*

*Mr. R. E. Twidale* and *Baboo Mohendro Lal Shome* for Appellant.

*Baboo Khetternath Bose* for Respondents.

A suit to recover possession by a tenant with a right of occupancy, illegally ejected by his zemindar, whether with or without the assistance of the Collector under Section 25, Act X. of 1859, is cognizable only in the Collector's Court under Clause 6, Section 23.

Where such a suit was brought in the Civil Court, the Judge on appeal should have refused to exercise jurisdiction in the matter, instead of going into the merits when he thought that he had no jurisdiction.

THE zemindar, the defendant in this suit, obtained the Collector's assistance under Section 25, Act X. of 1859, to oust the plaintiff. The plaintiff was ousted, whether legally or illegally is not now before us, and plaintiff then sued in the Civil Court to recover possession of his jote, from which he, a tenant with a right of occupancy, had been illegally ejected by the zemindar, the person that is entitled to receive rent.

The first Court thought the plaintiff's claim not proved, and dismissed it with costs. The Judge on appeal considered that he had no jurisdiction, and that the case should have been instituted before the Collector under Clause 6, Section 23, Act X. of 1859; nevertheless, as defendant denied that the plaintiff was his tenant, the Judge went into the case and dismissed the plaintiff's suit, affirming the judgment of the Court of first instance.

Plaintiff now appeals specially, urging that, when the Judge thought that he had no jurisdiction, he should have rejected the plaint on that ground, leaving him to sue under Clause 6, Section 23, Act X. of 1859.

We think that the Judge should have looked to the plaintiff's claim alone, and, as that was clearly one cognizable only under Clause 6, Section 23, Act X. of 1859, he should have refused to exercise jurisdiction in the matter. The plaintiff was, as he alleges, illegally ejected by the defendant, the zemindar, being his tenant with a right of occupancy. Whether this ejectment took place with or without the assistance of the Collector, ministerially given, it was, if plaintiff's allegation of being a tenant with a right of occupancy be proved, illegal in both cases. The remedy for the illegal ejectment would ordinarily—that is, if the Collector had not assisted—have been under Clause 6, Section 23, Act X. of 1859; and that assistance, whether given legally or illegally, cannot alter the jurisdiction. But it has been argued before us that the *dictum* of a Full Bench at the end of the judgment in the case of Phillip *vs.* Shibnath Moitro,* to the effect that, from an order passed by the Collector under Section 25, Act X. of 1859, a party has a remedy in a regular suit either under the provisions of Section 23, Act X. of 1859, or in the Civil Court, *as the case may be*, shows that a suit like the present may be instituted either before the Collector or in the Civil Court. But this is not so. The words "*as the case may be*" clearly show that there are some cases requiring the resort to one forum for the remedy, and others to another. That the proper forum in the case before us is the Collector's Court under Section 23, Act X. of 1869, seem to us undoubted.

* Sutherland's Full Bench Rulings, page 119.

In accordance, therefore, with the meaning of the ruling above cited, we declare that the proceedings that have taken place in the Civil Courts are a nullity, and we decree this special appeal without costs. As, however, the plaintiff has been misled by the action of the Court, we give him one month from the present date within which to file a suit before the Collector, to recover possession of the land of which he has been illegally ejected, agreeably to his statement, by the defendant in this case.

The 18th July 1866.

*Present :*

The Hon'ble W. S. Seton-Karr and L. S. Jackson, *Judges.*

**Rent (Liability of Lessee)—Appointment of Sezawal.**

Case No. 358 of 1865 under Act X. of 1859.

*Regular Appeal from a decision passed by the Collector of Durbangah, in Tirhoot, dated the 10th August 1865.*

Jhoomuck Chowdry (Defendant), *Appellant,*

*versus*

Mr. George Anderson, Manager on behalf of the Rajah of Durbangah (Plaintiff), *Respondent.*

*Mr. C. Gregory* and *Moonshee Ameer Ali* for Appellant.

*Baboos Kishen Kishore Ghose* and *Jugodanund Mookerjee* for Respondent.

Suit laid at Rs. 10,704-11-4.

**The appointment of a Sezawal by the landlord absolves the lessee from liability for rent subsequent to such appointment and during the continuance of it.**

THIS case has now come up with the Deputy Collector's finding on the issues directed in this Court's order. dated 5th March last.

Looking at the evidence, and at the circumstances of the case, we are clearly of opinion that the defendant must be held liable for the kists of the year 1270 down to and including that of Cheyt, in the latter end of which month the Sezawal was appointed.

The defendant was in possession of the mehal and bound by his engagement down to that time, and, if he failed to make collections, he has only himself to blame, and cannot escape liability.

Baboo Kishen Kishore Ghose indeed contends that his client is entitled to more, and ought to recover rent for the whole year, but we think it is settled law that the appointment of a Sezawal by the landlord absolves the lessee from liability subsequent to such appointment and during the continuance of it.

We therefore direct that, in modification of the Deputy Collector's order, a decree be entered for the plaintiff, respondent, for the 11 annas kists from Assin to Cheyt 1270, with interest accruing on the several kists to date of decree, with costs and interest to date of realization.

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The 19th July 1866.

*Present :*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Enhancement—Notice.**

Case No. 827 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 29th December 1865, affirming a decision passed by the Deputy Collector of Diamond Harbour, dated the 2nd September 1865.*

Kalee Koomaree Dossee and others (Plaintiffs), *Appellants,*

*versus*

Shumbhoo Chunder Ghose and others (Defendants), *Respondents.*

*Baboos Baneenath Bose* and *Obhoy Churn Bose* for Appellants.

*Baboo Khetturnath Bose* for Respondents.

**In a suit for enhancement of rent after notice on the allegation that the defendant holds land in excess of the area admitted by him to be in his occupation, it must be shown that the notice stated that such excess has been proved by measurement.**

THIS was a suit for enhancement of rent after issue of notice under Section 13. Both the Courts have held that the tenure of the defendant, special respondent, is protected from enhancement under Sections 3 and 4 of Act X. of 1859.

In special appeal, it is contended—

*First.*—That the Court below has not enquired into the fact that the defendant holds some ten beegahs in excess of the area admitted by him to be in his occupation.

*Second.*— That, before the presumption under Section 4 can be made in the tenant's favor, he must prove uniform payment of

rent for the twenty years immediately preceding the suit. A decision of a Divisional Bench of this Court, dated 27th August 1864, is referred to.

On the first point, we hold that the plaintiff was bound, under the terms of Section 13 of Act X., to state, in his notice of enhancement, the specific ground upon which the enhancement is claimed. One of the grounds of enhancement, as laid down in Section 17 of the Act, is that it has been proved by measurement that the tenant holds more land than that for which he has hitherto paid rent. The notice is silent as to any measurement, and therefore it does not comply with the requirements of Section 13.

On the second point, we find that the plaintiff, special appellant, admits receipt of rent at an uniform rate for 16 years immediately preceding the suit, and the ryot has filed a settlement of the year 1190, fixing his jumma at sicca Rupees 20-8, and further receipts for the years 1248, 1259, 1260, 1261, 1262, and 1263. It is therefore clear that he has proved uniform payment of rent for a period of much more than 20 years. It is clear that he has paid an uniform rate of rent, and the Court are therefore satisfied by legal evidence on that point.

In the case cited, there was no legal evidence to satisfy the Court.

The appeal is dismissed with costs and interest.

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The 19th July 1866.

*Present:*

The Hon'ble W. S. Seton-Karr and L. S. Jackson, *Judges.*

**Rent—Set-off—Abatement (as to land taken by Government for a Road).**

Case No. 1146 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Gya, dated the 9th March 1866, affirming a decision passed by the Deputy Collector of that District, dated the 28th October 1865.*

Deen Dyal Lal (Defendant), *Appellant,*

*versus*

Mussamut Thukroo Koonwar (Plaintiff), *Respondent.*

*Mr. C. Gregory* and *Baboo Debendro Narain Bose* for Appellant.

*Baboo Ashootosh Dhur* for Respondent.

**In a suit for arrears of rent, a claim for abatement may be made by way of set-off in respect of land taken up by Government for the purposes of a road.**

*Seton-Karr, J.*—We remand this case to the first Court, because we think that both the Lower Courts were wrong in refusing to try the claim for a set-off in favor of the defendant, urged on the ground that a certain portion of the mouzah had been taken up by Government for the purposes of a road. In remanding the case, we are partly guided by the analogy of a case reported at page 558 of Marshall's Reports, in which it is ruled that a suit for abatement of rent would lie by a talookdar on the ground that part of the talook had been washed away, and that deduction might be made, on such ground, in a suit for arrears of rent.

The first Court will first consider whether the defendant is, by the terms of his kubooleut, debarred from advancing any such claim for abatement; and, if he is not so barred, the Court will then consider how much land has been occupied by Government, and to what deduction the defendant is fairly entitled on that account.

*Jackson, J.*—On the authority of the case cited, I concur in the order of remand.

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The 19th July 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Special Appeal—Refusal of application to withdraw suit.**

Case No. 819 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Tipperah, dated the 30th January 1866, affirming a decision passed by the Deputy Collector of that District, dated the 30th October 1865.*

Raj Kishen Roy (Plaintiff), *Appellant,*

*versus*

Raj Kishen Deo and others (Defendants), *Respondents.*

*Baboo Greesh Chunder Ghose* for Appellant.

*Baboo Romanath Bose* for Respondents.

**The refusal of an application by a plaintiff to withdraw his suit is no ground for special appeal.**

It was entirely in the discretion of the Court of first instance to decide whether or not the application of the plaintiff to withdraw his suit should be granted. The refusal of this application is no ground for special appeal. This appeal is therefore dismissed with costs and interest.

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The 20th July 1866.

*Present:*

The Hon'ble W. S. Seton-Karr and L. S. Jackson, *Judges.*

**Suit for enhancement—Failure to prove service of notice—Declaratory decree.**

Case No. 580 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Mymensing, dated the 13th December 1865, reversing a decision passed by the Deputy Collector of that District, dated the 31st July 1865.*

Radha Monee Dossia (Defendant), *Appellant.*

*versus*

Maharanee Shibessuree Debia and others (Plaintiffs), *Respondents.*

*Baboo Mohinee Mohun Roy* for Appellant.

*Mr. W. L. Mackenzie* and *Baboos Dwarkanath Mitter, Sreenath Doss,* and *Shoshee Bhoosun Sein* for Respondents.

In a suit for rent at an enhanced rate founded on notice, if the plaintiff fails to prove service of notice, instead of his obtaining a declaratory decree with reference to future years, his suit ought to be dismissed.

*Jackson, J.*—It appears to me that the judgment of the Lower Appellate Court cannot stand in its present form. It has determined that the notice to the defendants is insufficient, and, therefore, instead of giving a decree for arrears of rent at enhanced rates, passed a declaratory order decreeing that the plaintiff was entitled to rent at some enhanced rate in years to come.

It appears to me that the plaintiff, in his suit under Clause 4, Section 23 of Act X. of 1859, claimed something definite; that is, alleging that the defendants owed him rent at an enhanced rate, by reason of its being liable to enhancement, and by reason of the plaintiff having given notice of his intention to enhance, he asked the Court to adjudge him the arrears of rent, as due at that enhanced rate. If, therefore, he has proved the facts which he alleged, namely, the liability to enhancement and the service of notice, he was entitled to a decree for rent at an enhanced rate. If he failed to prove those facts, his suit should have been dismissed, and the Court below was not competent to give him something for which he had not asked. The Judge considered that notice had not been duly served, because, it appearing that the jote formerly belonged to one Soorjo Narain, notice had been directed to his nephew Ootsub Anund, whereas the suit had been brought against two females, one the widow of Soorjo Narain, and the other the widow of his brother, in conjunction with Ootsub Anund. Now, it appears that the form of the notice was this: "Notice directed to the deceased Soorjo Narain, his nephew Ootsub Anund, *dakhilkar*, or in possession." This appears to indicate that the zemindar, in issuing notice, used the name of the original jotedar, which would probably be entered in his books, and also probably used the name of Ootsub Anund, whom he knew to be the nephew of the deceased jotedar, and with whom possibly he might have transacted business in connection with the jote. We are assisted to this conclusion by observing that this very Ootsub Anund is the very person who was employed by the present appellants as their agent in conducting this case. It is very possible that the relation of Ootsub Anund to the appellants in respect of the jote was such that notice to *him* would have been sufficient notice to *them*. If that be so, as no other objection has been taken to the form of the notice on the particular rate, the plaintiff would be entitled to a decree.

It seems to me, therefore, that the case must be remanded to the Lower Appellate Court, in order that there might be an enquiry as to whether the defendants were really affected by the notice to Ootsub Anund; and, if so, he should give a decree for the arrears of rent claimed; if not, he should dismiss the plaintiff's suit.

*Seton-Karr, J.*—This case has been twice argued before me on the law-point raised, and, on the whole, I have come to the conclusion at which my learned brother has arrived. This is not a case for the delivery of a kubooleut, or for the determination of the rates of rent at which a kubooleut should be delivered. Such a case would fall under Clause 1 of Section 23 of Act X. It is a suit under Clause 4 of that Section. The current of decisions in regard to enhancement of rents is, that notice must be proved to have been served, or else the case for enhancement should be dismissed. (*See* Weekly Reporter, Volume III., pages 139, 140, and 25; and Volume V., page 14.) The only decision cited against this view is that of the Full Bench reported in Suther-

land's Special Number, page 183; but that case referred to a demand made under the old law, and not under Act X. of 1859.

I think the point at issue in the present suit is whether Ootsub Anund, described as *dakhilkar* in the holding of the deceased Soorjo Narain, did or did not represent the females. If the Judge finds on evidence that he did represent them, then notice to him would be notice to all, and the case can go on If the Judge should find that he did not represent them, then, as the defendants Radha Monee and Bhoobun Moyee are the widows of Soorjo Narain and his brother, and are in possession of the jote, the case cannot go on, and it should be dismissed.

Remand to Judge to ascertain this accordingly.

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The 23rd July 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Ejectment—Dependent talookdars under temporary settlements.**

Cases Nos. 626 and 627 of 1866 under Act X. of 1859.

*Special Appeals from a decision passed by Mr. Swinton, Judge of Tipperah, dated the 25th November 1865, affirming a decision passed by the Deputy Collector of that District, dated the 25th August 1865.*

Huro Gobind Doss and others (Defendants), *Appellants,*

*versus*

Kala Chand Shaha and others (Plaintiffs), *Respondents.*

*Baboos Chunder Madhub Ghose* and *Onookool Chunder Mookerjee* for Appellants.

*Baboos Dwarkanath Mitter, Unnoda Pershad Banerjee,* and *Tarucknath Sein* for Respondents.

**Dependent talookdars, re-admitted to temporary settlements for a certain number of years, are not liable to ejectment at the close of those settlements.**

THE plaintiffs in this suit, alleging that they are dependent talookdars in the estate of the defendant, and that they have been dispossessed illegally by the defendant, sue to recover possession of their talook. The Lower Courts have decreed their claims on the view of the law taken by this Court in the precedent of Ram Mohun Shah and others *versus* Huree Kishen Adhikaree, reported in Volume VIII. of Sevestre's Reports. It is, on special appeal, urged that the facts of the two cases are not analogous. It does not appear that the Judge, in any way, dissented from the view of the facts taken by the first Court, and it must, therefore, be held that he has adopted them. Indeed, there does not appear to be any such dispute as to the facts. The plaintiffs are talookdars of a date anterior to the Decennial Settlement, and so far they stand in a higher position than the talookdars in the precedent referred to, whose tenure commenced subsequent to that Settlement, inasmuch as the tenures of the former description of talookdars are not voidable by a purchaser at a sale for arrears of revenue under Regulation XI. of 1822, whereas the tenures of the latter are. There seems to be no question also that, subsequent to this sale, for some years the tenures of these plaintiffs were voided by the Government which purchased the estate at the revenue-sale, and collected the rents through their own private agents. But it is also clear that, subsequent to that time, the Government re-admitted the plaintiffs to settlement, and acknowledged their rights to their dependent talooks, and reinstated them in possession. It is true that the settlements were temporary settlements for a certain number of years, but it does not follow that the talookdars were liable to ejection at the close of those settlements. If a ryot holds a right of occupancy but at a variable rate of rent, it does not follow that, because he enters into an agreement to pay a certain rate of rent for any number of years, he loses his right of occupancy at the end of that time. His rent is then liable to re-settlement; but he cannot be dispossessed, and until the rent is again re-settled, he holds over at the old rate. The plaintiffs, dependent talookdars, are in exactly the same position. The recognition by Government of their rights is a most important element in their case. It is possible that they might have preferred a suit to compel the Government to recognize their rights, had the Government not conceded them voluntarily. The recognition is very full, and proceeds, not upon a matter of favor, but

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upon the inherent rights of the talookdars as heirs of the owners of the original ante-decennial-settlement talook. It is not denied that the defendant, in purchasing their lands at a private sale from the Government, is, both by law and by the terms of purchase from Government, bound to recognize all such tenures as the Government recognized. Under these circumstances, the Lower Courts were right to declare the dispossession of the plaintiffs illegal, and to restore them to possession.

Objection is also taken to the decision of the Lower Court on the point of limitation in Special Appeal No. 626, but we think it is a correct decision, and that the cause of action arose when the defendants openly and publicly dispossessed the plaintiffs.

We dismiss these appeals with costs.

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The 24th July 1866.

*Present :*

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

**Presumption of holding from Permanent Settlement—Rebuttal.**

Case No. 596 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Mymensing, dated the 8th December 1865, affirming a decision passed by the Collector of that District, dated the 16th September 1864.*

Mugno Moyee Debia and others (Plaintiffs), *Appellants,*

*versus*

Huro Chunder Rawut and others (Defendants), *Respondents.*

*Baboos Kishen Dyal Roy* and *Soshee Bhoosun Sein* for Appellants.

No one for Respondents.

The admission by a ryot that his tenure was acquired by his father 30 or 35 years ago rebuts the presumption of holding from the Permanent Settlement, which arises from uniform payment of rent for 20 years.

This is a suit for enhancement. It is found that the defendant has paid an unvarying rent for 20 years, and that, plaintiff not having proved any earlier variation, or shewn when the tenure was created, the presumption of holding from time of Permanent Settlement arises. The respondent, defendant, has not appeared in this Court, but the appellant points out to us what appears to be a clear admission, in the examination of the defendant himself, that the tenure was acquired by his father from the landlord 30 or 35 years ago. If this is so, it is, of course, fatal to the ground on which the Judge has based his decision; and, nothing to the contrary being shewn, we remand the case for the Judge to pass a fresh decision with reference to the defendant's admissions. If he really made them, the Judge must simply find whether he has proved the tenure to be one at a fixed rent, as he (defendant) alleges.

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The 24th July 1866.

*Present :*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Limitation—Suit against Agent for money—Suspension of Agency.**

Case No. 874 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of West Burdwan, dated the 30th December 1865, affirming a decision passed by the Deputy Collector of that District, dated the 11th March 1865.*

Radhika Pershad Chatterjee (Plaintiff), *Appellant,*

*versus*

Ramdhun Pooroheet (Defendant), *Respondent.*

*Baboos Bykuntnath Paul* and *Issur Chunder Chuckerbutty* for Appellant.

*Baboos Dwarkanath Sein* and *Ashootosh Dhur* for Respondent.

In a suit for the recovery of money in the hands of an agent, the limitation prescribed by Section 33, Act X. of 1859, counts from the date of the suspension of the agent.

In this case, both Lower Courts rejected the plaintiff's claim on the ground of limitation. The defendant was a tehsildar in the service of the plaintiff, and, on the 22nd of Srabun 1271, he was suspended from his duties, another person was sent to replace him, and he never returned. The present suit for money received by him was not brought until the 8th of Srabun 1272, and, therefore, beyond the period of one year limited by Section 33 of Act X. of 1859. The appellant contends that the defendant was not actually dismissed till the 22nd Bhadro 1271, but it has been laid down as a general rule by this Court that the period of limitation counts from the date of suspension (*see* decision of 27th January 1864).

overlooked by the Lower Court. Relying then on the plaintiff's witnesses who stated that the defendant absconded in Falgoon or the beginning of Cheyt 1270, he found that the present suit, which was not instituted till the 15th Cheyt, was out of time, and, therefore, dismissed plaintiff's claim with costs.

Plaintiff now appeals specially, urging that, as the Lower Court has not laid down an issue as to limitation, the second Court should not have decided the case on that point without giving plaintiff an opportunity of producing evidence as to the date when his cause of action arose; and, *secondly*, that, as defendant pleads that he was dismissed on the 13th Cheyt, and on that ground pleads limitation, the *onus* was upon him of showing that he had been so dismissed before limitation could apply.

It appears that the Lower Court overlooked the plea of limitation and laid down no issue regarding it. The Appellate Court, taking it up, decides that, inasmuch as plaintiff's witnesses proved that defendant absconded at the end of Falgoon or the beginning of Cheyt, plaintiff is out of Court; but this is not defendant's allegation, which is that he was dismissed on the 13th of the month of Cheyt, and that, therefore, the present suit, instituted on the 15th of that month, was barred. Moreover, the mere absconding of an agent is not such a determination of the agency as to cause limitation to run from that date if it is one for a fixed period.

We, therefore, remit the case to the Judge, with directions that he will lay down an issue on the point of limitation, and give the parties opportunity to file evidence to prove their several allegations. The plaintiff will have to show that the defendant's agency was one of a yearly or other nature, and, having shown this, it will be for the defendant to show that he was dismissed from his agency on the date stated by him. If plaintiff is unable to show that defendant's agency, either by express or implied contract, or by custom, was one for a fixed period, he will be out of Court, as his suit is brought impliedly on the ground that the agency lasted to the end of 1270. If, however, plaintiff proves that the agency was one for a fixed period, defendant must then prove his allegation of dismissal; and, if he succeeds, limitation will bar the suit; if he fails, the case must be enquired into on the merits, the plea of limitation being decided in the negative.

The 30th July 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Limitation—Suit for money against Agent.**

Cases Nos. 653 and 682 of 1866 under Act X. of 1859.

*Special Appeals from a decision passed by Mr. E. G. Birch, Judge of Shahabad, dated the 6th December 1865, affirming a decision passed by the Deputy Collector of that District, dated the 5th August 1865.*

Huro Shurn Narain Sing (Plaintiff), *Appellant,*

*versus*

Roochee Dobey and others (Defendants), *Respondents.*

*Baboo Roopnath Banerjee* for Appellant.

*Mr. R. E. Twidale* and *Baboo Mohesh Chunder Chowdry* for Respondents.

A suit against an agent for money must be brought within one year from the date on which the plaintiff obtained knowledge of the sum due to him, which, in the present case, was the date on which, in a previous suit for rendering of accounts, the defendant had tendered the accounts in Court.

It is admitted by the pleaders before us that one and the same decision in special appeal will govern these two cases, in both of which the same plaintiff is special appellant.

Plaintiff sued his agent for delivery and rendering of accounts, and got a decree on the 9th October 1863 (Assin 1270). It is found as a fact, and indeed not disputed, that the defendants' agency ceased in Jeyt 1270, and that one defendant deposited in Court his accounts of his agency under

plaintiff before the decree was obtained by plaintiff. Plaintiff then, on the 28th June 1865, or about Assar 1272, in a separate suit, sued for Rs. 659-14-6 as money due, and stated that his cause of action arose from the 17th of Jeyt 1272, when the sums due under the accounts were made manifest to plaintiff.

The first Court held as a fact that plaintiff's statement that, on the 17th Jeyt 1272, the sums due became known to him, was false; next (as a matter of law) that plaintiff was barred by limitation, as the 17th Jeyt 1272 was not the date at which, as plaintiff alleged, he obtained knowledge of the sums due to him; and, therefore, under Section 33, Act X. of 1859, plaintiff was barred by limitation.

The Lower Appellate Court also held that plaintiff was thus barred and had no right of separate suit, and that he should have executed his decree for the rendering of the accounts.

It is contended before us that the plaintiff could only have knowledge from the time that defendants explained, from their accounts, on the 17th Jeyt 1272, the sums that were due to plaintiff, and that the decree was for the *explanation* of accounts.

The law contemplates that, where decrees are given to render accounts, the decree-holder shall, within a reasonable time of such accounts being rendered (and, of course, within the period of limitation prescribed by Section 33, Act X. of 1859), sue for such sums as may be due, or take such other action as he may be advised. But the accounts were rendered in this case *before* the decree, and it was for plaintiff *thereupon* to take those accounts and see himself what he could find fairly due to him under them; and that, within one year of these means of knowledge being available to him in this case (certainly within a month of the above accounts being filed in this case), he should, under Section 33, Act X. of 1859, have proceeded. It is not intended by the law that, when accounts have been put in and rendered, the other party shall wait till the explanation may come to him, two or more years afterwards, from the agents, as in this case.

Seeing, then, no reason to interfere with the decision of the Court below in this case, we dismiss these two special appeals with costs.

The 31st July 1866.

*Present:*

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

**Jurisdiction—Suit against Putneedar for Zemindary Dak Charges.**

Case No. 167 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Furreedpore, in Dacca, dated the 27th October 1865, affirming a decision passed by the Moonsiff of that District, dated the 27th May 1865.*

Ruttun Monee Dossee and others (Defendants), *Appellants,*

*versus*

Baboo Jotendro Mohun Tagore and another (Plaintiffs), *Respondents.*

*Baboo Greeja Sunkur Mojoomdar* for Appellants.

*Baboo Sreenath Doss* for Respondents.

A suit by a zemindar against a putneedar for zemindary dâk charges under Act VIII. of 1862 B. C. for which the latter is liable under his kubooleut, is not cognizable under Act X. of 1859.

PLAINTIFFS, zemindars, sue defendant, the putneedar, under his kubooleut, for the expense to which they have been put on account of dâk charges for which the putneedar is liable under his engagement dated in 1245.

Defendant pleads that he was only liable for the expense of any dâk stations that might be established within his putnee, and, as no such were established, he is not, under the terms of his putnee kubooleut, liable.

The Lower Courts gave plaintiff a decree. Defendant now appeals specially, urging, *first,* that the present suit is cognizable by the Revenue Court under Act X., and not in the Civil Court; and *secondly,* that, under the terms of his putnee kubooleut, he is not liable, no station having been established within his villages.

We do not think that a claim of this nature falls within the demands cognizable under Act X. of 1859; and, however convenient it might be to have them included under that law, we cannot legitimately construe the words so as to include them. On the second point, we are clear that, by his putnee-engagement, defendant was liable for all the dâk expenses incurred within his zemindary. For this burthen under Act VIII. of 1862 (B.C.) the zemindars, in the first instance, have been made liable to Government, they being entitled to recoup themselves under the engagement entered into with their tenants. Under this view, we think defendant has justly been made liable. We therefore dismiss the special appeal with costs.

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The 31st July 1866.

*Present:*

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

**Enhancement—Rule of proportion—Increase in value of produce (how to be calculated).**

Case No. 612 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Additional Judge of Hooghly, dated the 9th December 1865, affirming a decision passed by the Deputy Collector of that District, dated the 7th June 1865.*

Ram Taruck Ghose (Defendant), *Appellant,*

*versus*

Biressur Banerjee (Plaintiff), *Respondent.*

*Baboo Umbika Churn Banerjee* for Appellant.

*Baboos Mohendro Lal Shome* and *Pearee Mohun Mookerjee* for Respondent.

The mode of calculating the increase in the value of produce according to the rule of proportion is by simply taking the former and present value of produce, and not by calculating former and present profits after deducting costs.

THIS is a suit for enhancement in the Hooghly District. The defendant in special appeal urges *first* that he is protected by the terms of sale of the Government estate bought by plaintiff. But we find that those terms merely bound the purchaser to respect the rights of the ryots as recorded, and that defendant, being only recorded as a khodkasht ryot, may be liable to enhancement on account of the subsequent rise in the value of the produce. The appellant further says that he filed receipts to show 20 years' uniform payment, and that the Judge has not adjudicated the point. But the Deputy Collector having decided against him, he made no appeal to the Judge on this point; and therefore we will not hear him now.

As respects the rates, the Judge has found that, between 1255, when the rent was last fixed, and the present time, the profit has increased in the proportion of Rs. 3-8 to Rs. 8, or as 7 to 16, and has decreed enhancement in that proportion. Having ruled that certain new and valuable staples had been introduced by the labor and at the expense of the ryot, he properly bases his calculation on the increase in the value of the old kinds of produce. It would seem that his calculation so far departs from the ruling of the Full Bench that he has calculated former and present profits after deducting costs, instead of simply taking the former and present value of produce: but no objection has been urged before us on this point, and the decision is probably quite equitable. We dismiss the appeal with costs.

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The 31st July 1866.

*Present:*

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

**Rent—Transfer of Ryot's jote—Registration.**

Case No. 613 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Additional Judge of Hooghly, dated the 9th December 1865, affirming a decision passed by the Deputy Collector of that District, dated the 7th June 1865.*

Gunga Ram Sirdar (Defendant) and Raj Kishen Mookerjee (Objector), *Appellants,*

*versus*

Biressur Banerjee (Plaintiff), *Respondent.*

*Mr. R. T. Allan* for Appellants.

*Baboos Mohendro Lal Shome* and *Pearee Mohun Banerjee* for Respondent.

In the case of transfer of a mere ryot's jote the person in possession is liable for the rent, whether he is registered or not.

As respects the question of enhancement, this case is analogous to No. 612, and the

Judge has found the rates on the same evidence. But there is an additional plea that the defendant, having previously parted with his jote, is no longer liable, and Raj Kishen Mookerjee, the purchaser, urges that the Courts below wrongfully refuse to make him a party. On this last point, we do not think that the decision of the Judge is quite clear. He seems to consider that the old tenant, and the old tenant only, must remain liable till the transfer has been formally registered under Section 27, Act X. of 1859. The tenure does not appear to be an intermediate holding within the meaning of the Section, but a mere ryot's jote. In respect to such a jote, we think (as laid down in a former ruling) that the person liable is the party in possession. It appears to be admitted that receipts on the record show that plaintiff did actually receive rents from Raj Kishen, although he gave the receipts in the form—"*Gunga Ram through Raj Kishen.*" We think, therefore, that, on this objection, the Courts must find whether Raj Kishen really was the party in possession during the period sued for. If so, then he, and not Gunga Ram, will be liable for the rent. If, however, Raj Kishen is liable for the rent, there may then arise the question whether he has any rights entitling him to resist enhancement, and it would on that point be necessary to find whether the tenure is one transferable according to the custom of the country. If not, he would be a mere holder during pleasure. The case will be re-tried with reference to the above remarks.

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The 31st July 1866.

*Present:*

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

**Enhancement (Standard of)—Ryots with rights of occupancy.**

Case No. 873 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Hooghly, dated the 30th December 1865, reversing a decision passed by the Deputy Collector of that District, dated the 25th June 1864.*

Ram Coomar Dhara and others (Defendants), *Appellants,*

*versus*

Bhoyrub Chunder Mookerjee (Plaintiff), *Respondent.*

*Babbo Tarucknath Sein* for Appellants.

*Baboo Romanath Bose* for Respondent.

In the absence of proof of any separate class of ryots within the general body of occupancy-ryots, the general body of such ryots must be held to be "the same class of ryots" to whose standard a ryot with a right of occupancy may be raised, although some may be more and some less ancient than he.

THIS is a suit for enhancement on the ground that defendant is holding at rates below the prevailing rates. Defendant in special appeal objects that the ryots to whose standard he has been raised are ryots of a more modern character than himself.

But the Judge finds that *similar* ryots pay those rates for *similar* lands, and defendant admits that those other ryots with whom he is compared are ryots with rights of occupancy as he is. He is unable to show that, according to the custom of the village, there are any separate *class* of ryots within the general body of occupancy-ryots, and, therefore, we must consider the general body of ryots with rights of occupancy to be "the same class of ryots" within the meaning of the law, although some may be more and some less ancient. The appeal is dismissed with costs.

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The 31st July 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Jurisdiction—Damages—Illegal distraint of crops.**

Case No. 986 of 1866.

*Special Appeal from a decision passed by the Judge of Dacca, dated the 15th January 1866, affirming a decision passed by the Moonsiff of Bohur, dated the 29th June 1865.*

Shumbhoonath Banerjee and others (Defendants), *Appellants,*

*versus*

Tarinee Churn Bose and others (Plaintiffs), *Respondents.*

*Baboo Romesh Chunder Mitter* for Appellants.

*Baboo Chunder Madhub Ghose* for Respondents.

A suit to recover damages for an illegal distraint of the plaintiff's crops is properly brought in the Revenue Courts.

THE special appellant's vakeel endeavours to make out that this suit is not cognizable by a Revenue Court under Act X. of 1859, as it is, he considers, a suit for damages

or mesne-profits in consequence of the dispossession of the plaintiffs by the defendants from their tenure. But, after hearing the plaint and reading the judgments, we find that the suit is brought to recover damages for an illegal distraint of the plaintiff's crops.

Such a suit is properly brought in the Revenue Courts.

Appeal dismissed with costs.

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The 31st July 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Enhancement—Under-tenures.**

Case No. 1014 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Additional Judge of Hooghly, dated the 8th January 1866, reversing a decision passed by the Deputy Collector of Howrah, dated the 15th June 1865.*

Tarucknath Puramanick (Plaintiff), *Appellant,*

*versus*

Mr. R. McAllister (Defendant), *Respondent.*

*Baboos Dwarkanath Mitter* and *Onookool Chunder Mookerjee* for Appellant.

No one for Respondent.

Under-tenures fall with the original tenure of the defaulter, and are liable to enhancement by the purchaser of the tenure sold for arrears of rent.

THE Judge is in error in ruling that this case is governed by Section 26, Act I. of 1845. The plaintiff, having purchased a mokurruree tenure at a sale for arrears of its own rent, sues two under-tenants in that mokurruree to enhance their rent. They put forward pottahs received from the mokururreedar. The Judge has ordered that the Lower Court shall consider whether these have been granted at a fair rate. The law which the Judge alludes to has no connection with the sale of tenures. Regulations I. of 1820 and VIII. of 1819 are applicable. The under-tenures fall with the original tenure of the defaulter, and the pottahs granted by the old mokurrureedar are of no avail. The plaintiff is entitled to enhance the rent, if he can show good and legal grounds for it, to the extent to which those grounds apply.

The Judge's decision is reversed, and the case is remanded to him to carry out these orders.

Costs to follow the final judgment.

The 31st July 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

**Enhancement—Increase in the Value of produce (Meaning of).**

Case No. 1182 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Shahabad, dated the 10th April 1866, reversing a decision passed by the Deputy Collector of that District, dated the 20th November 1865.*

Bhagruth Doss and others (Plaintiffs), *Appellants,*

*versus*

Mohasoop Roy and another (Defendants), *Respondents.*

*Messrs. R. E. Twidale* and *C. Gregory* for Appellants.

*Baboo Kishen Succa Mookerjee* for Respondents.

The increase in the "value of the produce," which is to form a ground for enhancement of rent under Section 17 of Act X. of 1859, means an increase in its natural and usual value in ordinary years. The accidental and exceptional high prices of a particular year, in consequence of drought and scarcity, cannot be treated as a measure by which rent is to be adjusted. A tenant takes land, not with reference to the exceptional high prices of a past year, but with reference to the prices he may reasonably expect to realize for the crops which he will raise in succeeding years.

THIS was a suit for enhancement of the rent of certain land held by the defendants at the rate of Rs. 2-4 per beegah.

The plaintiff relied on two grounds: *first,* that the rates for neighbouring land were higher. The Judge, in a former decision remanding the case to the Deputy Collector, from which there has been no appeal, decided that the plaintiff was bound by a certain jummabundee, and could not maintain his suit for enhancement on this ground. *Secondly,* that there had been an increase in the value of the produce of the land independently of any act of the ryot, defendant. The Lower Court gave the plaintiff a decree for rent at Rs. 4 per beegah. But, on appeal, the Judge found that the Deputy Collector had fixed this rate on a comparison of the prices of 1268 with those of 1271 and 1272; that the prices in those years were owing, not to the proximity of the Railway, but to the scarcity of grain all over that part of the country; and he says that, in his opinion, "the law does not "contemplate that zemindars should take "advantage of a rise in prices in two bad sea-"sons." He says that "plaintiff has failed

"to show that, since the settlement in 1268, "circumstances, of which he ought to take "advantage, have occurred to raise the value "of the land;" and he adds that he thinks the suit "is the attempt of a grasping land-"lord to take advantage of the rise in prices "occasioned by two years of drought." And accordingly he dismissed the suit.

In special appeal before us, Mr. Gregory, for the plaintiff, attempted to contend, *first*, that the plaintiff was entitled to enhance rent according to the actual prices of the two years 1864-65, as compared with those of 1861, when the rent was last fixed. We think, however, that it is clear that the increase in the "value of the produce," which is to form a ground for enhancement of rent under Section 17 of Act X., means an increase in its natural and usual value in ordinary years, and that the accidental and exceptional high prices of a particular year, in consequence of drought and scarcity, cannot be treated as a measure by which rent is to be adjusted. A tenant takes land, not with reference to the exceptional high prices of a past year, but with reference to the prices he may reasonably expect to realize for the crops which he will raise in succeeding years.

Mr. Gregory next urged that the Judge should have made an allowance in respect to some increase in price which he said must have been caused by the Railway.

It is no doubt true that the facility of access to markets afforded by the Railway has probably increased the value of the produce. But the plaintiff's claim was not so limited. The evidence adduced by him did not point to, or apparently enable the Court to distinguish, the increase in price attributable to this cause.

The Judge was not bound to make a new case for the plaintiff which he did not make for himself; and, considering that the defendant had the fullest right to resist the claim, as shaped by the plaintiff, we think that the suit was properly dismissed. We dismiss the appeal with costs and interest.

The 1st August 1866.

*Present:*

The Hon'ble C. B. Trevor and E. Jackson, *Judges.*

**Presumption of uniform payment from Permanent Settlement—Nature of uniformity.**

Case No. 762 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Jessore, dated the 20th December 1865, affirming a decision passed by the Deputy Collector of that District, dated the 27th June 1865.*

Messrs. W. Moran and Co. (Plaintiffs), *Appellants,*

*versus*

Anund Chunder Majcomdar (Defendant), *Respondent.*

*Mr. R. T. Allan* for Appellants.

*Baboos Greeja Sunkur Mojoomdar* and *Bungsheedhur Sein* for Respondent.

Uniformity in the amount actually paid is not required to raise the presumption under Section 4, Act X. of 1859, but uniformity in the rate agreed upon, either expressly or impliedly, between the parties to be paid.

PLAINTIFF in the present suit has sued to enhance the rent of the defendant after service of notice.

The defendant pleads that he is not liable to enhancement, and that he holds a mokurruree jote under a pottah, dated 1246 or 1839, executed by plaintiff's predecessor confirmatory of an old one, dated 1194 or 1787.

Both the Lower Courts considered defendant not liable to enhancement, and dismissed the plaintiff's claim.

Plaintiff now appeals specially, urging, *first*, that, as the pottahs on which defendant relies not having been proved formally, the Judge should not have admitted them as genuine documents sufficient to defeat his right to enhance after due service of notice; and, *second*, that the evidence, so far from proving that a uniform rate of rent was paid by defendant, shows incontestibly a varying rate; he, plaintiff, therefore, is entitled to a decree for enhancement.

The defendant in the Court below relied on a decree dated 1844, in which plaintiff's predecessor having sued defendant for rent, he relied on the pottah of 1839 now propounded, and obtained a decree in conformity with his plea. It is not shewn that the rate of rent has been changed by any

conjoint act of the parties at any period subsequent to that date; consequently, unless plaintiff is able to show that the defendant has voluntarily paid a higher rate than that decreed, he will be entitled to the presumption of Section 4, Act X. of 1859. With a view of proving this, plaintiff urges that the varying amounts of rent paid by defendant in each year are inconsistent with the uniformity in amount of payment required by law to warrant that presumption, and show a voluntary variation of payment on the part of the tenant. As to the varying amount paid yearly, as remarked by the Judge, the increased payments in some years were probably to make up deficiencies in previous years. But, be that as it may, as before observed, it is not uniformity in the amount actually paid that is required to raise the presumption, but only uniformity in the rate agreed upon, either express or implied, between the parties to be paid. The uniformity is evidenced in the present case, and, therefore, plaintiff's special appeal cannot succeed, but must be dismissed with costs.

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The 2nd August 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Sale of tenure (for arrears of rent)—Rights of purchaser.**

Case No. 1096 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Chittagong, dated the 5th February 1866, reversing a decision passed by the Deputy Collector of that District, dated the 25th August 1865.*

Jan Ali (Plaintiff), *Appellant,*

*versus*

Sufeena Bibee (Defendant), *Respondent.*

*Baboo Greeja Sunkur Mojoomdar* for Appellant.

*Baboo Kishen Succa Mookerjee* for Respondent.

The purchaser of a tenure sold for arrears of rent acquires the tenure free from all encumbrances and under-tenures created by the defaulter.

THE Judge is wrong in law. The purchaser of a tenure at a sale for arrears of its own rent obtains that tenure as it was originally created, free from all encumbrances and under-tenures created by the defaulter. The Judge has upheld the defaulter's under-tenures against such a purchaser. His decision is reversed, and the case remanded for decision on the remaining points which arise in it.

Costs to follow final judgment.

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The 3rd August 1866.

*Present:*

The Hon'ble G. Campbell and E. Jackson, *Judges.*

**Rent—Liability of ryot in possession—Registration.**

Case No. 1201 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Purneah, dated the 8th February 1866, affirming a decision passed by the Assistant Collector of that District, dated the 20th August 1865.*

Jerabutoonissa Khanum (Plaintiff), *Appellant,*

*versus*

Ram Chunder Doss and others (Defendants), *Respondents.*

*Mr. R. E. Twidale* for Appellant.

No one for Respondents.

A suit for rent against several parties is maintainable against such of them as are shown to be in possession as tenants, whether they are registered or not.

THIS is a suit against several parties for rent. It has been dismissed, as the Judge calls it, by way of "non-suit," and the Assistant Collector also calls it "multifarious," both of which expressions are quite out of place. The ground of dismissal apparently is that plaintiff has failed to produce Hustobood papers. It may be that, if these papers were really necessary as evidence, their non-production after warning would justify a dismissal; but the matter is not clearly put, and the Lower Courts seem to hold that, unless the defendants are registered tenants, the suit cannot be maintained, and the Hustobood papers were called for on this point. This is a mistake. If the defendants, or any of them, are shewn to be in possession as tenants, the suit can be maintained whether they are registered or not, and those not in possession can be struck out. We remand the case to the first Court to be properly re-tried with reference to the above remarks.

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The 3rd August 1866.

*Present:*

The Hon'ble C. B. Trevor and H. V. Bayley, *Judges.*

**Enhancement—Waivor—Ejectment (Section 78, Act X. of 1859).**

Case No. 1009 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Additional Judge of Hooghly, dated the 29th January 1866, reversing a decision passed by the Deputy Collector of that District, dated 5th July 1865.*

Mr. Lauder (Defendant), *Appellant,*

*versus*

Benode Lal Ghose (Plaintiff), *Respondent.*

*Baboo Anund Chunder Ghossal* for Appellant.

*Baboo Issur Chunder Chuckerbutty* for Respondent.

In 1267 the plaintiff obtained a decree in a suit to enhance the defendant's rent. HELD that the acceptance by the plaintiff of the old rent from 1268 to 1271 was no waivor of his claim to the higher rent decreed to him.

Under Section 78, Act X. of 1859, a decree for ejectment must be conditional on the defendant not paying the decreed rent within 15 days.

PLAINTIFF sued to enhance defendant's rent from Rs. 1-1 ½ to Rs. 13-7-17 ½, and got a decree on the 28th August 1860 (13th Bhadro 1267). He then, on the 29th Cheyt 1271, sued for arrears of rent at the enhanced rates from 1268 to 1271, deducting the sums which defendant had paid at the old rates; and plaintiff also sued for ejectment. Plaintiff got a decree. Defendant appeals specially, and urges—

I. That limitation bars the suit.

II. That, by acceptance of the old rent from 1268 to 1271, plaintiff waived his claim to the higher rents decreed to him.

III. That, under Section 78, Act X. of 1859, the present decree should not have been for ejectment absolutely, but conditionally on defendant not paying the decreed rent within 15 days.

On the *first* point, we are clearly of opinion that limitation does *not* bar the suit, because, under Section 32, suits for the recovery of arrears of rent shall be instituted within three years of the last day of the Bengalee year in which the arrears shall have become due. The arrears became due from 1268. The last day of that year was the 30th Cheyt. The suit was brought on the 29th Cheyt 1271—that is within three years prescribed by that law. Plaintiff is, therefore, within time.

On the *second* point, we are of opinion that the alleged waivor relied on by special appellant is no waivor at all. The plaintiff cannot recover more than three years' rents, *i.e.*, for that period for which he would be within time by law to sue, but his abstaining to sue for that allowed time, or recovering the old rent on account, is no waivor.

On the *third* plea, we think the special appellant is right. The law, Section 78, enacts that, if the amount decreed, together with interest and costs of suit, be paid into Court within 15 days from the date of the decree, the execution shall be stayed. The decree should have been in the terms of the law. If, therefore, the defendant, special appellant, pay the decreed sum within 15 days of this decree, ejectment in execution is to be stayed. In all other points, the special appeal is dismissed with all costs.

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The 3rd August 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Presumption of holding from Permanent Settlement—Pleading—Proof of uniform payment for 20 years.**

Case No. 1080 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of East Burdwan, dated the 30th January 1866, affirming a decision passed by the Deputy Collector of that District, dated the 18th September 1865.*

Sham Lal Ghose (Plaintiff), *Appellant,*

*versus*

Muddun Gopal Ghose *alias* Makhun Lal Ghose and another (Defendants), *Respondents.*

*Mr. C. Gregory* for Appellant.

*Baboo Gopeenath Banerjee* for Respondents.

It is not absolutely necessary that a ryot who seeks the benefit of the presumption raised by Section 4, Act X. of 1859, should state explicitly that he has held at an uniform rent. Proof of uniform payment of rent for more than 20 years is sufficient.

WE think the decision of the Judge correct. It is not absolutely necessary that a ryot who seeks the benefit of the presumption raised by Section 4, Act X. of 1859, should state in explicit terms that he has held at an uniform rent from the Perpetual Settlement before he can obtain the benefit of such presumption.

In this case, the Judge has found that the receipts filed by the special respondent, the ryot, prove uniform payment of rent for more than 20 years preceding the suit; and we find, on inspection of the receipts, that this is the case.

Appeal dismissed with costs and interest.

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The 3rd August 1866.

*Present:*

The Hon'ble G. Campbell and E. Jackson, *Judges.*

**Right of occupancy—Evidence—Mention of a term in pottah.**

Cases Nos. 1219 to 1222 of 1866 under Act X. of 1859.

*Special Appeals from a decision passed by the Judge of Bhaugulpore, dated the 16th February 1866, affirming a decision passed by the Deputy Collector of that District, dated the 31st August 1865.*

Baboo Nund Lal Singh and another (Defendants), *Appellants,*

*versus*

Rumun Singh (Plaintiff), *Respondent.*

*Baboos Chunder Madhab Ghose* and *Anund Gopal Paulit* for Appellants.

*Mr. R. E. Twidale* for Respondent.

The mention in a pottah of a certain term for which the rate of rent is fixed is not of itself evidence that there is no right of occupancy.

WE think that the Judge on these appeals has adopted the careful and elaborate judgment of the Deputy Collector. The finding is that the tenants hold a right of occupancy, although their pottahs state a certain term for which the rate of rent is fixed. It is said that the mention of this term is of itself evidence that there was no right of occupancy. But we think that the Deputy Collector was right. Under some circumstances, especially at the commencement of a new contract, a specification of a term may lead to the presumption that the landlord has a right of re-entry at the end of it. But, in this case, the tenants are found to be ancient tenants, and the term stated in their pottahs evidently referred only to the rate of rent fixed by those pottahs.

Appeals dismissed with costs.

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The 3rd August 1866.

*Present:*

The Hon'ble W. S. Seton-Karr and Shumbhoonath Pundit, *Judges.*

**Limitation—Unsuccessful intervention under Section 77, Act X. of 1859—Suit of intervenor for possession.**

Case No. 109 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Gya, dated the 24th October 1865, affirming a decision passed by the Sudder Ameen of that District, dated the 14th March 1865.*

Mussamut Mungroo Oopadhyan and others (Defendants), *Appellants,*

*versus*

Mussamut Chamelee Koonwar (Plaintiff), *Respondent.*

*Baboo Nil Madhub Sein* for Appellants.

*Mr. C. Gregory* for Respondent.

The fact of a person obtaining a decree against other parties in a suit for rent under Act X. of 1859, in which a third party unsuccessfully intervened, does not affect the rights of the intervenor or bar the intervenor's present suit for possession, merely because it was not instituted within a year of the decree for rent which the intervenor does not ask to be set aside.

THE Lower Appellate Court has found on evidence that the plaintiff is proved to be in possession, and that the lands sued for are the lakheraj lands purchased by her husband.

The special appellant contends that the plaintiff cannot sue, as she is not the heir of her husband when he left sons who are alive; but it appears that the plaintiff asserts in her plaint that she has, since the death of her husband, by a family arrangement, taken

possession of the lands in dispute; and the said sons of her husband do not appear to contradict this assertion. Under such circumstances, the special appellant is not entitled to object to the right of the plaintiff to sue the special appellant for restoration of possession of lands of which the special appellant is proved to have dispossessed her.

As to the plea of limitation taken by the special appellant, it has been repeatedly ruled by the Court that the fact of the special appellant obtaining a decree for rent against other parties in a case under Act X. of 1859, in which the plaintiff had unsuccessfully intervened, does not affect the rights of the plaintiff, or make her present suit for possession liable to be affected by limitation, merely because she has not instituted this case within a year of the decision in the rent-case, the decree passed in which case she does not ask to be set aside.

We reject this special appeal with costs.

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The 3rd August 1866.

*Present:*

The Hon'ble C. B. Trevor and H. V. Bayley, *Judges.*

**Onus probandi—Enhancement—Plea of Mokururree pottah.**

Case No. 993 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by Mr. F. L. Beaufort, Judge of the 24-Pergunnahs, dated the 20th December 1865, affirming a decision passed by the Deputy Collector of that District, dated the 23rd August 1865.*

Prannath Roy Chowdhry (Plaintiff), *Appellant,*

*versus*

Moheeooddeen Ahmed (Defendant), *Respondent.*

*Baboo Motee Lal Mookerjee* for Appellant.

*Mr. R. E. Twidale* and *Baboo Khettur Mohun Mookerjee* for Respondent.

**Where a plaintiff sues for enhancement on the ground that the defendant did not pay the rents paid by others in the neighbourhood for similar lands, and the defendant denies his liability to pay such rents owing to his having mokurruree pottahs, the *onus* is on the defendant to prove those pottahs.**

In this case, plaintiff sued to enhance defendant's rent. Defendant pleaded three pottahs at fixed rents. The case was remanded by this Court for the trial of the genuineness of the pottahs, this Court ruling that the Lower Courts had erroneously held that irregularity in regard to the stamps prevented their looking further into the pottahs.

The first Court now finds that, on the depositions of the parties and the documentary evidence, the pottahs were proved.

The Lower Appellate Court on appeal held that there had been no evidence in the first Court to the execution of the pottahs; but that such evidence was unnecessary, because the plaintiff did not deny the genuineness of the pottahs in previous suits between himself and the defendant, and in which the documents were material.

It is urged in special appeal that there were no admissions that these pottahs were genuine, and, even if made in other suits, it would not estop plaintiff from raising the question of the genuineness of defendant's pottahs in this suit.

In a case like this, where plaintiff sues to enhance defendant's rent, on the ground that the defendant did not pay the rents paid by others in the neighbourhood for similar lands, and defendant denied his liability to pay such rents owing to his having mokurruree pottahs, it was clearly for defendant, first of all, to prove those pottahs. It is not obligatory on plaintiff to admit or deny anything till defendant, on whom, in such a case as this, the burden of proof entirely falls, proved his allegations as to his pottahs. We, therefore, think that the Lower Appellate Court was wrong in its view that no evidence was necessary. Nor are we shown by the respondent, in any of the decisions which form the whole documentary evidence in the case, that they recorded any adjudication as on a material issue in those cases upon the genuineness of the pottahs. Thus, those decisions could not be sufficient evidence of the genuineness of the pottahs.

On both the above grounds, then, we think the Judge's decision wrong, and we reverse it, and remand the case, requiring that the defendant be required to produce direct evidence to the genuineness of the pottahs, and the case be re-tried, and such orders be then passed as may appear just and proper.

The respondent wishes to object, under Section 348, Act VIII. of 1859, on the matter of interest on costs.

But, as a fresh judgment will, under this remand order, be necessary on the whole costs, this point may be considered with reference to whatever may be the final judgment of the Lower Courts on this remand.

This special appeal is, accordingly, dismissed with costs.

The 3rd August 1866.

*Present:*

The Hon'ble G. Campbell and E. Jackson, *Judges.*

**Ryots with rights of occupancy (Power of—to build pucka houses).**

Case No. 1204 of 1866.

*Special Appeal from a decision passed by the Additional Principal Sudder Ameen of Dacca, dated the 8th February 1866, affirming a decision passed by the Moonsiff of that District, dated the 12th July 1865.*

Nyamutoollah Ostagur (Defendant), *Appellant,*

*versus*

Gobind Churn Dutt (Plaintiff), *Respondent.*

*Mr. G. C. Paul* and *Baboo Gopal Lal Mitter* for Appellant.

*Baboos Grish Chunder Ghose* and *Chunder Madhub Ghose* for Respondent.

A ryot with a right of occupancy may build a pucka house on his land, or do what he likes with the land so long as he does not injure it to the detriment of the landlord.

It is admitted that defendant is a ryot with a right of occupancy. Plaintiff sues to compel him to pull down a pucka house, on the ground that he has no right to build it; and the Lower Appellate Court has decreed accordingly. We think it clear that every man possessed of a right to hold the land permanently—that is, of a right of occupancy—can do what he likes with the land so long as he does not injure it to the zemindar's detriment. The Lower Appellate Court finds from the evidence of certain zemindars that "kursa" ryots have no right to build houses without the permission of the zemindar, rejecting the ryots who testified for defendant as low men, and *not* zemindars; and he finds that defendant has not proved a "*meeras*" right.

Respondent cannot show us the exact meaning of "kursa," but he states that it is applied to simple cultivating ryots, as opposed to "mourosee" and "mokurruree" ryots. Now, even assuming that, previous to the passing of Act X. of 1859, defendant was a mere "kursa" ryot (which he by no means admits), it has been judicially determined that he has now a right of occupancy, that is, has a "mourosee" or "meeras" (*i. e.*, hereditary), though not a mokurruree tenure; and any custom which may have applied to him as a kursa ryot cannot now apply to him. A custom must be a reasonable custom protecting the rights of some persons or classes; and, as respects the ryots without right of occupancy, such a custom as is alleged would be reasonable enough, but, when there is a permanent hereditary right of occupancy, such a custom would be utterly unreasonable. Plaintiff in no way suffers by the building of a pucka house on the land of the occupancy-ryot; on the contrary, the land is rendered more valuable. We decree the appeal and dismiss the suit with all costs.

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The 3rd August 1866.

*Present:*

The Hon'ble W. S. Seton-Karr and Shumbhoonath Pundit, *Judges.*

**Appeal—Section 77, Act X. of 1859.**

Case No. 1189 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Cuttack, dated the 6th February 1866, reversing a decision passed by the Deputy Collector of that District, dated the 30th July 1864.*

Padook Purindah and another (Defendants), *Appellants,*

*versus*

Gopee Bundhoo Patnaid (Plaintiff) and another (Intervenor), *Respondents.*

*Baboo Umbica Churn Banerjee* for Appellants.

*Baboo Tarucknath Sein* for Respondents.

Under Section 153, Act X. of 1859, an appeal lies to the Judge when, in a suit for rent below Rs. 100 in which a third party intervenes under Section 77, the Court of first instance decides any matter relating to title.

The special appellant objects in this case to the trial of the appeal from the first Court by the Judge below, because the case was for rents below Rupees 100, and because he asserts that, under Section 77, Act X.

of 1859, as regards the intervenor, no question of title could be decided by the first Court.

It is clear that, when, in a case under Section 77, the Court of first instance decides any matter relating to title, under Section 153 of the Act of 1859, the appeal lies to the Judge. (*See* page 1, Act X. Rulings, Volume VI., Weekly Reporter.)

In this case, the Judge below, we see, was, with reference to the decision passed by the Court of first instance, justified in hearing an appeal from that decision.

We accordingly reject the special appeal with costs.

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The 3rd August 1866.

*Present :*

The Hon'ble W. S. Seton-Karr and Shumbhoonath Pundit, *Judges.*

**Enhancement—Intermediate holders—Evidence—Notice.**

Case No. 700 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Rungpore, dated the 15th December 1865, modifying a decision passed by the Deputy Collector of that District, dated the 11th September 1865.*

Gouree Pershad Doss (Defendant), *Appellant,*

*versus*

Ranee Shurno Moyee (Plaintiff), *Respondent.*

*Mr. C. Gregory* and *Baboo Kishen Succa Mookerjee* for Appellant.

*Baboos Unnoda Pershad Banerjee* and *Sreenath Doss* for Respondent.

**An intermediate holder's rent should not be enhanced so as to render his holding altogether void of all reasonable profit.**

**The mere service of a notice by an intermediate holder on certain of his ryots is no proof that he realized rents at the rates specified in such notice.**

THE special appellant is sued for enhancement of his jote, and the lands held by him are situated in ten villages, and their quantity is very *considerable.*

He is clearly an intermediate holder between the zemindar and many ryots, and the assessment fixed for his lands without allowing him any profits, by adopting the rate of the rents payable by cultivating ryots, does not appear to us to be fair and equitable in his case. He has long held these lands, and has, no doubt, taken some trouble in settling and encouraging ryots thereon; and the law does not authorize the plaintiff to assess him so as to render the holding of the lands by the special appellant altogether void of all reasonable profit. The case is, therefore, remanded to the Lower Appellate Court, with directions to adopt rates suitable to the intermediate position of the special appellant. The Judge must endeavour to fix, by some means, what is fair and equitable for a person in such a position. He will see that it is clear that, to charge him with the full rates of cultivating and resident ryots—such, for instance, as 4 rupees for bastoo lands—would not be "fair and equitable." We may observe that the mere service by the appellant of a notice on certain of his ryots is no proof that he realizes rents at the rates specified in such notice. The special appellant is also entitled to an enquiry by the Lower Appellate Court, regarding the custom pleaded by him that he should be allowed a deduction of 2 cottahs per beegah out of certain kinds of lands held by him under the custom locally known as Bishun Kuncha. The interest upon the assessment fixed by the Lower Appellate Court from the date of the notice should be allowed only from the date of the decree fixing the jumma payable by the special respondent, whatever it may be.

Remand accordingly to the Judge for a fresh decision on the above points.

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The 6th August 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble F. B. Kemp, *Judge.*

**Enhancement—Presumption of uniform payment for 20 years—Evidence.**

Case No. 3221 of 1865 under Act X. of 1859.

*Special Appeal from a decision passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 31st August 1865, affirming a decision passed by Mr. W. Scott, Deputy Collector of that District, dated the 31st May 1865.*

Gobind Chunder Bhoomik (Plaintiff), *Appellant*,

*versus*

Rammonee Dossee and another (Defendants), *Respondents*.

*Baboos Rajender Misser* and *Nulleet Chunder Sein* for Appellant.

*Baboo Nilmonee Sein* for Respondents.

**Although, in order to prove the payment of a uniform rate of rent for 20 years, it may not be necessary to prove an uninterrupted course of receipts, yet, if the evidence in the case shows that, during the period for which receipts are not produced, the ryot was paying at a different rate of rent, that evidence must be taken into consideration with the receipts that are produced.**

THIS is a suit to enhance rent. The Judge finds that the defendant has paid at the rate of Rupees 22-6 for the last 20 years. If the Judge was right in that finding, then under Section 4, Act X. of 1859, it was presumptive evidence that the ryot was entitled to the benefit of Section 3 of that Act as having held at that rate of rent from the time of the Permanent Settlement. The Judge says that, in order to prove the payment of a uniform rate of rent for 20 years, it is not necessary to prove an uninterrupted course of receipts. In that respect he may be right. But, if the evidence in the case shows that, during the period for which receipts are not produced, the ryot was paying at a different rate of rent, that evidence must be taken into consideration with the receipts that are produced.

In this case, it appeared that Gunganarain, who was the brother of Issur Chunder and the husband of the other defendant, in 1259, executed an ekrarnamah acknowledging that he held these lands at the yearly rent of Rupees 28, and he agreed to pay a certain amount which was due from him as a balance of rent for 1257-58 (1850-51). A suit was brought against him in the Moonsiff's Court upon that ekrarnamah, and a decree passed against him for the balance due under it, and that decree was upheld in appeal before the Principal Sudder Ameen. If that ekrarnamah was really executed, it shows that in 1259 (1852) the holding was at Rupees 28, and not at Rupees 22, which rebutted the evidence of the receipts tending to show uniformity in the rent for the last 20 years.

It is said that that ekrarnamah of 1259 and the decrees upon it were not admissible in this case, inasmuch as in 1864 a suit was brought for rent at the rate of Rupees 22, and the Collector rejected the ekrarnamah of 1259. That may be right. It did not follow that, because Rupees 28 were payable in 1858, that same rate of rent necessarily continued to 1864. In 1864 he was sued for the balance of the rent due for that year, not for enhancement, and no question arose or could arise on that suit beyond the mere question of what was the rate of rent at which he was holding—not the rate at which he had held in 1259 or in any other year.

The case must be remanded to the Judge to try whether (taking into consideration the ekrarnamah of 1259, the instalment that was paid upon it, and the decree against Gunganarain which is evidence against Issen Chunder who claims through Gunganarain) the two brothers held jointly in 1259 at Rupees 22, and whether, notwithstanding that ekrarnamah, it is proved that the defendant and those through whom he claims have held at a uniform rate of Rupees 22 for the last 20 years.

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The 8th August 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges*.

**Limitation—Cause of action—Enhancement.**

Case No. 147 of 1866 under Act X. of 1859.

*Regular Appeal from a decision passed by the Deputy Collector of Baghaut, in Jessore, dated the 16th March 1866.*

Madhub Chunder Ghose (one of the Defendants), *Appellant*,

*versus*

Radhika Chowdrain (Plaintiff), *Respondent*.

*Mr. J. Cochrane* and *Baboo Bungsheedhur Sein* for Appellant.

*Mr. R. T. Allan* and *Baboo Anund Chunder Ghosal* for Respondents.

**A previous suit was brought in June 1859 which was not finally decided in appeal by the High Court until December 1865, the effect of which decision was to take the talook then in dispute out of the class of those protected by Section 51, Regulation VIII., 1793, and to make it liable to enhancement. HELD that the plaintiff's cause of action for rent did not accrue until the ascertainment of the rent by that decision, and that her present suit for about 5 years' rent from 1st July 1859, having been brought within one year from the date of that decision, could be maintained.**

*Seton-Karr, J.*—THIS suit was decreed by the Deputy Collector *ex parte* on the 31st of August 1865. It was afterwards revived, under Section 58 of Act X. of 1859, on an application made to that effect by the appellant now before us.

We may at once say that Mr. Allan, for the plaintiff, respondent, has not made out a plea taken by him in cross-appeal, to the effect that the suit was revived irregularly. Nothing has been adduced to lead us to think that the revival of the suit was not regularly done.

The suit was for rents due from the date of the institution of a previous suit on the 30th of June 1859, or Assar 1266, to Cheyt 1271, amounting with interest to Rupees 10,755, and it has been decreed by the Deputy Collector.

On appeal, Mr. Cochrane urges that the suit should not have been decreed, inasmuch as no notice was served on the defendant, and in support of his view he quotes the cases noted in the margin,* in which rent-suits were dismissed without trial on failure of notice.

* Weekly Reporter, Vol. III., p. 25, Act X.
Ditto ditto „ III., p. 139 „
Ditto ditto „ III., p. 140 „
Ditto ditto „ V., p. 14 „

But the case before us is taken out of the purview of those cases by the fact that, in this instance, the plaintiff had instituted a previous suit on the 30th of June 1859, to fix the rent of the defendant after service of notice, and that the right to enhancement was only decreed and fixed by the decision of the High Court of the 17th of December 1864. Until this former suit had been decided, it was useless for the plaintiff to sue, as the rent had not been ascertained, and, when it was decided, the plaintiff had a right to come in under Section 30 of Act X. of 1859, inasmuch as the ascertainment of the rent by the decision in question gave her a "cause of action," and she has sued within one year of the same.

The objections, then, as to the failure of notice in this instance, have no application.

But it is objected that the plaintiff cannot get more than 3 years' rent, and that, in any view of the case, the plaintiff is not entitled to the rents of 1266, as she might have asked for and obtained them in her previous suit brought in 1859. In support of this point, a decision is quoted of Justices Trevor and Campbell, Weekly Reporter, Volume III, page 19 of Act X. Rulings.

We have given this decision very full attention, but we do not think the circumstances identical with those of the case now before us. In that case, our learned colleagues held, though the plaint was not before them, that it was "an action, not merely asking for a "declaration of rights, but admitting of the "application of a remedy by way of a decree "for rent at the enhanced rate." The Court goes on to say that, as the plaintiff "failed to "obtain, in that action, the remedy as to the "rents of 1266 which he might have obtain-"ed, we cannot allow him now to come into "Court claiming rents which he might have "before obtained, and which are now barred "by the limitation prescribed by Section "32 of Act X. of 1859."

But, on referring to the previous decision in the case now before us, we find that there is nothing to show that rents could have been awarded for any period by that decision. The effect of the decision (Weekly Reporter, Volume I., page 339, Civil Rulings) is simply to take the talook then in dispute out of the class of those protected by Section 51, Regulation VIII. of 1793, and to make it liable to enhancement as not held at a permanent rate from a date previous to the Perpetual Settlement. The decision appears to us to fix the *status* and to define the liabilities of the defendant talookdars, and to do nothing more.

Under these circumstances, can it be said that the plaintiff ought to have sued, and was bound to sue, for rents while the *status* of her opponents was still uncertain, and when she did not know what rate of rents she might lawfully claim?

We think not. We do not see that the plaintiff could sue for the rents of each year, or for the rents of any one year, until the main question as to the rights of the talookdars had been decided. She could not bring rent-suits at a mere venture, or on the speculation that the civil suit would be decided in her favor. When she gained the decree ultimately, she sued within the year, and thus she can claim the benefit of Section 30 of Act X. of 1859.

If we were to rule otherwise, it seems to us that we might be the means of depriving a zemindar of his rents merely because his opponent was successful in protracting litigation for a period more than 3 years from the time when rent was claimed.

Seeing, then, a clear distinction between the suit before us and that decided by our learned colleagues, and holding that the plaintiff could not have obtained rents in the former suit, we affirm the decision of the Deputy Collector, and dismiss the appeal with costs. The plaintiff will be entitled to her rents from the first of July 1859, or the 15th of Assar 1266, to the end of Cheyt 1271, with interest from the first date.

*Norman, J.*—I entirely concur in this judgment.

Baboo Bungsheedhur Sein, the junior pleader of the appellant, contended that the decree declaring the plaintiff's right to enhanced rent in the former suit, being simply a declaratory decree, was erroneous, or at least defective, and that the plaintiff should have recovered in that suit the rents from the date of its institution to the date of execution.

But the answer is that the rent was not due at the time of the institution of the former suit. The plaintiff had no cause of action for the recovery of such rent. Courts of civil justice exist for the purpose of redressing wrongs or declaring rights in certain cases when such rights are controverted. In the case under consideration, no complaint was made that, up to the time of the institution of the suit, the rent had not been fully paid. If no rent was due, it would follow that the plaintiff had sustained no wrong, and that any suit for the non-payment of rent must have been dismissed. The decree declaring the plaintiff's rights, affirmed on special appeal by this Court, was the only decree which it was competent to the Court to pass.

The pleader compared a claim for rent to the case of mesne-profits awarded in execution against a party wrongfully in possession. There is no real analogy. In a case for the recovery of land, the cause of action is the wrongful dispossession. The damages for that dispossession are measured by the profits which the wrong-doer realizes down to the time when the wrong is remedied by execution and restoration of possession to the owner. In the same manner, interest would be the measure of damages for the detention of a debt.

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The 11th August 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

**Notice of Enhancement.**

Case No. 1175 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 6th March 1866, affirming a decision passed by the Deputy Collector of that District, dated the 7th July 1865.*

Syud Soojaat Ali (Defendant), *Appellant,*

*versus*

Huree Thakoor (Plaintiff), *Respondent.*

*Mr. R. E. Twidale* for Appellant.

*Baboo Pearee Lal Roy* for Respondent.

A notice of enhancement under the second Clause of Section 17, Act X. of 1859, is defective if it omits to state that the value of the produce or the productive powers of the land have been *increased otherwise than by the agency or at the expense of the ryot himself.*

In this case, the zemindar has given a notice of enhancement in which he alleges that the fitness and capacity of the land, with regard to its productive powers and value of the produce, has increased, and that the rates are lower than those for lands of similar description in places adjacent.

The first Court and the Lower Appellate Court have found that the rates paid by the ryot are not lower than those paid in places adjacent, and on that ground have declared that the rents cannot be enhanced.

We think that this decision is perfectly correct. The only ground upon which, under the notice in question, the zemindar could rely, was that the rates in places adjacent for similar lands was higher. He does not bring himself under the second Clause of Section 17, because he does not allege that the value of the produce, or the productive powers of the land, have been *increased otherwise than by the agency or expense of the ryot himself.* The notice, as a notice under the second Clause, is defective, and we therefore dismiss this appeal with costs and interest.

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The 15th August 1866.

*Present:*

The Hon'ble H. V. Bayley and G. Campbell, *Judges.*

**Ejectment—Effect of suit under Clause 6, Section 23 or Section 25, Act X. of 1859.**

Case No. 1269 of 1866.

*Special Appeal from a decision passed by the Judge of Purneah, dated the 15th February 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 20th March 1865.*

Soorjo Kant Roy (one of the Defendants), *Appellant,*

*versus*

Mr. James Furlong (Plaintiff), *Respondent,*

*Baboo Khettur Mohun Mookerjee* for Appellant.

*Baboo Juggodanund Mookerjee* for Respondent.

A decision under Act X. of 1859 is not final in a mere suit for ejectment under Clause 6, Section 23 or Section 25, which depends on the question of possession and illegal dispossession only.

THIS is a suit by a purchaser to oust a fraudulent and benamee putneedar, and, the tenure being found to be as alleged, a decree has been passed against defendant. He now urges that, plaintiff having previously illegally ousted him, he was reinstated by the Collector in a suit for ouster under Act X., Clause 6, Section 23, and that the present suit is barred. But we think that, in such a suit, the issue is not on title, but merely on the question of illegal dispossession, and that the Collector's decision merely amounts to this, that defendant, having a *primâ facie* title, had been illegally dispossessed. Where questions of title are necessarily tried, an Act X. decision may be final, but it is not so in a mere ouster-suit under Clause 6, Section 23 or Section 25, depending on the question of possession and illegal dispossession only. The present suit is not barred.

Nor was it beyond the discretion of the Lower Courts to refuse to admit documents not filed at the proper time, nor was there any appeal on that point. They were probably quite right as regards the non-examination of plaintiff's gomastah. The appeal is dismissed with costs.

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The 15th August 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Enhancement—Plea of Lakheraj—Onus probandi.**

Case No. 1242 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Hooghly, dated the 10th April 1866, reversing a decision passed by the Deputy Collector of that District, dated the 12th January 1866.*

Sheeb Narain Roy (Plaintiff), *Appellant,*

*versus*

Chidam Doss Byragee and others (Defendants), *Respondents.*

*Baboo Bungshee Doss Seal* for Appellant.

No one for Respondents.

In a suit for enhancement where the defendant pleads a lakheraj holding as to a portion of the land, the *onus* is on the plaintiff to prove whether the disputed land ever paid rent.

THIS was a suit for enhancement of rent. The defendant pleaded a lakheraj holding as to a portion of the land, and put in several documents in support of it. The Lower Appellate Court found that plaintiff had not proved to his satisfaction that this land had ever paid rent, and dismissed the plaintiff's suit as respects that land. It is on special appeal urged that the *onus* should have been on the other side. We think that the defendant having put in *primâ facie* evidence, and the suit being for enhancement, and not assessment, the plaintiff was bound to prove that the disputed land had paid rent in former years.

Appeal dismissed with costs.

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The 15th August 1866.

*Present:*

The Hon'ble H. V. Bayley and G. Campbell, *Judges.*

**Enhancement.**

Case No. 1382 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of West Burdwan, dated the 22nd March 1866, reversing a decision passed by the Deputy Collector of that District, dated the 30th June 1865.*

Pelaram Kotal (one of the Defendants), *Appellant,*

*versus*

Nund Coomar Chuttoram (Plaintiff), *Respondent.*

*Baboo Bungsheedhur Sein* for Appellant.

*Baboos Kishen Succa Mookerjee* and *Romanath Bose* for Respondent.

In a suit for enhancement, on the ground that the defendant pays a lower rent than that paid by neighbouring ryots of the same class for similar lands, the Judge, instead of decreeing what he considers "a fair rate," should find specifically whether the rate claimed by the plaintiff is actually paid by the neighbouring ryots of the same class for similar lands, or what rate is so paid, and decide accordingly.

THIS is a suit for enhancement on all the grounds mentioned in the law. It appears

that the defendant and other ryots in that part of the country pay rent in kind, not by division of the produce, but by paying a fixed quantity of grain. The defendant has hitherto paid 4 "maps" of rice. That being so, "increase of value of produce" can have no application, the produce itself being paid; or, if decree is passed in money for the back rent, the value will be adjusted according to market-rates. The quantity of the land is found to be more than defendant admits, *viz.*, 10 beegahs. There is no dispute about that. The only ground of enhancement, then, which forms the subject of contention before us, is that defendant pays a rent lower than that paid by neighbouring ryots of the same class for similar lands. The Ameen and Court below found that defendant's lands were of two kinds, and, according to neighbouring rates, assessed them at 6 "maps" valued at Rupees 12. The Judge, on the other hand, only says the evidence on both sides shows clearly that a rate of one "map" per beegah will be a fair rate, and decrees accordingly for all the land of both qualities. This decision is quite insufficient It is impossible to understand from the judgment or otherwise what the Judge means by "fair," and it is not for this Court to describe his meaning. He must find specifically whether the rate claimed by plaintiffs is actually paid by the neighbouring ryots *of the same class* for similar lands, or what rate is so paid, and decide accordingly. The case is remitted to the Judge for re-trial on the principle above noted.

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The 15th August 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Enhancement—Plea of custom—Onus probandi.**

Cases Nos. 1259 and 1261 of 1866 under Act X. of 1859.

*Special Appeals from a decision passed by the Judge of Midnapore, dated the 9th February 1866, modifying a decision passed by the Deputy Collector of that District, dated the 20th December 1865.*

Haroo Chowdhry and another (Defendants), *Appellants,*

*versus*

Joyessur Nundee (Plaintiff), *Respondent.*

*Baboo Bama Churn Banerjee* for Appellants.

*Baboo Mohendro Lal Shome* for Respondent.

In a suit for enhancement where the defendant pleads that rent had been assessed on lands covered by hedges and ditches and forming boundaries between fields, and that according to custom such land was not liable to pay rent at all, the *onus* is on the defendant to prove the custom.

THESE were enhancement of rent-suits decreed in both Courts.

One objection taken by the tenants was that rent had been assessed on lands covered by hedges and ditches, and forming boundaries between fields, and that, according to custom, such land was not liable to pay rent at all. The Judge placed the *onus* of proving the custom on the tenants, and found that they had failed in proving it.

On special appeal, it is urged that the *onus* should have been placed on the plaintiff. We think that the Judge was right. There was no allegation that the land was lakheraj. It was admittedly the plaintiff's mâl land, and in the tenancy of the defendants. It was for them to prove that they were entitled to hold any such land without paying rent for it.

We dismiss these appeals with costs.

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The 16th August 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

**Enhancement—Presumption of uniform payment from Permanent Settlement—Evidence.**

Case No. 1159 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Hooghly, dated the 30th December 1865, reversing a decision passed by the Deputy Collector of that District, dated the 7th June 1865.*

Luchmee Narain Shaha *alias* Gopeenath Shaha (Plaintiff), *Appellant,*

*versus*

Koochil Kant Roy and others (Defendants), *Respondents.*

*Baboo Nubbo Kishen Mookerjee* for Appellant.

*Mr. R. E. Twidale* for Respondents.

In a suit for enhancement where the defendant plead a holding at a uniform rate from the Permanent Settle-

ment, the mere existence of a pottah and amulnamah of 1215 is not conclusive evidence that the rate was then changed or was then first fixed.

THIS is a suit for enhancement. The ryot pleads that he held at a rate which had not been changed from the time of the Permanent Settlement, and, in support of that allegation, he produced dakhilahs for the last 20 or 25 years, and an old pottah dated 1173. The Judge finds that the defendant had held at fixed rates from the time of the Permanent Settlement, and dismissed the suit. On appeal, it is urged before us that, in certain proceedings in the year 1856, one of the defendants, Goura Chand, admitted that he held 24 beegahs and 9 cottahs in *Nabasha* under a pottah dated 1215. The defendants also appear to have admitted that they had an amulnamah also dated in 1215, but did not produce it. They gave evidence before the Judge, in explanation of the amulnamah, that the jote was not created in 1215, but that the land was then measured.

We think that it may have been open to the Judge upon the evidence in the case, looking at the admission by the ryot of the pottah of 1215 and of the amulnamah of 1215, to find that the jote was then first created, but that he was not bound to do so as a matter of law. If the circumstances (as they appeared to him) led to the inference that the ryot had previously held at the same rate of rent, the mere fact of the existence of a pottah of 1215 and of the amulnamah of the same date, is not conclusive evidence that the rate was then changed or was then first fixed.

We accordingly dismiss the appeal with costs.

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The 16th August 1866.

*Present:*

The Hon'ble H. V. Bayley and G. Campbell, *Judges.*

**Jurisdiction—Decree for rent—Execution of—by endorsement on bond.**

Case No. 1435 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Additional Judge of Mymensingh, dated the 29th March 1866, reversing a decision passed by the Deputy Collector of that District, dated the 31st October 1865.*

Golucknath Roy (Plaintiff), *Appellant,*

*versus*

Mr. K. Broody (Defendant), *Respondent.*

*Mr. R. T. Allan* and *Baboo Nil Madhub Sein* for Appellant.

*Boboos Romesh Chunder Mitter, Sreenath Doss,* and *Shushee Bhooshun Sein* for Respondent.

A decree for rent may be passed under Act X. of 1859 with a proviso that it should be executed by endorsing the amount on a bond.

PLAINTIFF let an estate in farm to defendant, and there was a condition that the rent should go in satisfaction of a bond executed by plaintiff in favor of defendant. Plaintiff sued for the rent. Defendant claimed a deduction on account of diluvion, and the Deputy Collector trying the case on that issue passed a decree with a proviso that it should be executed by endorsing the amount on the bond—a course to which neither party objects. But the Judge has thrown out the case for want of jurisdiction. We think that he is wrong. There is no question in issue regarding the bond. The only question is the purely revenue one regarding the amount of rent which depends on the claim for diluvion. We remand the case to the Judge for trial of that point. Any rent found due will be paid by endorsement on the bond as directed by the Deputy Collector.

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The 18th August 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

**Cancelment of lease (for non-payment of rent)—Section 22 of Act X. of 1859.**

Case No. 1405 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Officiating Judge of Jessore, dated the 27th February 1866, affirming a decision passed by the Deputy Collector of that District, dated the 31st August 1865.*

Kadir Gazee (Defendant), *Appellant,*

*versus*

Mohadebee Dossia (Plaintiff), *Respondent.*

*Mr. J. Cochrane* and *Baboo Bungsheedhur Sein* for Appellant.

*Mr. J. S. Rochfort* for Respondent.

The right to cancel a lease for non-payment of rent by a lease-holder not having a permanent or transferable interest in the land, being given by Section 22, Act X. of 1859, need not be provided for in the lease.

THE plaintiff sues, under Section 78, Act X. of 1859, for the non-payment of arrears of rent, and for the cancelment of defendant's lease. She sued for the arrears of 1271, and also adduced in evidence two unexecuted decrees for rents due from the defendant for the years 1269 and 1270. She obtained a decree in the Lower Appellate Court, with an order that, should the defendant not pay the rent due from him within 15 days, the plaintiff should obtain khas or actual possession of the disputed land. From this decision there was an appeal to the Judge, who confirmed the decision of the first Court, finding expressly that the appellant had given no proof whatever that he had a permanent or transferable interest in the land; on the contrary, that the kubooleut expressed that the title was not a transferable one. The defendant comes in special appeal before us, and urges that the plaintiff is not entitled to recover, because his lease contains no clause providing for a re-entry by the plaintiff or a forfeiture. of the lease on breach of any of the conditions of it. But the right to cancel a lease upon the non-payment of rent by the leaseholder not having a permanent or transferable interest in the land is given by Section 22 of the Act. It is perfectly clear that the plaintiff is entitled to the remedy which the Lower Court has given him under Sections 22 and 78. We therefore dismiss the appeal with costs.

A case was cited from Marshall's Reports, page 366, but it does not in any way touch the question now before us. That was a case in which the owner of the land sought to cancel the lease *for the breach of an agreement* not to under-let, there being no condition in the lease providing for a re-entry on breach of such condition. The Court did not decide that the plaintiff in that suit would not have had a remedy, had he been suing for re-entry and cancelment of the lease for non-payment of rent.

The 20th August 1866.

*Present:*

The Hon'ble H. V. Bayley and G. Campbell, *Judges.*

**Enhancement—Alluvial Lands.**

Cases Nos. 283, 284, and 285 of 1866 under Act X. of 1859.

*Special Appeals from a decision passed by the Judge of Backergunge, dated the 17th November 1865, affirming a decision passed by the Deputy Collector of that District, dated the 21st June 1864.*

Juggut Chunder Dutt and others (Defendants), *Appellants,*

*versus*

Mr. Panioty and others (Plaintiffs), *Respondents.*

*Mr. R. V. Doyne* and *Baboo Chunder Madhub Ghose* for Appellants.

*Mr. G. C. Paul* for Respondents.

Clause 1, Section 4, Regulation XI., 1825, prescribes that the right to the occupancy of accreted land is with the owner of the parent mehal or subordinate tenure as the case may be. But, so far from saying that it is revenue or rent-free, or that the original revenue or rent-assessment covers the demand both for the original estate or original subordinate tenure and for the accreted land, the very reverse is contemplated by the Section which provides for payment of revenue or rent if payable under law or usage.

Accreted lands, when liable to enhancement at the ordinary neighbouring rates, are entitled to a deduction of 10 per cent. for collection charges and 10 per cent. for talookdary profits.

THESE three cases will, it is admitted by the vakeels of both parties before us, be governed by one and the same decision in special appeal.

Plaintiff alleged that defendants held a *temporary* (*Gair-bundobustee*) "zima talook" named "Shib Chunder and Shumbhoo Chunder Dutt," included in Kismut Raepore, at a jumma of Rupees 818-10-8; that, by the action of the river, a new chur called "Raepore" was formed, and that defendant held this chur, and thereby some 40 droons of land in excess of the zima; that plaintiff served notice of enhancement under section 13, Act X. of 1859; that this suit was dismissed by the Deputy Collector who stated that it could not be entertained till a kubooleut should have been asked for and a pottah tendered; that then a kubooleut was asked for and a pottah tendered, but that defendant refused to give a kubooleut, and that hence plaintiff brought this suit for it.

Defendant's case was that the land sought to be assessed was land of his *zima* talook

which had diluviated and re-formed in the original site of such diluviated land, and that his zima tenure was protected by a dowl or settlement of 1198 B. S.

The first Court gave plaintiff a decree at rates according to the kubooleut and jummabundee papers, "inasmuch as defendant raises no question as to that point."

The Lower Appellate Court held that the suit could not lie as brought under Act X. of 1859. But, on special appeal here, the order was set aside, and it was ruled by Messrs. Justices Morgan and Shumbhoonath Pundit, on the 11th August 1865, that this suit would lie under Act X. of 1859. The remand order decided nothing else, but remanded the case for re-trial on the merits.

Upon this, the Lower Appellate Court has now decided for the plaintiff, holding that plaintiff's gomastah did tender a pottah, and that it was customary for gomastahs to give pottahs; that there was no diluvion or re-formation; that it was *accretion;* that the settlement of 1198 was *not* a genuine document; and that defendant "must pay the same rate as other cultivators pay in the neighbourhood for lands of a like description."

Against this decision defendant appeals, and the learned Counsel Mr. Doyne contends in his behalf—

I.—That the Judge has not found on any legal evidence that the plaintiff's gomastah had authority to tender a pottah.

II.—That the Lower Appellate Court erred in trying the genuineness of the settlement of 1198 without giving defendant opportunity to prove it.

III.—That, even if defendant had failed to prove it, he was entitled to the benefit of the presumption under Section 4, Act X. of 1859.

IV.—That, by established usage, this accretion, as an increment of the original tenure, is protected.

V.—That the plaintiff himself admits the talook to be a zima talook, and, therefore, the accretion on it becomes an integral part of it under Clause 1, Section 4, Regulation XI. of 1825; and that thus the rent now and all along paid of Rupees 818-10-8 covers the entire area (original and accreted) as the rent of the one zima mehal named Shumbhoo Chunder Dutt.

VI.—That, even if this be not so, the jumma to be assessed on the accreted area should be in proportion to that represented by Rupees 818 on the original area.

VII.—That under no circumstances could the rents have been awarded to be paid by defendant at ryotty rates, *but* at talookdary rates, *i. e.*, less ten per cent. collection charges and ten per cent. talookdary profits.

On the *first* point, we observe that the Lower Appellate Court has sufficiently found as a fact that the authority to tender a pottah lies in a gomastah by the custom of this part of the country. By such a finding of fact, then, a tender of a pottah would lie within the ordinary scope of a gomastah's duties in this case.

On the *second* point, we are of opinion that the defendant had not due opportunity of proving his settlement. The Lower Appellate Court, on a view of the expression of the document, has held it to be spurious. It might have been shown, if opportunity had been given to defendant, that other settlements of the same appearance had really been held to be quite genuine, and the Lower Appellate Court might, by independent evidence, have been itself satisfied eventually of that fact. We think thus, on the second point, that defendant should have his opportunity of proving his dowl of 1198.

As to the *third* plea, we think there should be some finding by the Lower Appellate Court, and there is at present none.

On the *fourth* and *fifth* points, reliance is placed on the terms of Section 4, Regulation XI. of 1825, as shewing the accretions to be an integral part of the *zima*, and that thus the total rent-demands as for the *one* mehal (consisting of original and accreted land) are represented by the jumma of Rupees 818-10-8; and so no further jumma can be passed.

Now, Clause 1, Section 4, is in these terms:—

"When land may be gained by gradual "accession, whether from the recess of a "river or of the sea, it shall be considered "an increment to the tenure of the person "to whose land or estate it is thus annexed, "*whether* such land or estate be held imme-"diately from Government by a zemindar or "other superior landholder, or as a subordi-"nate tenure by any description of under-ten-"ant whatever; provided that the increment "of *land* thus obtained shall not entitle the "person in possession of the *estate* or *tenure* "to which the land may be annexed, to a "right of property or permanent interest "therein beyond that possessed by him in the "estate or tenure to which the land may be "annexed, and shall not in any case be un-"derstood to *exempt* the holder of it from

"the payment to Government of any assess-"ment for the public revenue to which it "may be liable under the provisions of Re-"gulation II., 1819, or of any other Re-"gulation in force. *Nor, if annexed to a "subordinate tenure* held under a superior "landholder, shall the under-tenant, whe-"ther a khodkast ryot holding a mourosee "istemraree tenure at a fixed rate of rent per "beegah, or any other description of under-"tenant *liable by his engagements*, or by "established usage, *to an increase of rent "for the land annexed to his tenure by "alluvion*, be considered exempt from the "payment of any increase of *rent* to which "he may be justly liable."

Now, this law prescribes that the right to the occupancy of the accreted *land* shall be with the owner of the parent mehal or subordinate tenure, as the case may be; but, so far from saying that it shall be revenue or *rent-free*, or that the one original revenue or rent-assessment shall cover the demand both for the *original* estate or *original* subordinate tenure as for the *accreted portions*, the words of the Section show that the very reverse was in the contemplation of the Legislature which provides that the one shall pay revenue for the excess, the other rent, if payable under law or usage. We do not, therefore, consider this *per se* plea tenable. On these fourth and fifth pleas also, we think that the plaintiff does not admit the zima to be protected. The plaint to which we have referred in original distinctly calls the zima *Gair-bundobustee*. There is, then, no admission of the *zima* being of a permanent and fixed character, but the reverse.

Under these circumstances, all that can be said on the sixth and seventh pleas is that the Lower Appellate Court will have to decide them, with reference to the result of its finding on the 1st, 2nd, 3rd, and 4th pleas; but we observe that the plaint calls the talook a zima talook. We think, then, that, even if the accretions be found liable to enhancement at the ordinary neighbouring rates for similar lands, these should be fixed less ten per cent. for collection charges and ten per cent. for talookdaree profits—twenty per cent. in all.

We remand the case to be re-tried with reference to the above remarks.

The issue will be—

I.—Is the settlement of 1198 proved?

II.—Has defendant proved his right to hold the parent tenure at a fixed rent under Sections 15 and 16, Act X. of 1859?

III.—If the parent tenure is held at a fixed rent, is it, according to the custom of the country, liable to any, and what, increase on account of alluvion?

IV.—If the parent tenure is held at a variable rent, what is the rate at which lands in excess of the original quantity are assessable?

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The 21st August 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Enhancement—Presumption of holding from Permanent Settlement—Pottahs.**

Case No. 1469 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of the Twenty-four Pergunnahs, dated the 7th March 1866, reversing a decision passed by the Deputy Collector of that District, dated the 22nd September 1865.*

Koroona Moyee Dossee (one of the Defendants), *Appellant,*

*versus*

Shib Chunder Dey, Gomastah on the part of Radha Madhub Bose (Plaintiff), *Respondent.*

*Baboos Anund Chunder Ghosal* and *Sham Lal Mitter* for Appellant.

*Baboos Romanath Bose* and *Kishen Succa Mookerjee* for Respondent.

In a suit for enhancement, if the defendant pleads pottahs which are not inconsistent with the presumption under Section 4, Act X. of 1859, and proves 20 years' uniform payment of rent, the presumption will arise unless the opposite party prove a variance in the pottahs.

THE grounds of special appeal put before us are—

I.—That the Judge was wrong in not adjudicating the right of special appellant to the presumption contemplated by Section 4, Act X. of 1859, even if he considered the pottahs not to be sufficient of themselves to establish the existence of the tenure from the Permanent Settlement.

II.—That the special appellant had pleaded that the productive powers of the land had increased by his own agency, and that, consequently, he was legally exempt from enhancement.

On a reference to the judgment of the Lower Appellate Court, we think the objection on the *first* plea is valid. If a party pleads a pottah which is, on the face of it,

inconsistent with, and in rebutter of, the presumption referred to in Section 4, there the presumption would not exist. But where, as here, the terms of the pottahs do not show any such inconsistency, nor does the Judge find they do, it is still a right open to special appellant to have an adjudication of how far the presumption under Section 4 may support his case irrespective of the pottahs. Then he (the special appellant) would have to prove 20 years' payments of rents at uniform rates, and the presumption would arise, *unless* the opposite party (who would have *that* burden of proof) prove that there was a variance in the pottahs.

The Judge must re-try the case with reference to this remark, and also as to the plea of the productiveness of the soil having increased by the agency and exertions of special appellant himself.

Remand accordingly.

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The 21st August 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Presumption of holding from Permanent Settlement—Variation in dakhilas.**

Case No. 1457 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by Mr. E. W. Molony, Judge of Moorshedabad, dated the 23rd February 1866, affirming a decision passed by Baboo Gobind Kant Bidyabhooshun, Deputy Collector of that District, dated the 28th November 1865.*

Tara Soonduree Burmonya (Plaintiff), *Appellant,*

*versus*

Shibeshur Chatterjee (Defendant), *Respondent.*

*Baboo Doorga Doss Dutt* for Appellant.

*Baboos Kishen Succa Mookerjee* and *Greesh Chunder Ghose* for Respondent.

In order to obtain the benefit of the presumption under Section 4, Act X. of 1859, it is not necessary for the ryot to show how he obtained possession of the tenure. A plea of 20 years' uniform payment is sufficient.

The variation of a few annas in the dakhilas, when not proved to be a variation in the annual rents, is not sufficient to deprive the ryot of the benefit of the presumption.

In this case, the special appellant urges that the defendant did not plead that the tenure was one existing at the time of the Decennial Settlement, but admits that it came into his possession only 29 years ago; and, as the defendant does not show that he had purchased it from a tenant who held at the same rate before, it must be inferred that it was created when it came into the possession of the defendant.

The answer, we find, distinctly states that this tenure had been held by the heirs of Roopanund Malakar from a time anterior to the Decennial Settlement; and, if the defendant has not shewn how he obtained possession of the tenure, it does not materially affect his case by defect of pleading. It was quite sufficient for him to plead 20 years' uniform payment, and he stated and shewed this for nearly 30 years.

As to the variation to be found in dakhilas for 3 years of about 2 annas, and that of 2 annas additional being charged afterwards, it appears that the last addition was for the batta of the 2 rupees Sicca converted into Company's rupee, and the fact of some of the dakhilas for the half-share of the defendant for a period of 3 years preceding 20 years from the date of this suit shewing only a payment of 15 annas when it should have been of one rupee, we hold that it does not affect the plea of the defendant. It is, after all, a variation insufficient to deprive the defendant of the plea and effect of the presumption Section; and the plaintiff has not proved that it was any variation of the annual rents.

We reject the special appeal with costs.

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The 24th August 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Ejectment (under Section 78, Act X. of 1859)—Rights of persons claiming under defaulter.**

Cases Nos. 943 to 950 and Nos. 952 to 959 of 1866 under Act X. of 1859.

*Special Appeals from a decision passed by the Judge of Nuddea, dated the 14th December 1865, reversing a decision passed by the Deputy Collector of that District, dated the 28th July 1865.*

Aghore Chunder Mookerjee (Plaintiff), *Appellant,*

*versus*

Nund Moochee and others (Defendants), *Respondents.*

*Baboo Bhugobutty Churn Ghose* for Appellant.

*Baboos Tarucknath Sein* and *Kedarnath Chatterjee* for Respondents.

Where a se-putneedar, under Section 78, Act X. of 1859, dispossessed his ijaradar under a decree for arrears of rent, previous possession by a dur-ijaradar claiming under the defaulting ijaradar was held to be no bar to the claim of the se-putneedar to obtain rents or kubooleuts direct from the cultivators of the lands of his se-putnee.

THE special appellant, a "*se-putneedar*," having obtained an order under Section 78, Act X. of 1859, to dispossess his ijaradar under a decree for arrears of rent, was opposed by a party who called himself a "*dur-ijaradar*" under the defaulting ijaradar. The Revenue Court executing the decree for ouster overruled the claim of this alleged *dur-ijaradar*, and directed him to sue in the Civil Court.

The special appellant then sued (in these cases) for kubooleuts against certain ryots who were said by him to be in possession of the lands for which he had obtained the decree. The alleged "*dur-ijaradar*" intervened; and his claim was again overruled, and he was again referred to the Civil Court, and a decree was given to the special appellant, by the Court of first instance.

The ryots did not appeal.

The said intervenor, however, appealed.

The Lower Appellate Court holds that the dur-ijara lease of the intervenor being held good in a certain execution-case (before the decree was obtained by the special appellant ousting the ijaradar), the special appellant is not entitled to dispossess the dur-ijaradar by taking kubooleuts from the ryots to the prejudice of the said dur-ijaradar.

This decision of the Lower Appellate Court is, in our view, wrong. That Court had to see only whether the special appellant had a right to obtain a decree for kubooleut, just as if he had sued for rents; and when any intervenor comes in, in an ordinary case, the mere fact of possession of the intervenor is to be enquired into. In this case, however, the ijaradar being ordered to be dispossessed as a defaulter, and the special appellant having been put in possession in execution of a decree against the ijaradar, the dur-ijaradar, deriving from the defaulting and legally dispossessed ijaradar, cannot be allowed to show his previous possession, or rely upon the admitted fact that previously the special appellant did not realize rents from the ryots.

In such a case, where the decree terminates the rights of persons like this ijaradar and dur-ijaradar intervening between the special appellant and the cultivating ryots, previous possession by any intermediate intervenor is not a bar to the claim of the party who has obtained *a decree for possession*. The possession against the decree of a competent Revenue Court is no legal possession at all.

The intervenor was present in the execution-case, and the order to dispossess him was passed in his presence. So, on that point, the binding character of the decree cannot be questioned.

Now, as to the rights of the dur-ijaradar. We do not at present understand how those of a dur-ijaradar can survive the ijaradar's, from whom alone he derives. However, if the dur-ijaradar has any rights, and be so advised, he may go for them to the Civil Courts. He cannot set at arm's length the decree of a competent Revenue Court on the bare fact that before that decree he collected the rents.

The Lower Appellate Court, moreover, has not found in clear terms that it considered the dur-ijaradar to be in actual possession, which possession, however, as noticed above, would not have been the rightful possession mentioned in Section 77 of Act X. of 1859.

As to the order of the Civil Court releasing the property to the dur-ijaradar, and not ordering it to be sold for the debts of the ijaradar, it is clear that no such order is binding upon any one of the parties to the present suit; that the Civil Court could have ordered the sale of the rights and interests of the ijaradar in the lands though there may have been a dur-ijaradar. If, however, the Civil Court thought proper to refuse to sell any rights of the ijaradar in the property on the ground of the dur-ijara given by him, the effects of that order passed before the decree was obtained by the special appellant against the ijaradar, ceased entirely with the decree by which fall all the rights of the ijaradar and of those deriving from him.

On these grounds, we do hold that the intervenor had not any grounds to intervene,

much less to appeal to the Lower Appellate Court.

We accordingly reverse, with costs, the decisions of the Lower Appellate Court in all these sixteen cases, and, decreeing the appeals in all of them with costs, uphold the decisions of the Court of first instance in all sixteen cases.

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The 24th August 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Kubooleut—Purchaser of share.**

Case No. 965 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 10th January 1866, reversing a decision passed by the Deputy Collector of that District, dated the 31st August 1865.*

Nidhy Ram Sircar (Plaintiff) *Appellant,*

*versus*

Dhun Kishen Bhuttacharjee and others (Defendants), *Respondents.*

*Baboo Goopeenath Mookerjee* for Appellant.

*Baboo Bama Churn Banerjee* for Respondents.

The purchaser of an undisputed share of an estate may obtain from the Revenue Courts a decree for a kubooleut in respect of his share.

THE Lower Appellate Court has dismissed the case of the special appellant, because it thinks that the special appellant, having purchased from three out of several joint shareholders, has no right to ask for a kubooleut separately regarding the alleged specific quantity purchased by him.

We disagree with the Lower Appellate Court. If the special appellant had at once sued for his share of rents, the arguments of the Lower Appellate Court might have been of some force.

If the plaintiff, special appellant, can show that, as regards the shares purchased by him, or for a portion of them, there is no dispute, he will be entitled to obtain a decree for the kubooleut, to the extent of the shares undisputed. If there be any dispute regarding the extent of any share requiring decision by a Civil Court, the question regarding it must be settled in a Civil Court.

The case is accordingly remanded to the Lower Appellate Court to re-try it with reference to the above remarks.

The 27th August 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble G. Loch, L. S. Jackson, G. Campbell, and A. G. Macpherson, *Judges.*

**Jurisdiction—Section 35, Act XXIII. of 1861—Order of Deputy Collector for sale in execution of Decree for rent.**

Cases Nos. 129 and 130 of 1866.

*Miscellaneous Petitions under Section 35, Act XXIII. of 1861, from orders passed by Mr. E. E. Lowis, Officiating Collector of Furreedpore, dated the 21st July 1865, affirming orders passed by the Deputy Collector of the same Zillah on the 4th July 1865, and reversing orders passed by himself in appeal on the 7th July 1865.*

Docowree Cazèe, *Appellant,*

*versus*

Hurrosoonderee Debea and another, *Respondents.*

*Baboo Khettur Mohun Mookerjee* for Appellant.

*Baboo Romesh Chunder Mitter* for Respondents.

Where a Collector on appeal affirmed an order of a Deputy Collector for the sale of an under-tenure in execution of a decree for rent, but afterwards, upon review of judgment, set aside his former order as made without jurisdiction—HELD that the High Court had no power, under Section 35, Act XXIII. of 1861, to interfere with the order of the Deputy Collector which was final; and that, even if the Collector had not set aside his former order, the mere circumstance of his having by mistake assumed jurisdiction on appeal would not make it right for the High Court, in setting aside the Collector's order for want of jurisdiction, to interfere with the order of the Deputy Collector which the law intended to be final, and with which the High Court, but for the mistake of the Collector, could not have interfered.

*Quære.*—Whether the Collector is a Court subordinate to the High Court within the meaning of Section 35, Act XXIII. of 1861.

*The judgment of the Court was delivered by—*

*Peacock, C.J.*—IN this case, a Deputy Collector sold an under-tenure in execution of a decree given in favor of a sharer of a tenure on account of his share of the rent of the under-tenure. The case was appealed to the Collector upon the ground that the Deputy Collector ought not to have sold the under-tenure until execution had been taken out against the moveable property of the judgment-debtor

*Baboo Bhugobutty Churn Ghose* for Appellant.

*Baboos Tarucknath Sein* and *Kedarnath Chatterjee* for Respondents.

Where a se-putneedar, under Section 78, Act X. of 1859, dispossessed his ijaradar under a decree for arrears of rent, previous possession by a dur-ijaradar claiming under the defaulting ijaradar was held to be no bar to the claim of the se-putneedar to obtain rents or kubooleuts direct from the cultivators of the lands of his se-putnee.

THE special appellant, a "*se-putneedar*," having obtained an order under Section 78, Act X. of 1859, to dispossess his ijaradar under a decree for arrears of rent, was opposed by a party who called himself a "*dur-ijaradar*" under the defaulting ijaradar. The Revenue Court executing the decree for ouster overruled the claim of this alleged *dur-ijaradar*, and directed him to sue in the Civil Court.

The special appellant then sued (in these cases) for kubooleuts against certain ryots who were said by him to be in possession of the lands for which he had obtained the decree. The alleged "*dur-ijaradar*" intervened; and his claim was again overruled, and he was again referred to the Civil Court, and a decree was given to the special appellant, by the Court of first instance.

The ryots did not appeal.

The said intervenor, however, appealed.

The Lower Appellate Court holds that the dur-ijara lease of the intervenor being held good in a certain execution-case (before the decree was obtained by the special appellant ousting the ijaradar), the special appellant is not entitled to dispossess the dur-ijaradar by taking kubooleuts from the ryots to the prejudice of the said dur-ijaradar.

This decision of the Lower Appellate Court is, in our view, wrong. That Court had to see only whether the special appellant had a right to obtain a decree for kubooleut, just as if he had sued for rents; and when any intervenor comes in, in an ordinary case, the mere fact of possession of the intervenor is to be enquired into. In this case, however, the ijaradar being ordered to be dispossessed as a defaulter, and the special appellant having been put in possession in execution of a decree against the ijaradar, the dur-ijaradar, deriving from the defaulting and legally dispossessed ijaradar, cannot be allowed to show his previous possession, or rely upon the admitted fact that previously the special appellant did not realize rents from the ryots.

In such a case, where the decree terminates the rights of persons like this ijaradar and dur-ijaradar intervening between the special appellant and the cultivating ryots, previous possession by any intermediate intervenor is not a bar to the claim of the party who has obtained *a decree for possession*. The possession against the decree of a competent Revenue Court is no legal possession at all.

The intervenor was present in the execution-case, and the order to dispossess him was passed in his presence. So, on that point, the binding character of the decree cannot be questioned.

Now, as to the rights of the dur-ijaradar. We do not at present understand how those of a dur-ijaradar can survive the ijaradar's, from whom alone he derives. However, if the dur-ijaradar has any rights, and be so advised, he may go for them to the Civil Courts. He cannot set at arm's length the decree of a competent Revenue Court on the bare fact that before that decree he collected the rents.

The Lower Appellate Court, moreover, has not found in clear terms that it considered the dur-ijaradar to be in actual possession, which possession, however, as noticed above, would not have been the rightful possession mentioned in Section 77 of Act X. of 1859.

As to the order of the Civil Court releasing the property to the dur-ijaradar, and not ordering it to be sold for the debts of the ijaradar, it is clear that no such order is binding upon any one of the parties to the present suit; that the Civil Court could have ordered the sale of the rights and interests of the ijaradar in the lands though there may have been a dur-ijaradar. If, however, the Civil Court thought proper to refuse to sell any rights of the ijaradar in the property on the ground of the dur-ijara given by him, the effects of that order passed before the decree was obtained by the special appellant against the ijaradar, ceased entirely with the decree by which fall all the rights of the ijaradar and of those deriving from him.

On these grounds, we do hold that the intervenor had not any grounds to intervene,

much less to appeal to the Lower Appellate Court.

We accordingly reverse, with costs, the decisions of the Lower Appellate Court in all these sixteen cases, and, decreeing the appeals in all of them with costs, uphold the decisions of the Court of first instance in all sixteen cases.

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The 24th August 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Kubooleut—Purchaser of share.**

Case No. 965 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 10th January 1866, reversing a decision passed by the Deputy Collector of that District, dated the 31st August 1865.*

Nidhy Ram Sircar (Plaintiff) *Appellant,*

*versus*

Dhun Kishen Bhuttacharjee and others (Defendants), *Respondents.*

*Baboo Goopeenath Mookerjee* for Appellant.

*Baboo Bama Churn Banerjee* for Respondents.

**The purchaser of an undisputed share of an estate may obtain from the Revenue Courts a decree for a kubooleut in respect of his share.**

THE Lower Appellate Court has dismissed the case of the special appellant, because it thinks that the special appellant, having purchased from three out of several joint shareholders, has no right to ask for a kubooleut separately regarding the alleged specific quantity purchased by him.

We disagree with the Lower Appellate Court. If the special appellant had at once sued for his share of rents, the arguments of the Lower Appellate Court might have been of some force.

If the plaintiff, special appellant, can show that, as regards the shares purchased by him, or for a portion of them, there is no dispute, he will be entitled to obtain a decree for the kubooleut to the extent of the shares undisputed. If there be any dispute regarding the extent of any share requiring decision by a Civil Court, the question regarding it must be settled in a Civil Court.

The case is accordingly remanded to the Lower Appellate Court to re-try it with reference to the above remarks.

The 27th August 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble G. Loch, L. S. Jackson, G. Campbell, and A. G. Macpherson, *Judges.*

**Jurisdiction—Section 35, Act XXIII. of 1861—Order of Deputy Collector for sale in execution of Decree for rent.**

Cases Nos. 129 and 130 of 1866.

*Miscellaneous Petitions under Section 35, Act XXIII. of 1861, from orders passed by Mr. E. E. Lowis, Officiating Collector of Furreedpore, dated the 21st July 1865, affirming orders passed by the Deputy Collector of the same Zillah on the 4th July 1865, and reversing orders passed by himself in appeal on the 7th July 1865.*

Docowree Cazèe, *Appellant,*

*versus*

Hurrosoonderee Debea and another, *Respondents.*

*Baboo Khettur Mohun Mookerjee* for Appellant.

*Baboo Romesh Chunder Mitter* for Respondents.

**Where a Collector on appeal affirmed an order of a Deputy Collector for the sale of an under-tenure in execution of a decree for rent, but afterwards, upon review of judgment, set aside his former order as made without jurisdiction—HELD that the High Court had no power, under Section 35, Act XXIII. of 1861, to interfere with the order of the Deputy Collector which was final; and that, even if the Collector had not set aside his former order, the mere circumstance of his having by mistake assumed jurisdiction on appeal would not make it right for the High Court, in setting aside the Collector's order for want of jurisdiction, to interfere with the order of the Deputy Collector which the law intended to be final, and with which the High Court, but for the mistake of the Collector, could not have interfered.**

***Quære.*—Whether the Collector is a Court subordinate to the High Court within the meaning of Section 35, Act XXIII. of 1861.**

*The judgment of the Court was delivered by—*

*Peacock, C.J.*—IN this case, a Deputy Collector sold an under-tenure in execution of a decree given in favor of a sharer of a tenure on account of his share of the rent of the under-tenure. The case was appealed to the Collector upon the ground that the Deputy Collector ought not to have sold the under-tenure until execution had been taken out against the moveable property of the judgment-debtor

according to the directions of Section 108, Act X. of 1859. The Collector affirmed the decision of the Deputy Collector. Upon review of judgment, the Collector set aside his former order upon the ground that he had no jurisdiction, for, although the sale took place after Act VIII. of 1865 of the Bengal Council, it was made under the provisions of Act X. of 1859, and not under the provisions or according to the procedure laid down in Act VIII. of 1865, Bengal Council.

An application was made to this Court to set aside the order of the Collector under Section 35, Act XXIII. of 1861. It was contended that the Collector had no power to review his own judgment, and that consequently his first order stood, that it ought to be set aside by this Court under Section 35, Act XXIII, of 1861, and that this Court ought then to pass such order as it might think right, and to reverse the order of the Deputy Collector.

The case was referred to a Full Bench to determine whether Section 35 applies to the order of the Collector in this case.

It appears to me that the Collector had just as much jurisdiction to reverse his own order upon review as he had to make it, and that the case is now the same as if the order of the Collector had never been made. It is, therefore, unnecessary for the purposes of this case to decide whether the Collector was a Court subordinate to this Court within the meaning of Section 35, Act XXIII. of 1861, or not; nor is it necessary to determine the last point submitted to us in argument, namely, what order this Court would think it right to make in the case, if the Collector had not set aside his order, and this Court had set it aside.

The Collector upon review stated that the appeal from the order of the Deputy Collector lay to the Judge, and not to the Collector. But it was admitted in argument, and it is clear, that an appeal did not lie to the Judge.

If an appeal lay to the Judge, and not to the Collector, this Court, upon setting aside the order of the Collector made on appeal without jurisdiction, might have thought it right to refer the appeal to the Judge. But the sale by the Deputy Collector was intended by Act X. of 1859 to be final. That Act did not give an appeal to any Court, and, therefore, even if the Collector acting as a Court of Appeal was a Subordinate Court, within the meaning of Section 35, Act XXIII. of 1861, and if he had not set aside his order on review, I should not have thought it right for this Court, upon setting aside that order, to enter into the question of the merits for the purpose of determining whether the order of the Deputy Collector was correct or not.

The mere circumstance of the Collector's having by mistake assumed jurisdiction on appeal did not make it right for this Court, in setting aside the order of the Collector for want of jurisdiction, to interfere with the order of the Deputy Collector which the law intended to be final, and with which this Court, but for the mistake of the Collector, could not have interfered.

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The 28th August 1866.

*Present:*

The Hon'ble C. B. Trevor and F. B. Kemp, *Judges.*

**Section 58, Act X. of 1859—Revival of ex parte decree—Appeal.**

Case No. 927 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Rungpore, dated the 19th January 1866, affirming a decision passed by the Deputy Collector of that District, dated the 26th October 1865.*

Kanhye Doss (Plaintiff), *Appellant,*

*versus*

Nobin Chunder Chowdhry and others (Defendants), *Respondents.*

*Baboo Boykuntonath Paul* and *Moulvie Syud Murhumut Hossein* for Appellant.

*Baboo Issur Chunder Chuckerbutty* for Respondents.

The order of a Collector, complying with an application made more than 15 days after any process for enforcing the judgment has been executed, for the revival of an *ex parte* decree, is not final under Section 58, Act X. of 1859, because it is null and void for want of jurisdiction.

THIS was a suit under Clause 6, Section 23, Act X. of 1859. The zemindar and the ryot to whom he had leased the lands in dispute were made defendants.

The suit was decreed in favor of the plaintiff *ex parte*. The ryot-defendant then applied for a revival of the suit under the provisions of Section 58 of the said Act. His application was complied with, and the suit was again decreed. The plaintiff then sued in the Civil Court for the recovery of

wasilat, making the zemindar and his lessee parties, and obtained a decree in their presence.

In the meantime, the zemindar defendant applied, under the provisions of Section 58 of Act X. of 1859, for a revival of the original ejectment-suit; and his application was complied with. The suit was re-tried, and it has been found by both Courts below that the lands, the subject of the suit, were not included in the plaintiff's tenure. The Lower Courts appear to have arrived at this conclusion by comparison of the measurement chittahs of the plaintiff's jote on the spot.

It is now contended in special appeal that the order of the Collector under Section 58 of Act X. of 1859 was illegal, and that the decision passed is without jurisdiction.

The pleader for the special respondent urges that, under Section 13, Act VI. of 1862 (Bengal Council), no appeal lies from an order passed by the Collector reviving a suit under the provisions of Section 58, Act X. of 1859.

The application under Section 58, Act X. of 1859, by a defendant against whom a judgment has been passed *ex parte*, must be made within 15 days after any process for enforcing the judgment has been executed. The ryot-plaintiff got possession under the decree passed in the presence of the ryot-defendant in Agraun 1271 B. S., as shewn in the suit for mesne-profits to which the zemindar-defendant was a party. The zemindar's application under Section 58 was not made until a very long period after the fifteen days prescribed by the law had expired, and was therefore wholly inadmissible. Section 13, Act VI. of 1862 (Bengal Council), which enacts that an order passed by a Collector under Section 58 of Act X. of 1859 to set aside a judgment shall be final, contemplates an order which may be passed by a Collector legally and with jurisdiction, and not an order which is null and void for want of jurisdiction. Moreover, it is impossible that the zemindar-defendant can plead want of cognizance of the ejectment-suit, and of the fact that the plaintiff, who is his subordinate ryot, obtained possession in execution of the decree obtained by him in that suit.

Being, therefore, of opinion that the order of the Collector reviving the suit on the application of the zemindar was illegal, we reverse the decrees of both the Lower Courts, and decree this appeal with costs and interest payable by the zemindar.

The 25th August 1866.

*Present:*

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

**Jurisdiction (of Civil Court)—Declaratory suit—Sale in execution of decree for rent — Section 108, Act X. of 1859.**

Case No. 3172 of 1865.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Jessore, dated the 31st August 1865, affirming a decision passed by the Moonsiff of that District, dated the 8th July 1864.*

Shuroop Chunder Bhuttacharjee (Plaintiff), *Appellant,*

*versus*

Kasheeshuree Dossia and others (Defendants), *Respondents.*

*Mr. J. S. Rochfort* and *Baboo Chunder Madhub Ghose* for Appellant.

No one for Respondents.

The owner of an under-tenure may sue in the Civil Court for a declaration that the sale of his under-tenure under Act X. of 1859 was illegal and void under Section 108 of that Act, and that he is entitled to possession of the land in suit notwithstanding such illegal sale.

*Norman, J.*—THIS is a suit by the plaintiff who is the owner of a neem-howalah, and not of a two-annas share of a neem-howalah as supposed by the Lower Appellate Court, to obtain a declaration that the sale of the neem-howalah in execution of a decree for rent obtained by the defendant Kasheeshuree Dossee under Act X. of 1859 is illegal and void, and that he is entitled to possession of the land in suit notwithstanding such illegal sale.

Kasheeshuree was the owner of a two-annas share in the howalah of which the neem-howalah was a subordinate tenure. The plaintiff alleges that execution was not first taken out against his moveable property within the district in which the suit was instituted.

If this allegation be true, the 108th Section of Act X. of 1859 makes the sale wholly illegal, and we think that the plaintiff has a right to ask for a declaration to that effect in a Civil Court notwithstanding the decision reported in the Special Number of the Weekly Reporter, page 147. The doctrine laid down in that case may well apply when the party comes to the Civil Court to set aside a proceeding in the Revenue Court on the ground of irregularity. Here, even if the sale be not set aside, the contention is

that it is wholly illegal, and has no operation to transfer the property. The case must be remanded to the first Court for trial on the merits.

*Campbell, J.*—I would only guard myself against being supposed to concur in the decision of the Weekly Reporter, page 147, from which I have already differed, and which has been, I think, hit hard by a recent decision of a Full Bench. I concur in remanding this case for trial on the merits.

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The 28th August 1866.

*Present:*

The Hon'ble C. B. Trevor and H. V. Bayley, *Judges.*

**Clause 1, Section 23, Act X. of 1859—Suit for delivery of pottah.**

Case No. 962 of 1866.

*Special Appeal from a decision passed by the Judge of Backergunge, dated the 8th March 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 11th July 1865.*

Bharut Chunder Sein (Defendant), *Appellant,*

*versus*

Oseemooddeen (Plaintiff), *Respondent.*

*Baboo Otool Chunder Mookerjee* for Appellant.

*Baboo Kalee Mohun Dass* for Respondent.

Clause 1, Section 23, Act X. of 1859, contemplates suits for delivery of pottahs *by ryots in possession only.*

In this case, the point to be decided by us in special appeal is whether the Lower Appellate Court is correct in holding that the Civil Courts had jurisdiction in the case, and not the Revenue Courts under Clause 1, Section 23, Act X. of 1859.

The plaintiff sued that a certain putnee pottah, which has, in pursuance of a contract that it should be given to him by defendant, been prepared, but not signed, might be duly signed and delivered under a decree for specific performance.

It is contended in special appeal that, as Clause 1, Section 23, Act X. of 1859, speaks of all suits for delivery of pottahs, and plaintiff asks for the delivery of a pottah, the jurisdiction would be with the Revenue Courts.

But this plea is altogether untenable. Clause 1, Section 23, Act X. of 1859, contemplates suits by ryots in possession. Now, it is admitted here that plaintiff was not in possession. Further, it is clear that plaintiff asked for specific performance of an agreement to give a lease, with a view to get possession. And thus, in this case, till the plaintiff has obtained possession, he could not be in the relation of a tenant.

In this view, we see no ground to interfere with the decision of the Lower Appellate Court, and we, accordingly, reject this special appeal with costs.

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The 29th August 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble Shumbhoonath Pundit, *Judge.*

**Jurisdiction—Suit for rent below 100 Rs.—Appeal—Section 35, Act XXIII. of 1861.**

Case No. 748 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by Mr. F. C. Fowle, Judge of Rungpoor, dated the 15th December 1865, reversing a decision passed by Mr. W. Wavell, Deputy Collector of that District, dated the 23rd September 1865.*

Kristo Inder Roy Chowdry (Plaintiff), *Appellant,*

*versus*

Roopinee Bebee and others (Defendants), *Respondents.*

*Baboos Issur Chunder Chuckerbutty* and *Greeja Sunkur Mojoomdar* for Appellant.

*Moulvie Murhumut Hossein* for Respondent.

Where a Judge without jurisdiction heard an appeal from the order of a Deputy Collector in a suit for rent below 100 rupees, the High Court in special appeal set aside the order of the Judge and, under Section 35, Act XXIII. of 1861, transferred the case to the Collector for the purpose of hearing the appeal.

The suit is for arrears of rent not exceeding Rs. 100, and was tried by a Deputy Collector. We think that it is a case in which, if tried by the Collector, his decision would have been final under Section 153, Act X. of 1859, and consequently that the Judge had no jurisdiction to hear the appeal, but that an appeal lay to the Collector under Section 155. We think, therefore, that the decision of the Judge must be set aside.

But then under Section 35, Act XXIII. of 1861, this Court may pass such other order as it may think right. The order that

we think right to pass (the appeal not lying to the Judge) is that the decision of the Judge be set aside, and the case be transferred to the Collector for the purpose of its being heard by him.

There is nothing to satisfy us that this appeal was preferred to the Judge when the appellant knew that he ought to have preferred it to the Collector, or that he appealed to the Judge because the time for appeal to the Collector had expired. We think that this was a *bonâ-fide* appeal preferred by mistake to a Court which had no jurisdiction, and that it ought to go to the Collector who had power to hear it.

Our order, therefore, is that the decision of the Judge be set aside as made without jurisdiction, and that the case be transferred to the Collector for the purpose of his hearing the appeal.

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The 29th August 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Shumbhoonath Pandit, *Judge*.

**Rent—Excess lands.**

Case No. 395 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by Mr. F. C. Fowle, Judge of Rungpore, dated the 22nd November 1865, affirming a decision passed by Baboo Umbica Churn Roy Chowdry, Deputy Collector of Bogra, dated the 31st July 1865.*

Rashum Beebee (Defendant), *Appellant*,

*versus*

Bissonauth Sircar and others (Plaintiffs), *Respondents*.

*Baboos Romesh Chunder Mitter* and *Hem Chunder Banerjee* for Appellant.

*Baboos Bhuggobutty Churn Ghose* and *Kishen Dyal Roy* for Respondents.

**A ryot who holds land in excess of the quantity included in his mokurruree pottah is a trespasser and not a tenant as to such land, and cannot be sued for assessment of rent in respect of it.**

It appears to us that the plaintiff is not entitled to enhance the rent. The suit was for a kubooleut at an enhanced rent, and the defendant set up that he had held the land at 5 rupees rent under a mokurruree pottah. The plaintiff says that the mokurruree pottah included 5 khadahs odd, whereas the land upon measurement was found to be 8 khadahs odd. But the defendant had been paying 5 rupees rent for what he held, and he held the 8 khadahs as having been included in the mokurruree pottah. If the lands in excess of the 5 khadahs were not included under the mokurruree pottah, and the defendants encroached upon them, he was a trespasser, and not a tenant as to that part of the land, and the land-owner could not enhance the rent of that portion of the land which the defendant did not hold as a tenant.

There is no doubt that the tenant in this case had been paying 5 rupees a year for the land held by him under the mokurruree pottah, and he contended that the whole 8 khadahs were included in the mokurruree pottah at 5 rupees.

If the defendant has been paying 5 rupees rent for the 8 khadahs, the case does not fall within the 3rd Clause of Section 17, Act X. of 1859, for the quantity of land held by him has not been proved by measurement to be greater than the quantity for which rent has been previously paid. If he has been paying the 5 rupees for the 5 khadahs and nothing for the excess, he may be a trespasser as to the excess, but he is not a tenant liable to assessment.

Under these circumstances, it appears to us that the plaintiff has no right to enhance the rent, and that the decision of the Lower Courts must be reversed with costs.

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The 31st August 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, L. S. Jackson, G. Campbell, and A. G. Macpherson, *Judges*.

**Enhancement—Uniform payment from Permanent Settlement—Failure to prove pottah.**

Case No. 1005 of 1865 under Act X. of 1859.

*Special Appeal from a decision passed by Mr. G. Bright, Officiating Judge of the*

*24-Pergunnahs, dated the 16th January 1866, reversing a decision passed by Mr. R. T. Sevestre, Deputy Collector of that District, dated the 31st August 1865.*

Greesh Chunder Bose (Defendant), *Appellant,*

*versus*

Kally Kristo Holdar and others (Plaintiffs), *Respondents.*

*Baboo Chunder Madhub Ghose* for Appellant.

*Baboo Anund Chunder Ghosal* for Respondents.

**A ryot is not precluded from the benefit of having held at a uniform rent from the Permanent Settlement, or of any presumptive evidence to that effect, merely by reason of his stating that he holds under a pottah not inconsistent with that presumption, though he may fail to prove the pottah.**

*This case was referred to a Full Bench by Seton-Karr and Shumbhoonath Pundit, JJ., under the following order:—*

*Referring order.*—THE point urged in special appeal is that the Judge is wrong in not allowing the defendant the benefit of the presumption of payment at one rate for 20 years, the Judge finding that a pottah pleaded by him has not been proved.

In support of the Judge's ruling, two decisions are quoted (Weekly Reporter, Act X. Rulings, page 6, Vol. II., and Vol. I., page 106, Civil Rulings). On the other hand, the special appellant quotes the case of Ranee Surnomoyee, P. C., printed at Vol. II., Weekly Reporter, page 13, as showing that a forged document would not prevent a party to a suit from claiming an adjudication on other evidence of such portion of his claim as was true.

We observe that, in these cases decided by other Benches, the pottahs were found to be fictitious or forgeries. In the present case, the Judge's decision does not appear to us to go beyond saying that the pottah is not proved, or is not above suspicion. In those cases, too, the dates of the pottahs are not given. In the present case, the pottah declared to be not proved was one of 1192, or of a time anterior to the Perpetual Settlement. It could not, therefore, be a document setting up a rate of rent fixed after that Settlement; and it is thus argued that, in the present case, the defendant ought not to be precluded from showing, by other evidence, that he has paid at one rate ever since the Perpetual Settlement, although he has failed to prove that his rent was fixed permanently before that same Perpetual Settlement.

We are informed that a case (No. 2461 of 1865) somewhat bearing on this point has been referred to a Full Bench, and we think this case ought to be referred to the Full Bench for its consideration at the same time.

The points on which we would ask the opinion of the Full Bench are these—

*First.*—Are those two decisions sound in law?

*Second.*—Supposing the two decisions of other Benches, above quoted, to be sound in law as regards the inability of a defendant, whose pottah has been found fictitious or fraudulent, to fall back on the presumption of 20 years' payment at the same rate, would those rulings apply to a case in which a pottah alleged to have been given before the Permanent Settlement has been merely found unproved, or would the defendant still have the right to claim an adjudication of any other proofs which he might have adduced in order to show that his rent has been unchanged *from the time of the Permanent Settlement*, and independently of any such pottah?

*The judgment of the Full Bench was delivered by—*

*Peacock, C.J.*—In this case, which was a suit for enhancement of rent, it appears from the decision of the Zillah Judge that the defendant pleaded that the tenure existed previously to the Decennial Settlement, and that the rate of rent had been uniform. The Lower Court found that the receipts proved that the rent at which the land is held by the ryot had not been changed for a period of 20 years before the commencement of the suit. If this is so, it is to be "presumed "that the land has been held at that rent "from the time of the Permanent Settle-"ment, unless the contrary be shown, or "unless it be proved that such rent was

"fixed at some later period." If that presumption be made, the ryot is entitled to the benefit of the provision of Section 3, Act X. of 1859, which enacts that "ryots who hold lands at fixed rates "of rent which have not been changed "from the time of the Permanent Set-"tlement are entitled to receive pottahs "at those rates."

Then comes the question, what would comply with those words "unless the con-"trary be shown, or unless it be proved that "such rent was fixed at some later period?" If a defendant sets up that he came in under a pottah subsequent in date to the time of the Permanent Settlement, it appears by his own showing that he has not held from the date of the Permanent Settlement. But if he should say, "I hold under a pottah prior "to the time of the Permanent Settlement, "and I have been paying rent for the last "20 years at an uniform rate," and should prove that he had held at the same rate of rent for a period of 20 years next before the commencement of the suit, the fact of his having stated that he held under a pottah would not deprive him of the benefit of the presumption arising from the uniform payment of rent, even if he should fail to prove that his pottah was genuine. So, if he were to say, "I have held for a period of 20 "years at the same rent; I hold a pottah "of a date subsequent to the Permanent "Settlement, but that pottah was granted to "me in confirmation of a prior holding;" that would not rebut the presumption arising from the proof of his having held at a rent which has not been changed for a period of 20 years next before the commencement of the suit. It is only when, by evidence or by his own showing, it appears that his holding commenced, or that his rent was fixed, at a period subsequent to the date of the Permanent Settlement, that the presumption created in his favor by Section 4, Act X. of 1859, is rebutted. A ryot is not precluded from the benefit of his having held at a fixed rate of rent which has not been changed from the date of the Permanent Settlement, or of any presumptive evidence to that effect. merely from the fact of his stating that he holds under a pottah not inconsistent with that presumption, though he may fail to prove the pottah.

The case must go back to the Division Bench which referred it, with this expression of our opinion, in order that they may finally determine it.

The 31st August 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble G. Loch, L. S. Jackson, G. Campbell, and A. G. Macpherson, *Judges.*

**Jurisdiction (of Civil Court)—Suit to set aside sale in execution of decree under Act X. of 1859 (after deposit of rent).**

Case No. 921 of 1866.

*Special Appeal from a decision passed by Mr. J. R. Muspratt, Judge of Purneah, dated the 27th February 1866, reversing a decision passed by Moulvie Abdool Rub, Moonsiff of that District, dated the 7th September 1865.*

Sheik Afzul Ali (Plaintiff), *Appellant,*

*versus*

Lalla Gurnarain and others (Defendants), *Respondents.*

*Mr. R. E. Twidale* for Appellant.

*Baboo Kalee Kishen Sein* for Respondents.

A suit by an unregistered holder will lie in a Civil Court to set aside the sale of a tenure sold in execution of a decree for rent under Act X. of 1859, after the money due upon the decree was deposited, Section 151 of that Act notwithstanding.

*This case was referred to a Full Bench by Campbell and E. Jackson, JJ., with the following order:—*

*Referring order.*—THIS is a civil suit to set aside a sale of an under-tenure by a Collector and recover the property from the purchaser on the ground that the sale was improperly made, the rent decreed having been paid into Court.

The Court first decreed the claim, but the Judge set aside the decision on the ground that the person who paid the money was not the registered holder of the tenure. It appears that the plaintiff, a recent purchaser, paid the money in the name of the original holder and at his own risk; therefore the Judge is, we think, wrong. But respondent objects that no such suit can lie in the Civil Court. Fraud on the part of the purchaser is not shewn, and, therefore, the case as against him is not governed by the Full Bench Decision, dated 5th February

1866, Neelmoney Bonick *versus* Puddolochun (5 Weekly Reporter, Act X. Rulings, p. 20).

On the other hand, the decision of 16th March 1864 would support the respondent's contention. The result would seem to be that, however irregularly and improperly a man's tenure may be sold—however, as in the present case, no balance may be due to justify a sale—however all the prescribed notices and rules may be omitted—and however irregularly a tenure may be sold without a man's knowledge, for an utterly inadequate consideration, he has no remedy of any kind in the case in which fraud cannot be proved against the purchaser. We doubt this construction of Section 151, Act X of 1859, and, seeing the great importance of the matter, we think that the question should be authoritatively setttled by a Full Bench, to which accordingly we refer it.

*The judgment of the Full Bench was delivered by—*

*Peacock, C.J.*—In this case the plaintiff was not a person liable under the decree, but he was the holder of the tenure sold under it. The Judge finds that the transfer of the tenure to him had not been registered. Then comes the question, whether he, not being the registered owner of the tenure which was sold under the execution, can sue in the Civil Court to have it determined whether, under the circumstances, that tenure could be sold under the execution after the amount due under the decree had been deposited. It is clear, we think, that the plaintiff must have some means of having the question determined. If he was bound to come in as an intervenor under Section 106, Act X. of 1859, then it would have been tried by the Revenue Court; if he was not bound to come in under Section 106, he had a right to say that, "under a decree against "another person, you have sold my tenure, "and I will have an action in the Civil Court "to decide whether you had the right to "sell it or not." The defendant had a right to plead in the Civil Court, or in any other Court which had jurisdiction to try the question, that "this tenure, whether it was "assigned to the plaintiff or not, was saleable, "the transfer not having been registered in "the Sheristah." On the other hand, the plaintiff had a right to contend that, the tenure having been assigned to him, although saleable in his hands, if the money had not been deposited, the transfer not having been registered, was not saleable after the money due under the decree had been deposited in the name of the debtor. It appears to us that, even if he had a remedy under Section 106, he still had a right, if he pleased, to bring his action in the Civil Court to try that question. If he had come in under Section 106 as an intervenor in the Revenue Court, and the Revenue Court had decreed against him, he might, under Section 107, have brought a suit in the Civil Court within one year to contest that decision. It is clear that he would have had a right to have the decision of the Civil Court, if he had intervened, and the case had been determined against him; but we think that he was not bound to intervene, and that he had a right to sue in the Civil Court to try whether the tenure could be sold after the money due upon the decree was deposited, notwithstanding Section 151.

The Division Bench has already decided that the Judge's decision is wrong. It is therefore reversed with costs, and the decision of the first Court is affirmed.

This decree is to be registered.

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The 31st August 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Jurisdiction (of Civil Court)—Fraudulent sale in execution of decree under Act X. of 1859.**

Case No. 939 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 26th August 1865, affirming a decision passed by the Sudder Moonsiff of that District, dated the 28th November 1864.*

Noor Buksh (one of the Defendants), *Appellant,*

*versus*

Mean Jan (Plaintiff) and others (Defendants), *Respondents.*

*Baboo Nil Madhub Bose* for Appellant.

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*Mr. R. E. Twidale* and *Baboo Gopal Lal Mitter* for Respondents.

A suit will lie in the Civil Court for the recovery of land fraudulently sold in execution of a decree, against a party not in possession, for rent under Act X. of 1859, without suing specifically to set aside the sale, which could not pass away the interests of the real owners of the lands leased to him.

THE special appellant objects that the plaintiff in this case was not authorized to sue in the Civil Courts, because the special appellant held under a purchaser who had bought a jote of a ryot in execution of a decree for arrears of rent under Act X. of 1859 in favor of an ijaradar under Government; that the plaintiff could not also recover, because he had not sued to set aside this sale; and that the Lower Appellate Court, while it had given some grounds for decreeing the case of the plaintiff for the tank, had not given grounds for decreeing the other lands besides the tank claimed by the plaintiff.

The Lower Appellate Court has found as a fact on evidence that the tank and the lands in dispute were held by the plaintiff and his ancestors for several years; that the ijaradar had no right to make any settlement of the proprietary rights in the tank with anybody; that he, in collusion with others, pretended to have settled with one Mogul Jan the lands claimed by the plaintiff and held by him and his ancestors; that a case for arrears was brought against this Mogul Jan; and that, in execution of this decree, purchase was made by a different party who is alleged to have given a lease to the special appellant of the lands in dispute.

In a case like this, as has already been ruled by the Full Bench (*vide* pages 20 and 22, Volume V., Act X. Rulings, Weekly Reporter), the plaintiff was entitled to sue and to prove that, by the sale in question, plaintiff's rights and interests could not pass to the purchaser in execution of a decree given against a person who had no right to hold the lands, and did not hold them *bonâ fide*. The plaintiff also is not required to sue specifically to set aside such a sale; and the judgment of the Lower Appellate Court covers the entire lands in dispute, and not simply the tank. Therefore, seeing no reason to interfere, we reject the special appeal with costs.

The 1st September 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble G. Loch, L. S. Jackson, G. Campbell, and A. G. Macperson, *Judges*.

**Breach of contract—Limitation—Damages.**

Cases Nos. 970 and 994 to 1002 of 1866 under Act X. of 1859.

*Special Appeals from a decision passed by Mr. J. R. Muspratt, Judge of Purneah, dated the 27th November 1865, modifying a decision passed by Mr. W. DaCosta, Officiating Principal Sudder Ameen of that District, dated the 31st March 1865.*

Mohee Sahoo and others (Defendants), *Appellants*,

*versus*

Mr. A. J. Forbes (Plaintiff), *Respondent*.

*Messrs. C. Gregory* and *J. S. Rochfort* for Appellants.

*Mr. G. C. Paul* and *Baboo Juggodanund Mookerjee* for Respondent.

In a suit for breach of a contract to be performed at different times, limitation will count from each breach of contract as it arises, and separate damages may be recovered for each breach.

*These cases were referred to a Full Bench by Bayley and E. Jackson, JJ., under the following order:—*

*Referring order.*—THERE appear to have been conflicting decisions on the two points on which these appeals are urged before us, and we therefore refer them to a Full Bench.

The points are: first, whether, in a suit for breach of a contract, which in fact includes a series of contracts, limitation must be calculated from the first breach of the contract, or may be calculated from any breach of it? On this question, the judgment reported at page 277, Weekly Reporter, Volume V., and those reported at pages 45 and 148, Sutherland's Small Cause Court Rulings, are at variance.

The second point is whether damages can be awarded for each year where the contract extends over several years, or must be confined to the first year. On this point, the judgment reported at page 277, Volume V., Weekly Reporter, is at variance with the decision passed at page 386 of Marshall's Reports.

*Full Bench Judgments.*

*Peacock, C.J. (Loch, Jackson, and Macpherson, JJ., concurring).*—In this case, two points are referred for the opinion of the Full Bench—

*1st.*—Whether, in a suit for breach of a contract, which in fact includes a series of contracts, limitation must be calculated from the first breach of the contract, or may be calculated from any breach of it.

*2nd.*—Whether damages can be awarded for each year when the contract extends over several years, or must be confined to the first year.

When this case was called on, there was no Counsel appearing for either side, and the Judges were obliged to argue the case amongst themselves.

With regard to the first question, it appears to me that, in a suit for breach of a contract to be performed at different times, limitation must be calculated from each breach of contract as it arises. Thus, in a suit upon a contract to pay by instalments, or to perform certain acts at different periods, each breach would be separate, and limitation as to such breach would run from the date at which the money was to be paid, or the duty to be performed. This ruling would not apply to any contract which expressly provides that, in the event of any breach, the whole debt shall become due, or the whole damages shall be recoverable, or a sum certain shall be paid as compensation in respect of the whole contract, as in the case cited from 5 Weekly Reporter, page 277.

The answer to the first question is substantially an answer to the second question, namely, whether damages can be awarded for each year when the contract extends over several years, or must be confined to the first year. Where there is a contract for performing certain duties in each of several years, each breach of the contract would be a complete cause of action, and separate damages would be recoverable for each breach.

The case will be sent back to the Court which referred the points to us, in order that it may deal with it.

There are several analogous cases which will be governed by this case. It will be for the Court which referred the questions to determine upon each particular contract with reference to the opinion we have now given, and to apply the law accordingly in each particular case.

*Campbell, J.*—I have considerable misgivings about answering these questions in this very abstract form. It seems to me that the form in which they have been sent up is inconvenient. The practice has been that either the whole case is referred to a Full Bench, or particular points in a particular case are referred for the opinion of a Full Bench.

I very much wish that the case had been argued before us, and that we had known exactly how the questions arose in the case before us—the more so because there has, I think, been some error in the reference in regard to the variance supposed to have existed between the decisions quoted.

On looking at these cases, I do not see that either of those points arises in any of them. With regard to limitation, it seems to me that the only question which arose was the application of Clauses 2, 9, and 10, Section 1, Act XIV. of 1859; and the question whether the cause of action arose from the first breach of contract, or whether every subsequent breach of contract was a new ground of action, was not raised or discussed in those cases.

As respects the second question, it seems to me that the point which arose in the case previously decided was on the construction of a particular contract, *i. e.*, whether the liquidated damages there specified were liquidated damages for the whole contract, or damages for each year during which the contract lasted. That question was decided on the construction of the particular contract. That being so, and the question not having been argued, we have only to answer these abstract questions without reference to any particular case, either to the present case, or to those quoted in the order of reference.

I have no doubt that the answer in reference to the abstract question on the first point must be that, where the contract does in fact contain a series of contracts, each of that series of contracts may constitute the subject of a fresh breach. I would only like to qualify that general answer, so far as I am concerned, by this one observation, that it seems to me that, if the parties have treated the contract as *de facto* wholly broken and at an end from the time of the first rupture—if they have, as between themselves, wholy renounced the contract, reserving only the claim for damages, and not seeking to obtain specific performance—then I have very great doubt whether a party claiming under that contract can, at the end of many years, bring up a stale claim for

damages, on the ground that the contract made so many years ago was originally to be in part performed at a later date. But on the supposition that either of the parties has treated the contract as a subsisting contract, then in each of the series of contracts (supposing there is such a series) a new cause of action arises.

As to the second question, there can be no doubt, I should think, supposing that there is no provision for liquidated damages, that the damages to be awarded in regard to any contract are for the whole contract, and not for a single year. If the contract is for several years, the damages cannot be limited to one year, but must cover the whole injury sustained; such damage being reasonably assessed as a Jury would assess it.

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The 3rd September 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

**Rent—Limitation.**

Case No. 771 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by Mr. W. Tucker, Judge of West Burdwan, affirming a decision passed by the Deputy Collector of that District, dated the 20th July 1865.*

Doorga Doss Chatterjee (Plaintiff), *Appellant*,

*versus*

Nobin Mohun Ghossal (Defendant), *Respondent*.

*Baboos Nobo Kissen Mookerjee* and *Tara Prosunno Mookerjee* for Appellant.

*Baboo Nil Madhub Sein* for Respondent.

Act X. of 1859 does not authorize the recovery of only 3 years' rent. Thus, where a suit was commenced within 3 years from the end of the Bengal year 1268, the plaintiff was held entitled to recover the whole of that year's rent.

SECTION 32, Act X. of 1859, enacts that "suits for the recovery of arrears of rent "shall be instituted within three years from the "last day of the Bengal year in which the "arrear claimed shall have become due."

It is a mistake to suppose that this Act only authorizes 3 years' rent to be recovered. The question is with regard to the rent of 1268 whether the suit was commenced within 3 years from the last day of the Bengal year 1268. If it was, then the plaintiff was entitled to recover the whole of that year's rent.

Now, it appears that the suit was brought on the 22nd February 1865, corresponding with Falgoon 1271. Consequently, it was brought within 3 years from the end of the Bengal year 1268, and no part of the rent of 1268 was barred by limitation.

The decree of the Lower Appellate Court must be amended by decreeing to the plaintiff the whole of the rent of 1268 instead of that portion of it which the Deputy Collector has allowed. The sum to be added to the amount decreed by the Lower Courts is Rs. 26-13-14 for rent and Rs. 14-6-6 for interest thereon at 12 per cent. from 1269 to 18th Bhadur 1273, *viz.*, 4 years, 4 months, 18 days, aggregating Rs. 41-3-20. That sum will carry interest at 12 per cent. from this date to the date of realization.

The costs of this appeal will be awarded in proportion to the amounts decreed and disallowed.

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The 4th September 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumboonath Pundit, *Judges*.

**Jurisdiction (of Civil Court)—Refusal of Collector to sell a tenure for rent.**

Case No. 974 of 1866.

*Special Appeal from a decision passed by the Judge of Patna, dated the 16th January 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 12th September 1865.*

Roy Huree Kishen and others (Plaintiffs), *Appellants*,

*versus*

Nursingh Narain and others (Defendants), *Respondents*.

*Mr. R. E. Twidale* and *Moonshee Ameer Ali Khan Bahadoor* for Appellants.

*Baboo Nil Monee Sein* for Respondents.

A suit will not lie in the Civil Court against an order of a Collector refusing to hold a sale of a tenure for arrears of rent,

WE are of opinion that the plea taken by special respondent preliminarily here, that under Section 154 Act X. of 1859, an action will not lie in the Civil Courts against an order of a Collector refusing to hold a sale of

a tenure for arrears of rent, is a valid one. The law, as far as we can see, does not provide for such an appeal.

We accordingly dismiss the special appeal with costs.

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The 4th September 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Re-entry (Decree for)—against farmer.**

Case No. 1506 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Tipperah, dated the 4th April 1866, reversing a decision passed by the Deputy Collector of that District, dated the 18th January 1866.*

Buksh Ali (Defendant), *Appellant,*

*versus*

Ramtunoo Gun, Agent on the part of Roop Monjoory Koery (Plaintiff), *Respondent.*

*Baboo Kalee Mohun Doss* for Appellant.

*Baboo Chunder Madhub Ghose* for Respondent.

With reference to Sections 22 and 78 of Act X. of 1859, a decree for an unconditional re-entry cannot be given against a farmer.

THE special appellant contends that the Lower Appellate Court should not have given an unconditional decree for re-entry to the plaintiff, respondent, on proof of the special appellant being in arrears; that, though the plaintiff may have a right under the law or under contract to *sue* for re-entry, he cannot recover a decree opposed to Section 78 of Act X. of 1859; that the special appellant had, immediately after suit, deposited the arrears asked by the plaintiff; and, if necessary, he, the special appellant, can deposit under Section 78, within 15 days of the decree, more, if the sum deposited by him is found to be short of what he may have occasion to deposit under that Section.

We agree with the special appellant that Sections 78 and 22 of Act X. of 1859 must be read together, and no decree for an unconditional re-entry can be under the latter Section given against a farmer in opposition to the former Section of the aforesaid Law.

The order of the Lower Appellate Court is, accordingly, reversed, and the case remanded to the Lower Appellate Court to pass a decree in this case consistent with Section 78 of Act X. of 1859.

The 6th September 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Ejectment—Cancelment of Lease—Section 78, Act X, of 1859.**

Case No. 200 of 1866 under Act X. of 1859.

*Regular Appeal from a decision passed by Moulvie Syud Ameer Hossein, Deputy Collector of Monghyr, dated the 11th May 1866.*

Mr. W. Fitzpatrick (Plaintiff), *Appellant,*

*versus*

Mr. J. Gowan (Defendant), *Respondent.*

*Mr. G. C. Paul* and *Baboo Umurnath Bose* for Appellant.

*Messrs. R. V. Doyne* and *Goodall* for Respondent.

Suit laid at Rs. 6,000.

Section 78, Act X. of 1859, is not confined to suits for ejectment or cancelment of lease on account of the non-payment of rent only, but also applies to suits for ejectment and cancelment of lease on account of a breach by the ryot of the conditions of his contract.

THIS is an appeal from the decision of the Deputy Collector of Monghyr. The amount or value in dispute in the suit exceeding 5,000 rupees, the appeal lies direct to this Court under the provisions of Section 160, Act X. of 1859.

The suit was for the cancelment of the lease and the ejectment of the defendant on the allegation that he had committed a breach of the conditions of his lease it not paying the rent punctually, and allowing it to fall into arrears for four monthly kists or instalments. The lease, which is dated the 25th April 1865, for a term of years, is not disputed.

Two suits, and not one (according to Section 78, Act X.), were instituted by the plaintiff—the one to recover the rent in arrear; the other, the suit before us, under the provisions of Clause 5, Section 23, Act X. of 1859.

The written statement of the defendant, Mr. James Gowan, was briefly to this effect: that he had paid up the rent in full up to Assar 1273 F. S., either by cash payments to the plaintiff or by deposit in Court.

The Deputy Collector, Moulvie Syud Ameer Hossein, on the 11th May 1866, dismissed the plaintiff's suit with costs.

The appeal has been argued before us by Mr. Paul for the appellant, and Mr. Doyne for the respondent.

It is admitted by the learned Counsel on both sides that, if this case comes within the purview of Section 78 of Act X. of 1859, the defendant must succeed, inasmuch as the defendant did pay into the Court the amount of the arrear within less than 15 days from the date of the decree.

Mr. Paul contends that the latter portion of the above Section applies only to suits for the ejectment of a ryot or the cancelment of a lease on account of the non-payment of arrears of rent under Section 22 of Act X., and not to a suit such as the present one, which is for the ejectment of a lessee and the cancelment of his lease on account of a breach of the conditions of his contract, by which the lessee is liable to ejectment, and his lease to be cancelled; and, further, that Act X. in no way contracts the power of the zemindar to eject any lessee who holds under a contract the specific terms of which he had broken, nor can the defendant invoke the Court as a Court of equity, but he must stand or fall by the strict letter of his lease.

It appears to us to be very clear that a party who seeks to get rid of a lessee on the plea that the lease is forfeited must sue under Act X. of 1859. Such a suit is not cognizable by any other Court, but by the Collectors of Land Revenue, and it must be tried under the provisions of the aforesaid Act.

The present suit has for its object the cancelment of the lease of the defendant, and his ejectment on account of a breach of the conditions of his lease, *i. e.*, the non-payment of the rent according to the fixed periods in the kistbundee, or instalment-account appended to the lease.

The words of the latter portion of Section 78 of Act X. of 1859 run thus: "In *all* "cases of suits for the ejectment of a ryot or "cancelment of a lease, the decree shall "specify the amount of the arrears; and, if "such amount, together with interest and "costs of suit, be paid into Court within 15 "days from the date of the decree, execution "*shall* be stayed."

It is admitted that, as the defendant has complied with the provisions of the Section, execution of the decree for the arrears is necessarily stayed by statutory provisions, and not by any act of the Court, and the defendant cannot be ejected. The words of the Section are very comprehensive in their scope. *All suits* for ejectment and cancelment of a lease fall within the Section; and, were we to rule otherwise, the merciful proviso contained in the latter portion of the Section would be a nullity. With reference to the above remarks, it is perhaps unnecessary to enter into any question of equity, but we must observe that the defendant was always willing and ready to pay the rent. The plaintiff demanded a large sum on account of certain village and other expenses. The defendant objected to the payment of this sum which led to the suit for arrears of rent in which these extra items were disallowed. There was no recusancy on the part of the defendant, and he is equitably entitled to the protection which Section 78 gives to a good tenant.

The appeal is dismissed, and the decision of the Lower Court affirmed with costs and interest for which the appellant is liable.

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The 7th September 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, L. S. Jackson, and Shumbhoonath Pundit, *Judges*.

**Appeals—Jurisdiction (of Deputy Collectors).**

Case No. 821 of 1865.

*Miscellaneous Appeal from a decision passed by Baboo Ramcoomar Bose, Deputy Collector of Dacca, dated the 22nd September 1865.*

Kally Narain Roy Chowdry, *Petitioner*,

*versus*

Sadurunissa Bebee, *Opposite Party*.

*Baboos Onookool Chunder Mookerjee, Peary Lall Roy*, and *Sreenath Bannerjee* for Petitioner.

*Mr. C. Gregory* and *Baboo Unnodapersad Bannerjee* for Opposite Party.

A Deputy Collector cannot, under Section 19, Act VI. of 1862 B. C., hear appeals upon reference by a Collector.

*This case was referred to a Full Bench by Loch and L. S. Jackson, JJ., under the following orders :—*

*Jackson, J.*—BEFORE proceeding to hear this appeal upon its merits, I wish to state that the order of a Deputy Collector passed upon an appeal in a case under Act X. of 1859 appears to me to be an order made without jurisdiction. But, as there is a decision* of a Divisional Court, to the effect that a Deputy Collector, by virtue of Section 19 of the Bengal Act VI. of 1862, may hear appeals upon reference by a Collector, I think it would be advisable, in order to set this point at rest, to refer the question for the decision of a Full Bench.

* Josim Kagzee *versus* Koylash Nath Holdar (2 Weekly Reporter, Act X. Rulings, page 10).

*Loch, J.*—I was one of the Judges who passed the decision in January 1865, and I am perfectly willing that the question should be referred for the further consideration of a Full Bench, in order that the point may be settled, so that, if there has been any incorrect ruling, it may be corrected as soon as possible.

*Judgment of Full Bench.*—The question is whether, under Section 19 of the Bengal Act VI. of 1862, a Deputy Collector can hear appeals upon reference by a Collector.

It is contended that the words "all the powers vested in the Collector by any of the Sections of this Act or of Act X. of 1859" include the powers of hearing appeals. But it is clear what the object of the Section was, and that it was never intended to authorize a Deputy Collector to hear appeals.

Section 1, Act VI. of 1862, repealed Section 150, Act X. of 1859, except as to cases which had been instituted before the passing of that Act. By Section 150, Act X. of 1859, it was enacted that "all the powers vested in the Collector *by the preceding Sections of this Act* may be exercised by any Deputy Collector, in cases referred to him by a Collector, and in all cases without such reference, by any Deputy Collector placed in charge of any Sub-division of a District." The Section was re-enacted by Section 19, Act VI. of 1862, with the addition of the following words: "or who is specially authorized by Government to receive such cases." It was, therefore, intended to give to Deputy Collectors, who were specially authorized by Government to receive such cases, all the powers which might be exercised by a Deputy Collector placed in charge of a Sub-division, or by any Deputy Collector in cases referred to him by a Collector.

Section 19, Act VI. of 1862, is not very accurately worded. It uses the words "all the powers vested in the Collector by any of the Sections of Act X. of 1859," and not "all the powers vested in the Collector by any of the Sections of Act X. preceding Section 150." It was not the intention of the Legislature to give to a Collector the power of authorizing a Deputy Collector to hear an appeal from the judgment of another Deputy Collector.

Section 154 of Act X. enacts that, "in "suits in which the judgment of the Col- "lector is final as provided in the last pre- "ceding Section, the Collector may, upon "the application of either party, if preferred "within 30 days from the date of the deci- "sion, order the re-hearing of a suit upon "the ground of the discovery of new evi- "dence," &c.

By Section 20, Act VI. of the Bengal Council, the Collector may withdraw a suit from any Deputy Collector and try it himself. If a Collector should withdraw a suit from a Deputy Collector in charge of a Sub-division, and hear it himself, he would have power to order a re-hearing of it under Section 154 of Act X.; but it cannot be contended that the Deputy Collector in charge of a Sub-division could order a re-hearing in such a case after it had been heard by the Collector.

It must be borne in mind that whatever power is vested by the Section in question in a Deputy Collector in cases referred to him by a Collector is also vested without such reference in a Deputy Collector in charge of a Sub-division.

Section 155, Act X. of 1859, gives an appeal to the Collector from the judgment of a Deputy Collector in certain cases, and it, therefore, impliedly gives the Collector power to hear the appeal; but this implied power was not one of the powers intended to be given to a Deputy Collector in charge of a Sub-division.

It is clear that the right of appeal given by Section 155 of Act X. to a Collector from the decision of a Deputy Collector in charge of a Sub division has not been taken away, and that the power of hearing such

appeal is still vested in the Collector. It cannot be supposed that the Legislature intended that a Deputy Collector in charge of a Sub-division could exercise the powers of the Collector and hear the appeal from his own decision, or that the Collector should have power to refer it to another Deputy Collector in the same Sub-division or in any other part of his District.

It appears to us that the case is too clear for argument, and that the object of Section 19 of the Bengal Act VI. of 1862 was to give to Deputy Collectors, specially entrusted with those particular powers, all the powers which were conferred on Deputy Collectors upon reference by the Collector, or Deputy Collectors placed in charge of Sub-divisions without such reference.

We, therefore, think that a Deputy Collector cannot hear an appeal from another Deputy Collector, even if the case is referred to him by the Collector.

This case will go back to the Division Bench to be finally determined.

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The 7th September 1866.

*Present:*

The Hon'ble G. Loch and J. P. Norman, *Judges.*

**Res judicata—Jurisdiction—Registry of transfer of talooks—Section 27, Act X. of 1859.**

Case No. 1429 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 26th February 1866, affirming a decision passed by the Sudder Ameen of that District, dated the 15th September 1865.*

Moonshee Mahomed Noor Buksh (Plaintiff), *Appellant,*

*versus*

Mohun Chunder Poddar and others (Defendants), *Respondents.*

*Mr. G. C. Paul* and *Baboo Woomesh Chunder Banerjee* for Appellant.

*Baboos Dwarkanath Mitter, Onookool Chunder Mookerjee,* and *Romesh Chunder Mitter* for Respondents.

A suit will not lie in the Civil Court to set aside an order by a Collector made under Section 27, Act X. of 1859, for the registration of the names of the defendants as shikmee talookdars in the plaintiff's sheristah.

We think it quite plain that this suit will not lie. The plaintiff sues to set aside an order for registration of the names of the defendants as shikmee talookdars in his sheristah. It appears that the now defendants, having obtained a decree of a Civil Court, and established their right against the other shikmee talookdars to hold as co-sharers with them, applied to the Collector, under Section 27 of Act X. of 1859, who proceeded to enquire into the case, and made an order enjoining the now plaintiffs to admit them to registry, and give effect to the transfer which had taken place to them.

It is quite clear that the determination of the Collector was a decision by a Court of competent jurisdiction, and, therefore, the Court is precluded from taking cognizance of the present suit, which is a suit between the same parties, by Section 2 of Act VIII. of 1859.

The appeal is dismissed with costs in all Courts and interest.

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The 7th September 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Execution of money-decree (against immoveable property)—Section 109, Act X. of 1859.**

Case No. 1380 of 1866.

*Special Appeal from a decision passed by the Judge of West Burdwan, dated the 27th February 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 10th May 1865.*

Jadub Paul Potedar (Plaintiff), *Appellant,*

*versus*

Radha Lal Chatterjee and another (Defendants), *Respondents.*

*Baboos Bungsheedhur Sein* and *Chunder Kally Ghose* for Appellant.

*Baboos Chunder Madhub Ghose* and *Mohesh Chunder Chowdry* for Respondents.

A decree-holder took out, against the moveable property of his judgment-debtors, execution of a decree passed in December 1859 in a suit for damages on account of illegal distraint and sale instituted before Act X. of 1859 came into operation. His decree remaining still unsatisfied, he sued in the Civil Court for a declaratory decree against the immoveable property of his judgments-debtors. HELD that the plaintiff's remedy, if his claim was not barred by limitation, was, under Section 109, Act X. of 1859, to apply to the Collector for execution against the immoveable property of his judgment-debtors.

THE question before us is this: The special appellant instituted a suit under the provisions of Regulation V. of 1812, Section 17, for the recovery of damages on account of injury sustained by him by the illegal sale of his property under the Distraint Law in the Deputy Collector's Court.

Before the decision was arrived at, Act X. of 1859 came into operation. The suit was finally decided by the Collector in appeal in December 1859. The decree of the Deputy Collector being amended, and one of the defendants entirely absolved, the other defendants were held to be liable.

The decree-holder in that suit sued out execution against the moveable property of his judgment-debtors, and has exhausted it. His decree is, however, still unsatisfied. He now sues in the Civil Court to obtain a declaratory decree that the immoveable property of his judgment-debtors is liable for the satisfaction of his decree.

The Judge refuses to entertain the suit.

We think that the special appellant has his remedy, provided he is not barred under the Statute of Limitations, under Section 109 of Act X. of 1859, and can apply to the Collector for execution of his decree of December 1859, which was passed after Act X. came into operation, against the immoveable property belonging to his judgment-debtors.

Act X. does not enact that its provisions are not applicable to suits instituted before, but decided after, it came into operation, and the Section quoted by us does not, by its application to the present case, deprive the special appellant of any right which, but for the passing of Act X., would have belonged to him; on the contrary, it enlarges his right.

The appeal is dismissed with costs and interest.

The 8th September 1866.*

*Present:*

The Hon'ble J. P. Norman and L. S. Jackson, *Judges.*

**Jurisdiction—Power of High Court (to superintend Collector's Court)—Section 15 of High Court's Act.**

Bhyrub Chunder Chunder and others, *Petitioners,*

*versus*

Shama Soonderee Debea and another, *Opposite Party.*

*Baboos Kali Mohun Doss* and *Otool Chunder Mookerjee* for Petitioners.

*Baboos Dwarkanath Mitter* and *Romesh Chunder Mitter* for Opposite Party.

Under Section 15 of the High Court's Act, the High Court has a power of superintendence over Collector's Courts, and can interfere to restrain a Collector from exercising a jurisdiction which properly belongs to a Zillah Judge.

*Norman, J.*—THIS was a rule calling on the opposite party to show cause why the order of the Collector should not be set aside for the want of jurisdiction. The facts of the case are, that the plaintiff, an ijaradar under a Hindoo lady, brought a suit against a ryot for arrears of rent. The daughter-in-law of this Hindoo lady, the lessor, intervened, alleging that she had been in the *bona fide* receipt of the rents, and that the original purchase was made by her husband in the name of his mother, and that she, as his widow, was entitled to the rents. The Deputy Collector found that the ijara lease had been executed by the mother and attested by the daughter-in-law; that the daughter-in-law, the intervenor, could not object to a document of which she herself had approved; that, under these circumstances, it was not necessary to enquire specially as to the previous receipt and enjoyment of the rents in order to determine in favor of the plaintiff.

From this decision the intervenor appealed to the Collector, who reversed the order of the Deputy Collector. The plaintiff, dissatisfied with that order, has now applied to this Court.

We think it plain, under Section 153, Act X. of 1859, that, where a question relating to title to land, or some interest in land, as between parties having conflicting claims

* *Note.*—This decision does not conflict with the Full Bench decision printed at page 25, Vol. 5, W. R., Miscellaneous Appeals, because the latter decision had not before it Section 15 of the High Court's Act, upon which the present decision is based.

thereto, has been in *point of fact* actually *determined* by the Deputy Collector, the appeal lies to the Zillah Judge under Sections 160 and 161. The appeal in the present case having been presented to the Collector, instead of to the Judge, under those Sections, the question which has been argued before us is whether we can interfere to restrain the Collector from exercising a jurisdiction which is not given to him by Act X.

By Section 15 of the Charter Act each of the High Courts established under that Act is to "have superintendence over all Courts which may be subject to its appellate jurisdiction."

Now, as I understand those words, they give to this Court large powers over the inferior Courts to compel them to do any act which by law they should do, to command them to execute all powers with which they are vested, and to restrain them from meddling when they have no jurisdiction. It is clear that the Collector's Court is a Court over which, at the time of the passing of the Charter Act, the Sudder Court possessed appellate jurisdiction; and, therefore, it is clear that the 15th Section of the Charter Act gives us a superintendence over such Courts for the purpose to which I have already alluded.

Under the large and general powers of the 15th Section of the Charter Act, I think we have power to prevent the Collector exercising a jurisdiction which properly belongs to the Court of the Zillah Judge.

We need not discuss the question as to whether there is not also power under the 35th Section of Act XXIII. of 1861. The matter has been already discussed by a Full Bench of this Court which has expressed no positive opinion on the subject, and we need not express any opinion upon it until it is necessary to do so.

It is clear that we have power under Section 15 of the Charter Act; and, in exercising the power given to us by that Section, we set aside the order of the Collector, giving the other side liberty to appeal to the Judge within one month.

*Jackson, J.*—I agree in the view taken by my brother Norman as to the authority of the Court under the 15th Section of the Act of Parliament.

As to the operation of Section 35, Act XXIII. of 1861, I still retain the doubt which I expressed on another occasion, both as to the power of this Court to deal with cases where the jurisdiction to entertain the appeal is altogether wanting, and also as to the applicability of that Section to the Courts of Collectors. But, as it appears that the Court has jurisdiction under the 15th Section of the High Court's Act, it is needless to express any opinion on the other matter.

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The 8th September 1866.

*Present:*

The Hon'ble J. P. Norman and L. S. Jackson, *Judges.*

**Uniform payment of rent for 20 years—Section 4, Act X. of 1859.**

Case No. 1507 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by Mr. J. E. S. Lillie, Judge of East Burdwan, dated the 22nd February 1866, affirming a decision passed by Baboo Nitto Lal Dey, Deputy Collector of that District, dated the 27th October 1865.*

Kootubooddeen Mundul and others (Defendants), *Appellants,*

*versus*

Kisto Soondery Debea (Plaintiff), *Respondent.*

*Moulvie Murhumut Hossein* and *Baboo Bykant Nath Paul* for Appellants.

*Baboo Mohesh Chunder Chowdry* for Respondent.

Section 4, Act X. of 1859, has no application in a case in which the defendant pleads payment of a uniform rent of 67 Rs. for 20 years, when it appears that the plaintiff obtained a decree for rent at 79 Rs. in April 1861, since which time until the present suit was brought in July 1865 no appeal was preferred from that decision and no suit brought to contest its correctness, and where it appears that rent at 79 Rs. was in fact paid under that decree.

THIS is a suit for rent at an enhanced rate. The ryot defendant pleads that he held for 20 years at the rent of 67 rupees, and that the rent has not been changed from the time of the Perpetual Settlement, in order to bring his case within Section 4, Act X. of 1859. It appears, however, that in a summary suit the plaintiff obtained a decree before the Principal Sudder Ameen on the 23rd April 1861 for rent at 79 rupees. The dakhilas were produced, and apparently some contest was raised by the now defendant that the plaintiff, after taking rent at the larger sum, had returned a portion of it, which the Principal Sudder Ameen did not believe, but he said that his decree was without prejudice to any suit which the defendant might bring to show that he had a right to hold at the

lower rent. From that time until July 1865, when the present suit was brought, there was no appeal from the decision of the Principal Sudder Ameen, and no suit brought to contest the correctness of his finding. It appears, too, that rent at 79 rupees was in fact paid under that decree.

Under these circumstances, it is perfectly clear that it cannot be said that the rent had not been changed for a period of 20 years before the commencement of the suit; and therefore Section 4 has no application.

The appeal must be dismissed with costs and interest.

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The 10th September 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, L. S. Jackson, Shumbhoonath Pundit, and A. G. Macpherson, *Judges*.

**Enhancement—Forged Pottah.**

Case No. 2461 of 1865 under Act X. of 1859.

*Special Appeal from a decision passed by Mr. H. Richardson, Officiating Additional Judge of Jessore, dated the 6th June 1865, affirming a decision passed by Baboo Anund Mohun Mozoomdar, Deputy Collector of that District, dated the 4th August 1864.*

Issur Chander Doss (Defendant), *Appellant*

*versus*

Nittyanund Doss (Plaintiff), *Respondent*.

*Baboo Anund Chunder Ghosal* for Appellant.

*Baboo Romanath Bose* for Respondent.

If a ryot sets up a mokurruree pottah as an answer to a landlord's claim to enhance his rent, and fails to prove the pottah, or the pottah produced by him is held to be forged, the landlord is not necessarily entitled to enhance the rent to the full amount claimed, but only to a fair and equitable rate having regard to the grounds of enhancement.

*This case was referred to a Full Bench by Bayley and Shumbhoonath Pundit, JJ., under the following order:—*

*Referring order.*—In this case the special appellant, having pleaded a pottah which was found to be false, was not allowed by Trevor and Campbell, *JJ.*, to fall back upon the plea that he had been paying uniformly for more than 20 years, and on this ground was entitled to the presumption allowed by Act X. of 1859.

The case was remanded to try the question of rates. The Courts below decreed the claim of enhancement as brought by the plaintiffs, without trying whether these rates demanded and decreed are fair and equitable. The ground upon which the Lower Courts proceeded this way is simply that the special appellant had pleaded a pottah which was afterwards found to be forged, and, therefore, was not entitled to an enquiry as to the proper rates.

This order is in accordance with the decision passed by Steer and Kemp, *JJ.*, on the 31st of March 1864, in the case of Gooroodoss, Appellant, *versus* Sristee Dhur, Respondent (*see* page 58 of Volume II. of the Selections of Cases under Act X. published by the Revenue Board), which the Lower Courts have adopted in this case.

The special appellant appeals and objects, *first*, to the ruling of Trevor and Campbell, *JJ.*; *secondly*, pleads that the precedent relied upon by the Lower Courts has been since overruled by the High Court, and quotes, in support of his allegation, the case of Nobin Chunder Sircar and others, No. 480 of 1864, 12th September 1864, printed in page 106 of Volume I. of Sutherland's Weekly Reporter. We did not allow the special appellant to proceed further with his first plea, as any objection to the order of another Division Bench could be taken only by way of an application for review before Trevor and Campbell, *JJ.*

As to the second plea, we agree with the special appellant that there is no reason and justice in refusing to try whether the rents claimed against the special appellant by the plaintiff are fair and equitable, because the pottah the special appellant pleaded had been found to be forged. The forgery of the deed does not deprive the special appellant of the right awarded to him by law to see that the enhanced rates demanded from him are fair and equitable.

No law empowers a Court of Justice to punish the special appellant for the crime of forgery by refusing him the right which the law has given him as a tenant.

We are inclined to adopt the ruling of September 1864 cited above.

As, however, the precedent quoted by the Lower Courts is opposed to the aforesaid ruling, we think it best to refer this case to the Full Bench.

*Judgment of the Full Bench.*—This appeal must be decreed, and the case remanded to the Deputy Collector to try what are fair and equitable rates with reference to the grounds of enhancement.

"It is quite clear that, if a ryot sets up a mokurruree pottah as an answer to the landlord's claim to enhance his rent, and the

ryot fails to prove the pottah, or the pottah produced by him is held to be forged, the landlord is not necessarily entitled to enhance the rent to the full amount claimed; he is entitled only to a fair and equitable rate, having regard to the grounds of enhancement.

If it were otherwise, a landlord might claim to enhance his rent to a crore of rupees for a beegah of land, and, if the tenant should set up a pottah which should be held to be a forgery, the landlord would be entitled to enhance to the amount claimed. A ryot might purchase a holding or come to it by descent, and might receive with the land a mokurruree pottah, and, believing it to be genuine, might set it up as an answer to a claim to enhance his rent. It would be very unjust, under such circumstances, to hold that his rent might be enhanced to the amount claimed by the landowner, however exorbitant it might be.

But, even if a ryot sets up a mokurruree pottah which he knows to be forged, he is liable to be punished criminally for using as genuine a document which he knows to be false. But it does not entitle the landowner to enhance the rent beyond a rate which is fair and equitable. The crime of the ryot cannot entitle the landowner to more than his just rights.

We concur with the Judges who referred the case, and are of opinion that the judgment of the 31st March 1864 cannot be upheld.

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The 11th September 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, L. S. Jackson, and Shumbhoonath Pundit, *Judges*.

**Estoppel—Payment of rent to alleged representative—Joint Hindoo Family—Suit for deceased member's share of rent—Will—Certificate.**

Case No. 3109 of 1865 under Act X. of 1859.

*Special Appeal from a decision passed by Mr. L. C. Craster, Officiating Judge of Beerbhoom, dated the 26th July 1865, affirming a decision passed by Baboo Prosunno Coomar Ghose, Deputy Collector of that District, dated the 26th July 1864.*

Baney Madhub Ghose (Plaintiff), *Appellant*,
*versus*
Thakoor Doss Mundul (Defendant), *Respondent*.

*Baboo Chunder Madhub Ghose* for Appellant.

*Baboo Onookool Chunder Mookerjee* for Respondent.

The admission of a man's representative character by payment of rent to him is not conclusive, but *primâ facie* evidence which the tenant is not estopped from rebutting if he can. Thus, if a widow, after her husband's death, has once or oftener received her husband's proportion of the rents, the tenant is not estopped from afterwards proving that the husband had left a will by which he had devised his share of the estate to other persons in trust to apply a portion of the rents in a particular manner, and to pay over the residue to his widow.

Where, upon the death of a member of a joint Hindoo family, his interest in the joint estate passes to another as his representative—*e. g.*, where there is a joint family consisting of four brothers, one of whom dies leaving a son, or without issue leaving a widow—the son or the widow, as the case may be, is not entitled to sue separately for the deceased member's share of rent received jointly.

In a suit for rent by a devisee under a will, it is not necessary for him to obtain a certificate of will.

*This case was referred to a Full Bench by Bayley and Shumbhoonath Pundit, JJ., under the following order:—*

*Referring order.*—In this case the plaintiff (special appellant) sued a ryot for rents, averring himself the putneedar of the one-fourth share of Gobind monee, the widow of one of the joint proprietors.

The defendant pleaded that he had neither paid rents to plaintiff, special appellant, nor to his lessor Gobind Monee, but to the *intervenors*, who, having appeared under Section 77 of Act X. of 1859, were made defendants.

These intervenors plead that, by the *will* of their predecessors, the management of the property to a one-fourth of which this putnee extends, as well as *all* family-property, has always been in the hands of the head member of the family; that the husband of Gobind Monee herself had no separate possession; that the husband was one of five brothers, and so was entitled to only a one-fifth, *viz.*, annas 3-4 share; that the share of the fifth brother had been inherited by the three other brothers to the exclusion of the husband of Gobind Monee, as he had predeceased; that before his death he had, by a will, devised 16 gundahs of his share to *one* of the *intervenors*, thus leaving as his estate *only annas* 2-8; that of this share of annas 2-8 Gobind Monee had no separate possession, and that, as representing this share, she had all along received maintenance. It was further pleaded that the husband of Gobind

Monee, in respect of this share of annas 2-8 so left to her, had appointed one of the intervenors as executor; that the executor, however, failed to furnish the security required from him, and so did not take out any certificate to act as executor; and that the widow thus obtained a certificate to represent her husband's estate. Moreover, it is stated by the *intervenors* that, under the will of the common ancestor, no shareholder could make any putnee settlement of his share; lastly, that Gobind Monee, being a childless widow, could not create a putnee to the prejudice of the reversioners.

It is now found as a fact on evidence that the intervenors never collected rents from the ryot now sued. Plaintiff, however, never alleged that he had collected any rents since he obtained the putnee. Until it be shown that his lessor did not collect rents from before the creation of the putnee, the intervenors, who have failed to establish their assertion of having made those collections, have no right to object to the claim of the special appellant.

Now, this will of Gobind Monee's husband was produced by the intervenors, who, it is apparent, are found to have failed in that part of the case which alone they could set up, *viz.*, under Section 77 of Act X. of 1859, *i. e.*, as to the receipt and enjoyment of rent by them previous to the suit. Even if the benefit of this will were extended to the ryot defendant, it is clear that it would not be correct or proper for a Revenue Court in a suit for arrears of rents to decide whether the lessor of the plaintiff had a legal right to create a putnee, and so to dismiss the case of the special appellant, because on a question of legal title she had not shown such title. Now, as to the facts connected with the previous wills of the predecessors of the intervenors, we find that these wills are neither established nor even filed; and, if it was proved that these deeds contained the directions pleaded by the intervenors, these wills could not set aside the fact that, notwithstanding such directions, the head member of the family in the present instance did not hold possession before the suit, with regard at least to the property within which the ryot defendant was holding his jote.

These previous wills may have created rights, and yet at the present time these rights may not be capable of being enforced. Not having been enforced for a long period, they may have become barred by lapse of time, or the parties may have acted against the directions so as not to be now entitled to obtain any benefit under these wills. There can, however, be no doubt that, in regard to the property in dispute, no person who is not proved to be in possession of these rights can plead them against the special appellant, who in this case is legally suing for rents under Act X. of 1859. Further, if the party who may have obtained the right to collect the rents of the share of the husband of Gobind Monee under her husband's will is not in possession, it would not be legal or proper to refuse rents to the widow when she has been allowed to remain in possession against the conditions of the will. If she has a right to collect until a decree is obtained against her by one authorized to take possession under the will, he who holds under her has also a general right to ask for rents as her subordinate and lessee. The certificate obtained by her with regard to the estate of her husband may not, as it is said by the Lower Appellate Court, be an absolute authority for her to collect the rents of her husband's share, but it is to be borne in mind that it is admitted that the alleged executor has not taken out certificate of administration so as to show an opposite title in force, and that Gobind Monee was in possession as one of the joint proprietors. In such a case we would hold that, as a joint proprietor, she can claim separate collection of the rents due to her share, and those who think they have a right to oppose her in this on the grounds of a special title cannot object to her rights in this suit without obtaining a decree (in support of such title) adverse to the proprietary rights of Gobind Monee. It may, however, be doubtful whether Gobind Monee could be allowed to claim these rents in such a case before a Revenue Court without first obtaining a decree in support of this title from a Civil Court, and accordingly it may also be held that it is proper that she or those holding through her should be directed to sue in the Civil Court to prove their title to realize the rents separately.

And again, referring to the findings of fact by the Lower Appellate Court, we may in special appeal be obliged to hold that Gobind Monee is proved to have collected the rents in dispute, and is therefore, under Section 77, entitled to a decree.

The ryot pleaded payment of his rents to the intervenors, who failed to prove that they had ever collected any rents, and so, if there is any period since the death of the husband of Gobind Monee for which rents have been paid by the ryot (beyond the period for which the special appellant

claims arrears by this suit), it is evident such rents must be supposed to have been paid to the account of the share of the deceased husband of Gobind Monee, and so to her as his widow.

If the fact of the collection by Gobind Monee is not to be considered as proved, it may be necessary to direct the Lower Appellate Court to come to a clear finding as to that point.

Now, as to the extent of the share of Gobind Monee's husband, it also appears necessary to decide whether the husband was entitled to one-fifth or one-fourth, and whether he had conveyed away any portion out of this to one of the intervenors, and what fraction.

On this point we hold that, if receipt of rent by Gobind Monee of the entire share of her husband, be it one-fourth or one-fifth, be proved, the fact of the husband having conveyed any portion of his share to another would not be a bar to a decree of the rents to the plaintiff, to the extent that the share of Gobind Monee's husband may be established. He, plaintiff, comes in through Gobind Monee; and the devisee, who may have acquired a right by separate deed to a portion of her husband's estate, must be either previously in legal possession, or obtain it through a Court of Justice, before he can in a rent-suit object to the right of the widow to collect the rents of *that* portion of the share of her husband which he claims is made over to him.

We hold that the mere fact of the proof of the existence of the will cannot, in a case for rent, be sufficient ground for dismissing this claim of the plaintiff. To do so would be to dispossess a party in possession without requiring the party entitled to hold possession to bring an action.

As to the objection of the intervenors, *viz.*, whether Gobind Monee, as a childless widow, has a right to create a putnee to the prejudice of their rights when they may become entitled to inherit after her death, it is clearly a question which is not to be settled in this rent-case.

As in similar cases, two Division Benches of *this Court* appear to have passed conflicting decisions,* we think it proper *to refer the case to a Full Bench* to decide which ruling is to be followed.

* Nos. 2007 to 2010 of 1862.
Chief Justice and Mr. Justice Steer.
No. 1518 of 1862, 21st of April 1863.
Mr. Justice Norman and Mr. Justice Kemp, and the review of this No. 375 of 1863, ditto ditto. 21st of December 1863.

It is true that, in the cases decided by our learned Chief Justice and Mr. Justice Steer, the appeals were by the ryot-defendants; and in the appeal heard by the other two Judges, the intervenors were the appellants to this Court.

It is also true that, in the cases decided by Mr. Justice Norman and Mr. Justice Kemp, and those decided by the other Divisional Benches, the Lower Appellate Court had decreed the claim of the plaintiff, and in this case the said Court has dismissed the plaintiff's claim.

It is also true that, after remand by the Chief Justice and Mr. Justice Steer, the decision below was against the plaintiff, and the special appeal preferred against that decision by him. The appeal was disallowed by another Divisional Bench composed of Mr. Justice Morgan and Mr. Justice Shumbhoonath Pundit. It appears that the latter Bench did not think it proper to decide, on the subsequent appeal of the plaintiff, against the principle laid down by the Chief Justice and Mr. Justice Steer when they remanded the case, and the fact of the Lower Appellate Court, having also decided against the plaintiff, does not necessarily render it proper that in this case also the decision passed by the Chief Justice and Mr. Justice Steer should be adopted when there is any occasion to consider that that decision is not proper for *this* case. The order for remand passed in this case does not appear to us to be so decisive of the rights of the intervenors based on the will, as it was in the cases remanded by the Chief Justice and Mr. Justice Steer.

The order of remand passed by another Divisional Bench, on the 26th of May 1865, simply proceeds to lay down that, after the intervenors have failed to prove their objection as to the collection of rents by them, the Lower Appellate Court should try, as against the plaintiff, the objections of the ryot. Now, it is seen that the ryot pleaded simply that he had paid rents to the said intervenors, and that accordingly his case was really different from that of the intervenors. There is no allusion in the remand on this case to the will, and it does not appear to be opposed to the view that we are inclined to adopt in this case.

As to the difference between the two cases heard by the Chief Justice and Mr. Justice Steer, and the two cases decided by Mr. Justice Norman and Mr. Justice Kemp, the two former Judges directed that the benefit of the plea of the will set up by the intervenors,

and not by the ryots—whose own case, as far as it could be heard under Section 77 of Act X. of 1859, has failed—should be allowed to the ryot, defendant. We are inclined to adopt the decision of Mr. Justice Norman and Mr. Justice Kemp, but feel ourselves restricted from adopting that ruling by the order of the Chief Justice and Mr. Justice Steer in other two similar cases.

We would therefore make the reference in order to ascertain whether, in this case for rents, we are to order any enquiry regarding the fact of the possession of the widow, and an investigation of the extent of the share held by her. We also wish to know whether we are to hold her entitled to claim to collect separately the rents of the whole of her husband's share upon the assumption that she was in legal possession of her husband's share as an admitted joint proprietor in possession; and it is further necessary to know what orders should be given as to the share claimed by one of the intervenors to have been devised to him by the husband of Gobind Monee—that is, whether we should, on the findings of the Lower Appellate Court, and on the devisee's admission of not having taken out a certificate, consider that the said devisee is not in possession of the share said to have been conveyed to him, or that we are to dismiss the claim of the special appellant on the ground that, though he may be in possession, still Gobind Monee, his lessor under the will of her husband, had no right to collect herself, although, in fact, there is no possession held as yet under the will by the said devisee.

*The judgment of the Full Bench was delivered by—*

*Peacock, C.J.*—This is a suit for rent claimed by the plaintiff as putneedar of a quarter-share of certain property granted to him by Gobind Monee, the widow of Sree Kissen. Sree Kissen was one of four brothers. The tenant denied the widow's right to the rent, and stated that he had never paid rent either to the widow or to the plaintiff. He stated that no definite share of the rent was ever received on account of the widow after Sree Kissen's death; that the whole rent had been paid to Pran Kisto, one of the surviving brothers, who was the head member of the family.

Pran Kisto and another brother Juggut intervened, but they failed to prove that they had been in actual receipt of the rent up to the commencement of the suit. The widow Gobind Monee had obtained a certificate of administration to her husband's effects, but the intervenors produced and proved a will of Sree Kissen under which the widow had no power to grant a putnee. The plaintiff's suit was dismissed by both the Lower Courts, and on special appeal several questions have been referred for the decision of a Full Bench: *1st*, Whether the Court ought to order an enquiry regarding the fact of possession by the widow, and as to the extent of the share held by her. *2ndly*, Whether the Court should hold her entitled to collect separately the rents of the whole of her husband's share, upon the assumption that she was in legal possession of her husband's share as an admitted joint proprietor in possession. *3rdly*, What orders should be given as to the share claimed by one of the intervenors to have been devised to him by the husband of Gobind Monee—*i.e.*, whether the Court should, on the findings of the Lower Appellate Court, and on the devisee's admission of not having taken out a certificate, consider that the said devisee is not in possession of the share said to have been conveyed to him, or whether the Court ought to dismiss the claim of the special appellant, on the ground that, though he may be in possession, still Gobind Monee, his lessor under the will of her husband, had no right to collect herself, although in fact there is no possession held as yet under the will of the said devisee.

*1st.*—As to whether the Court should remand the case in order to ascertain whether any enquiry is necessary as to the fact of the possession of the widow, and for an investigation of the extent of the share held by her.

It appears that the tenant held originally under four brothers, of whom Gobind Monee's husband Sree Kissen was one. They were a joint family, and the tenant was paying rent to them jointly.

I should have thought myself, though it is unnecessary in this case to express any decisive opinion on the point, that, where rent is received by a joint family, the tenant is not liable to be sued by each member of the joint family for a separate share of the rent. But, if the estate is severed by partition, and, instead of being a joint estate, becomes separate estates, then the rent would be apportioned in respect of the several allotments, and each member would be entitled to sue for his separate share of the rent in

respect of the lands allotted to him on partition.

In this case there was no allegation that the widow, after her husband's death, had ever succeeded to, or obtained possession of, her husband's share in the property either jointly or separately. The tenant said that it was the custom of the family for the elder member to collect the rents. But he did not admit that the widow was ever in separate collection of her husband's share of the rent.

The Judge having found that the widow had no power under her husband's will to grant a putnee, we do not think that the Judge was wrong in not finding whether she was in possession or not. If the plaintiff had alleged that the widow obtained separate possession of her husband's share of the rent, and that, being in separate possession of her husband's share, she had granted a putnee to the plaintiff, and that, as grantee of the putnee, he had the right to collect the rent which the widow had previously collected, the case might have been different.

But, even if the widow had been in receipt of her husband's share of the rent— that is to say, if after her husband's death the tenant had paid rent to her—speaking for myself alone, I should have been of opinion that neither she nor her grantee would be entitled in this suit to recover the rent after the will of her husband was established, and her title disproved. According to English Law, if a man takes land from another as his tenant, he is estopped from denying the title of that person. But, if he takes land from one person, and afterwards pays rent to another, believing that other to be the representative of the person from whom he took the land, he is not estopped, in a suit for rent subsequently becoming due, from proving that the person to whom he so paid rent was not the legal representative of the person from whom he took. For example, if a man pays rent to another, believing him to be the heir-at-law of his deceased landlord, and afterwards discovers that he is not the heir-at-law, or that the landlord left a will, the tenant, in a suit for subsequent arrears of rent, would not be estopped from showing that he paid the former arrears under a mistake, and that the person to whom he so paid had no title. The admission of a man's representative character by payment of rent to him is not conclusive, although it may amount to *primâ facie* evidence. It is, like all *primâ facie* evidence, liable to be rebutted, and the tenant is not estopped from rebutting it if he can. Therefore, even if it had been proved that the widow in this case, after her husband's death, received one-fourth of the rent, that would not estop the tenant from afterwards proving that the husband had left a will by which he had devised his share of the estate to other persons in trust to apply a portion of the rents in a particular manner, and to pay over the residue to his widow. Therefore, speaking for myself alone, I should say that, even if it had been proved that the widow had once or oftener received her husband's proportion of the rent, the tenant would not be estopped from setting up the will in answer to a claim by her, or by any person claiming through her, to continue to receive such share of the rent.

When the Judge found, as he did, that the husband left a will under which the widow had no power to alienate the property, he in effect found that the plaintiff who claimed through an alienation by the widow had no title. It was unnecessary, therefore, for him to go on and enquire whether the widow ever had been in receipt of the rent, or to enter into an investigation as to the share held by her.

The first question must be answered in the negative.

As to the 2nd question, whether the Division Bench ought to hold that the widow was entitled to collect separately the rents of the whole of her husband's share upon the assumption that she was in legal possession of her husband's share as an admitted joint proprietor in possession.

There was no admission that the widow ever was in possession of her husband's share of the rent, and no proof of it. Her *primâ facie* title as heir to her husband was rebutted by her husband's will; and, as I have already stated, I should have thought that, where, upon the death of a member of a joint family, his interest in the joint estate passes to another as his representative—as, for instance, where there is a joint family consisting of four brothers, one of whom dies leaving a son, or without issue leaving a widow—the son or the widow, as the case may be, is not entitled to sue separately for the share of the deceased member of rent received jointly. But I am speaking for myself alone, and I do not think it necessary to express any decisive opinion on that point now, because I think we may determine this case upon another point, namely, that, as the will was proved, and the widow had no power under it to convey her hus-

band's share of the property, the plaintiff had no right to sue for any part of the rent.

As to that part of the 3rd question by which it is asked what orders should be given as to the share claimed by one of the intervenors to have been devised to him by the husband of Gobind Monee, the answer is that, the intervenor not having proved that he was in receipt of the rent up to the time of the commencement of the suit, he is out of Court. But, although the intervenor is out of Court, still the plaintiff is bound to prove his title, and the will, being proved, shows that he had no title.

Then, as to whether this Court, upon the finding of the Lower Appellate Court, and on the devisee's admission of not having taken out a certificate, ought to consider that the devisee is not in possession of the share said to have been conveyed to him, it appears to us that, in a suit for rent by a devisee under a will, it is not necessary for him to obtain a certificate of will. A landlord dies having granted a lease to a tenant, and devises his estate to another person, that person has a right to come into the Collector's Court, and to sue for rent as representative of the original landlord. He is not bound to obtain a certificate, and the Collector is competent to try his title. The Collector being the Civil Court for the purpose of trying actions for rent, he has power to try whether the person who claims the rent as legal representative of the landlord is the legal representative or not. A devisee who has not obtained a certificate is not out of possession. He has not a right to collect the debts due to the testator. But it is not contended that the devisee in this case claims to collect anything due to the testator. He only claims to collect the rents due since the death of the testator, for which the testator could never have sued. A devisee under a will can sue for rent without obtaining possession. The will gives him the same right as the testator had.

We think that there is no necessity to remand the case to try any further issues. It appears that, in point of fact, there was a will made by the widow's husband, by which the plaintiff's title is disproved—that is an answer to his claim to the rent.

The special appeal must be dismissed, and the decision of the Judge affirmed with costs.

The 11th September 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Right of occupancy—Suit for Pottah at fixed rates.**

Case No. 1596 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Purneah, dated the 16th March 1866, reversing a decision passed by the Deputy Collector of that District, dated the 11th November 1865.*

Shaikh Lotf Ali (Plaintiff), *Appellant,*

*versus*

Manick Chand Chuckerbutty and others (Defendants), *Respondents.*

*Baboo Kalee Kishen Sein* for Appellant.

*Baboo Ramanath Bose* for Respondents.

Though a ryot may have asked for a pottah at fixed rates, yet, if it be clear from the facts pleaded by him that he never claimed the benefit of Section 3 of Act X. of 1859, and has pleaded only the facts required by Section 5 of the Act, he is entitled to obtain a pottah at fair and equitable rates, for the period specified in the plaint, or, if necessary, to be fixed by the Court, if he can prove his allegation of having held at the same rate for 20 years, and so acquired a right of occupancy.

THERE cannot be any doubt regarding the real intent of the plaintiff's plaint. He may have asked for a pottah at fixed rates, but clearly his object never was to ask for a pottah at fixed rates in perpetuity on the ground of Section 3 of Act X. of 1859, as he distinctly came in Court upon the allegation of having held the jote for 20 years under two different pottahs, and so had acquired a right of occupancy. This fact, if proved, would, under Section 5 of the said Act, give the plaintiff a right to obtain a pottah for a period specified in the plaint, or, if necessary, to be fixed by the Court, at fair and equitable rates.

The precedent quoted by the Lower Appellate Court against the claim of the special appellant does not fairly apply to his case.

In that case, apparently, the plaintiff had asked for a perpetual pottah at certain fixed rates under Section 3, on the ground of having held at those rates from the time of the Decennial Settlement. It was properly held in that case that, having failed to prove that he is entitled to obtain what he asks under Section 3, the plaintiff cannot be allowed to fall back upon Section 5 to obtain a new relief not asked in the plaint, and which relief relates to a state of facts quite

different from those upon the allegation of which the suit was originally brought by the plaintiff.

In this case, the special appellant has alluded only to the facts required by Section 5 of the Act, and so he comes under that Section; and, if he succeeds in establishing his allegations on this point, he will be entitled under that Section to obtain a pottah at the fair and equitable rates which was the relief given to him by the Court of first instance.

We accordingly remand the case to the Lower Appellate Court to re-try the case with reference to the above remarks.

We could have upheld the decision of the Court of first instance if we had been clearly satisfied that there was no dispute regarding the rates of rents decreed by the Court of first instance.

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The 12th September 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, L. S. Jackson, and A. G. Macpherson, *Judges*.

**Enhancement—Limitation—Declaratory decree.**

Case No. 41 of 1866 under Act X. of 1859.

*Regular Appeal from a decision passed by Mr. F. H. Elphinstone, Deputy Collector of Baughaul, dated the 10th November 1866.*

Doyamoyee Chowdrainee and another (Plaintiffs), *Appellants*,

*versus*

Bholanath Ghose and others (Defendants), *Respondents*.

*Baboo Onookool Chunder Mookerjee* for Appellants.

*Baboo Anund Chunder Ghosal* for Respondents.

**A decree declaring a right to enhance does not constitute a "cause of action." A suit for arrears of rent at an enhanced rate after notice may be brought without first getting a decree in a merely declaratory suit establishing the plaintiff's right to enhance.**

*This case was referred to a Full Bench by Seton-Karr and Macpherson, JJ., under the following order:—*

*Referring order.*—THE first question which arises in this case is, whether the appellant's suit for the rents of the years 1264-1267 is barred by reason of their having, in a previous suit, sued for and recovered the rents of the years 1268 and 1269. Concurring in the judgment delivered in the case of Rajah Sutto Churn Ghosal *versus* Obhoy Nund Doss (2 W. R., Act X. Cases, 31), we are of opinion that the present suit is not barred.

The second question is whether Section 30 or Section 32 of Act X. of 1859 is applicable to this suit—whether the appellants are not barred, either as to the whole or as to some part of their claim, by lapse of time. The suit is brought under Act X. of 1859. The plaint was filed on the 9th of August 1865, and the prayer is for the recovery of the arrears of rent for the years 1264-5-6-7. On the 23rd Cheyt 1264, the appellants issued a notice to enhance the rent under Regulation V., 1812, and on that notice instituted a suit for a declaration of their right to enhance. That suit was pending for many years, and it was not until the 31st August 1864 that a final decree was passed. The decree declared the right to enhance, and fixed the amount of the enhanced rent, but did not make any order under which the appellants could in that suit recover the arrears due. Within one year from the 31st August 1864, the present suit was instituted to recover the arrears at the enhanced rate.

The appellants contend that, under Section 30 of Act X., this suit is within time, and they are entitled to recover all the arrears which they claim. They treat the date of the decree declaring their right to enhance as "the date of the accruing of the cause of action," and they rely on the decision of this Court in the case of Joymonee Dossee *versus* Hurronath Roy (2 W. R., Act X. Cases, 51).

The respondents contend that the case falls under Section 32 of Act X., and they rely on the case of Hurronath Roy *versus* Gooroodoss Biswas (3 W. R., Act X. Cases, 19).

The two cases referred to appear to us to be in direct conflict. We therefore refer this second question for the decision of a Full Bench.

*The Judgment of the Full Bench was delivered by—*

*Peacock, C.J.*—This suit was brought on the 9th August 1865 to recover arrears of rent at an enhanced rate for 1264, 1265, 1266, and 1267 (that is, from 1857 to 1860 inclusive), the rents for 1859 to 1860 being arrears which accrued after the passing of Act X. of 1859, and those for 1857 and 1858 before the passing of that Act.

A notice of enhancement was given on the 23rd Cheyt 1264, corresponding with 1857, which was before the passing of Act X. of 1859; and a suit was commenced for a declaration of the plaintiff's right to enhance. That suit was pending many years, and on the 31st August 1864 a decree was given which merely declared the plaintiff's right to enhance the rent, and the rate to which he was entitled to enhance it; but the decree did not make any order for the payment of arrears to the plaintiff.

The question referred to a Full Bench is whether the present suit for the arrears, which was commenced within one year after the decree in the former suit, and more than three years after the end of the year 1860, or 1267, the last year in respect of which any portion of the rent sued for is claimed, was barred by limitation or not.

Section 32, Act X. of 1859, provides that "suits for the recovery of arrears of rent "shall be instituted within three years from "the last day of the Bengal year, or from "the last day of the month of Cheyt of the "Fuslee or Willayuttee years in which the "arrears claimed shall have become due;" and Section 30, Act X. of 1859, enacts that, "except as otherwise herein provided, all suits "instituted under this Act shall be com-"menced within the period of one year from "the date of the accruing of the cause of "action."

If this is a suit for the recovery of arrears of rent, and if the case falls within Section 32 of Act X., it is barred. But it is contended that the cause of action did not accrue until the decree in the declaratory suit was passed, and that the case consequently falls within Section 30.

Two conflicting cases are referred to: *1st*, Joymonee Dossee *vs.* Huronauth Roy, 2 Weekly Reporter, Act X. Cases, 51; *2nd*, Humeedoodeen *vs.* Razeooddeen, 3 *idem.* 21.

The question is, whether this is a suit for arrears of rent, or upon some other cause of action. But, for the former of the two cases which have been cited, I should have thought it clear that a decree, declaring that the plaintiff had a right to enhance, was not a cause of action. The non-payment of the rent at the enhanced rates, and not the declaration of a Civil Court that plaintiff had a right to enhance, was the cause of action. The action for that cause might have been brought if the decree had never existed. A suit for arrears of rent at an enhanced rate, after notice, may be brought without first obtaining a decree in a declaratory suit that the plaintiff has a right to enhance.

Section 14, Act X. of 1859, says: "Any "under-tenant or ryot on whom such notice "as aforesaid has been served may contest "his liability to pay the enhanced rent de-"manded of him, either by complaint of "excessive demand of rent as hereinafter "provided, or in answer to any suit prefer-"red against him for recovery of arrears of "the enhanced rent;" and Regulation V. of 1812 (the Regulation which was in force before Act X. of 1859 was passed) also allowed the land-owner to sue for rent at an enhanced rate, after notice, without previously obtaining a decree declaring that he had a right to enhance. The decree in the declaratory suit may be used in evidence between the same parties, but it cannot constitute a cause of action. A decree in a suit instituted in 1859 declaring that the plaintiff had a right to enhance could not constitute a cause of action in respect of the rent for 1860.

If a doubt existed whether defendant held under a tenure liable to enhancement of rent or not, it might be well to settle the question once for all by a declaratory suit. But there could be no decree in that suit which would bind the tenant to pay, or the landlord to receive, a particular rate for ever, whatever might be the rates for adjoining lands, or the value of the produce or productive powers of the land in time to come.

Parties are often, I regret to say, put to much unnecessary expense and delay by these declaratory suits. There was no necessity in this case to bring a suit for declaration of the right to enhance—at least, the arrears claimed might have been sued for without such a suit or a decree pronounced on it. The non-payment of the rent was the cause of action. The suit was for arrears of rent at an enhanced rate. Section 32 was the rule of limitation applicable, and Section 30 did not apply. Even if one year was the period of limitation, the decree in 1864 was not the cause of action, and the one year did not run from the date of that decree.

With regard to the rent for 1859 and 1860 which became due after Act X. came into operation, the suit is clearly barred, whether the limit was 3 years under the first part, or 3 months under the last part, of the Section. Probably 3 years was the period, as the notice of enhancement was not given under Section 13, Act X.

As to the arrears for 1264 and 1265, or 1857-1858, the following part of Section 32 is applicable:—

"For arrears of rent due at the passing of "this Act, the suit shall be brought within "three years after the passing of this Act, "or within the period now allowed for the "institution of such suits in the Civil Court "whichever may first expire."

The period of 3 years from the date of the passing of the Act, expired in April 1862, and consequently, as to arrears for 1857-1858, the suit was barred when brought on the 9th August 1865.

We think that the ruling in the second of the two cases cited was the correct one.

This appeal will be dismissed with costs.

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The 13th September 1866.

*Present:*

The Hon'ble J. P. Norman and L. S. Jackson, *Judges.*

**Damages—Section 10, Act X. of 1859.**

Case No. 1325 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by Mr. F. Tucker, Judge of Dinagepore, dated the 31st January 1866, affirming a decision passed by Moulvie Ameerooddeen Ahmed, Deputy Collector of Bhowanygunge, dated the 30th June 1865.*

Sumeena Beebee (Defendant), *Appellant,*

*versus*

Koylas Chunder Roy (Plaintiff), *Respondent.*

*Baboos Sreenath Doss* and *Issur Chunder Chuckerbutty* for Appellant.

*Baboos Dwarkanath Mitter* and *Debendro Narain Bose* for Respondent.

Damages under Section 10, Act X. of 1859, are recoverable only in respect of money actually paid as rent.

*Norman, J.*—This was a suit instituted in the Deputy Collector's Court by an under-tenant, alleging that receipts had been withheld from him for money paid by him as rent. He claims damages under Section 10, Act X. of 1859.

It appears that the plaintiff has paid 499 rupees on account of Government revenue in the Dinagepore Collectorate, 189 rupees in the Bograh Collectorate, and 26 rupees 7 annas on account of Income Tax, besides 8 rupees 8 annas remitted in cash to the defendant. The Lower Court has given the plaintiff a decree for 800 and odd rupees as damages under Section 10. The defendant appeals.

I am of opinion that, except as to the sum of 8 rupees 8 annas, no part of this money was *paid by the plaintiff as rent* within the meaning of Section 10, and consequently that, as to the remaining sums, the plaintiff is not entitled to sue his landlord under Section 10 in the Collector's Court for damages for not giving him receipts. He alleges that, under the terms of his pottah, he is bound to pay Government revenue and Income Tax, and that, under the special terms of the contract in the pottah, the payment of Government revenue and Income Tax is payment of rent entitling him to receive dakhilas from his zemindar. If that be so, he will be entitled to sue for damages in the Civil Court for the breach of the contract by the zemindar in refusing to give him such dakhilas; but he has no remedy under Section 10, Act X. of 1859, which merely contemplates cases of money actually and simply paid as rent.

The damages must be reduced, therefore, to the sum of 17 rupees, being double the amount of 8 rupees 8 annas actually paid as rent.

The costs in all the Courts will be in proportion.

*Jackson, J.*—I wish only to add this. It appears to me perfectly clear that in this case, except in respect of the small sum actually paid in cash to the zemindar, the plaintiff had not brought himself within the terms of Section 10, Act X. of 1859.

The plaintiff alleged that, under the agreement between him and the zemindar, he was to pay to the Collector certain sums on account of Land Revenue and Income Tax due from that zemindar, and that he should make over the receipts which he obtained from the Collector for those sums, and that in exchange for those receipts he should receive from the zemindar dakhilas for the amounts of his rents. At the outside, therefore, all that the plaintiff in this case could have been entitled to would be that, if he had actually made over to the zemindar the receipts which he had got from the Collector for the amounts paid on the zemindar's account, the zemindar having agreed to treat such

receipts as cash payments, he might have been possibly entitled to sue by reason of the non-receipt of dakhilas.. But it appears that the plaintiff has not made over the Collector's receipts to the zemindar at all. In fact, he has himself produced them as evidence in this case. Under our Rent Laws, as well under Act X. of 1859 as under previous laws, the ryot is bound to pay his rent. But then, as security to the ryot in order that he may not be compelled to pay his rent over again, the zemindar is bound to grant him dakhilas or receipts for that rent, and the dakhilas must also specify the year or years on account of which rent is paid. It is quite clear that, to entitle himself to dakhilas, the ryot must first have paid the rent. In this particular case he seems not to have parted with the receipts which the zemindar was bound to accept as rent. I am quite disposed to concur with my brother Norman that these payments do not represent money paid as rent. They were payments for the zemindar's use and benefit, and the zemindar had agreed to treat them as cash payments. It may be that the plaintiff would have his remedy in the Civil Court against the zemindar for breach of the covenant between them. But it is perfectly clear that in this case the plaintiff has not brought himself within the provisions of Section 10, Act X. of 1859, by having paid rent to the zemindar except for the small sum of 8½ rupees. Therefore, I agree to reducing the damages to the sum of 17 rupees, being twice that amount.

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The 13th September 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Enhancement—Notice—Declaratory decree.**

Case No. 1302 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 21st December 1865, modifying a decision passed by the Sudder Ameen of that District, dated the 28th November 1864.*

Romanath Dutt and others (Defendants), *Appellants,*

*versus*

Joy Kishen Mookerjee (Plaintiff), *Respondent.*

*Baboo Boykuntnath Paul* and *Moulvie Syud Murhumut Hossein* for Appellants.

*Baboos Mohendro Lal Shome* and *Peare Mohun Mookerjee* for Respondent.

Where a notice of enhancement is served during the pendency of a suit in which the only decree which can be passed is one simply declaratory of the plaintiff's right to recover rent at an enhanced rate, and fixing the rate to which the rent is to be enhanced, the notice is inoperative, and will not enable the Court to give a decree in that suit for the payment of a sum by way of rent from the year subsequent to the service of the notice.

THIS suit has been pending since 1852. It is a suit for rent at an enhanced rate. Many years ago, the Sudder Court decided that the notice to enhance which was said to have been served before the suit was brought was insufficient, and that the suit could therefore proceed merely as a declaratory suit, and not as one for the actual recovery of rent at the rate at which the Court should eventually fix the enhanced rents. After Act X. of 1859 came into force, the plaintiff served the defendant with notice of enhancement in the form prescribed by Act X.; and it is contended that this notice cured the defect in the proceedings so far as to entitle the plaintiff to recover in this suit rent at the enhanced rate ultimately fixed by the Court from the year after that in which the notice under Act X. was served.

We think that this notice is inoperative for the purposes of the present suit, being served during the pendency of the suit, and that the only decree which can be passed now is one simply declaratory of the plaintiff's right to recover rent at an enhanced rate, and fixing the rate to which the rent is to be enhanced (*see* Joy Kishen Mookerjee *versus* Brojonath Dutt, 8 Sevestre, page 799). In this respect, therefore, the decree of the Lower Court is wrong; it must be altered so as to make it simply a declaratory decree fixing the rent at the rate raised by the Lower Court (156 rupees and 15 gundahs).

In all other respects the decree of the Lower Court is affirmed.

Each party will pay his own costs of this appeal.

The 14th September 1866.

*Present:*

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

**Local Investigation—Taidnuvees—Section 73, Act X. of 1859.**

Case No. 1081 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of West Burdwan, dated the 31st January 1866, affirming a decision passed by the Deputy Collector of that District, dated the 18th September 1865.*

Doorga Doss Chatterjee (Plaintiff), *Appellant,*

*versus*

Gooroo Churn Mistree and others (Defendants), *Respondents.*

*Baboo Poorno Chunder Shome* for Appellant.

No one for Respondents.

**A taidnuvees, or apprentice, who does occasional work as a copyist, is not an officer of Government who should be entrusted with the making of a local enquiry and report under Section 73, Act X. of 1859.**

THIS is a suit for a kubooleut. The Deputy Collector caused a local enquiry and report to be made under Section 73 of Act X. of 1859 by one Halodhur Gossamee, who is described as a taidnuvees in the office of the Collector, who does occasional work as a mohurir.

We find that, under Section 73, such enquiry can only be made by an "Officer" subordinate to the Collector, or by some other *officer of Government* with the consent of the authority to whom such officer is subordinate.

A taidnuvees, or apprentice, who does occasional work as a copyist, is not an officer of Government, and, therefore, not a person to whom the Deputy Collector had any power to refer the case under that Section. The enquiry having been held by a person whom the Deputy Collector had no power to appoint under the Section in question, the case must be remanded to the first Court for trial.

We direct that a copy of this judgment be forwarded to the Board of Revenue in order that they may be informed of the irregularity committed in employing a person of this description.

The 19th September 1866.

*Present:*

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

**Enhancement—Decree under former law not affected by Act X. of 1859.**

Case No. 1677 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 11th April 1866, modifying a decision passed by the Moonsiff of Hurripal, dated the 31st August 1865.*

Modhoosoodun Koondoo and others (some of the Defendants), *Appellants,*

*versus*

Gopee Kishen Gossain (Plaintiff) and others (Defendants), *Respondents.*

*Baboo Kishen Succa Mookerjee* for Appellants.

No one for Respondents.

**A ryot who was held liable by a decree passed in 1855, to pay an enhanced rent on the ground that he had not paid a uniform rate for 12 years before the Permanent Settlement, is not entitled, in consequence of the delay in the hearing of a portion of his claim, to ask for a modification of that decree on the ground of an alteration in the law made subsequently by Act X. of 1859 by which uniform payment from the Settlement protects a ryot from enhancement.**

PLAINTIFF, on the 23rd March 1853, sued defendant for enhancement of rent after issue of notice.

Defendant answered that no notice had been served upon him, that he had paid at an uniform rate from before the Settlement, and he pleaded also the Statute of Limitations, inasmuch as plaintiff had been in possession of his estate for 18 years before he brought the present suit.

The Lower Appellate Court, before whom the case went, found, on 8th June 1855, that, in a suit like the present between landlord and tenant, the Statute of Limitations would not apply; that, as defendant had not held for 12 years before the Decennial Settlement at an uniform rate, he was liable to enhancement, and remanded the case for enquiry into the rate.

The defendant then appealed specially to the Sudder Court on the point of limitation, and the Court ruled, on the 26th March 1857, that that Statute would not apply. With reference to a point taken by defendant, *viz.*, that the Lower Court had not adjudicated on a point taken up by him, that no notice had been issued upon him, the Court remarked that the whole case was before the Lower Courts, and would be enquired into by them.

After the order passed in special appeal, the first Court found that no notice had been issued, that the rates were of a certain nature, and that plaintiff was liable to pay them from the date of the institution of the suit; the Lower Appellate Court affirmed the first Court's judgment.

Defendant now appeals specially, urging, *first*, that, as the Lower Courts have found that no notice was issued, he is only liable to the enhanced rate from any future year in which notice may be issued; and, *second*, that, although he has been determined in 1855 liable to pay an enhanced rate, inasmuch as he had not paid an uniform rate for 12 years before the Settlement, still he is now entitled to the favorable terms of Act X. of 1859; and, as he has paid an uniform rent from the Settlement, he is not liable to be enhanced at all.

On the first point, we think the judgment cannot stand, as no notice was issued. This judgment, passed in defendant's presence, will stand in the place of a notice, and he will be liable to the enhanced rate from the beginning of the year following that in which the decree fixing the rates was passed. On the second point, we think the contention of the special appellant will not hold water. The decree adverse to him was passed in accordance with the law *in force in* 1855. He is not entitled, therefore, in consequence of delay in the hearing of a portion of his claim, now to ask for a modification of that decree on the ground of an alteration in the law made subsequently to the date of the passing of the decree adverse to him. We reject the application.

The 20th September 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Suit against Agent and Surety (not on ground common to both).**

Case No. 1733 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Rajshahye, dated the 21st February 1866, reversing a decision passed by the Deputy Collector of that District, dated the 21st September 1865.*

Ram Mohinee Debia (Plaintiff), *Appellant,*

*versus*

Jabed Sircar and another (Defendants), *Respondents.*

*Baboos Mohendro Lal Shome* and *Debendro Narain Bose* for Appellant.

*Baboo Romesh Chunder Mitter* for Respondents.

In a suit for collection-papers and monies against a gomastah and his surety, a decree was given against the gomastah, and the surety was absolved from liability. Plaintiff appealed to make the surety liable, and the Judge on appeal dismissed the claim against both defendants.

HELD that, as the decision of the first Court did not proceed on a ground common to the two defendants, the Judge was wrong in reversing it as against the gomastah.

THIS was a suit against a gomastah for collection-papers and monies said to have been appropriated by him, as also against the surety of the said gomastah, with a view of fixing his liability.

The Deputy Collector absolved the surety from liability, on the ground that it was not proved that he was surety. He decreed the suit against the gomastah for the delivery of the collection-papers.

The gomastah defendant did not appeal against the decision which was adverse to him. The plaintiff appealed with a view of making the surety liable. The surety was made respondent, and must have appeared and defended the appeal in the Appellate Court, for we find the Judge distinctly records that he did so.

The Judge went into the whole case, and dismissed the whole claim of the plaintiff, including even that against the gomastah who had not appealed.

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In special appeal, it is contended—

*1st.*—That the gomastah defendant not having appealed, the Judge was wrong in dismissing the plaintiff's suit as against the gomastah.

*2nd.*—That the Judge ought to have found whether the surety-defendant was surety or not.

It is clear that Section 337 cannot apply to this case at all, for the decision of the first Court did not proceed on a ground common to the two defendants before it. The Judge, therefore, was clearly wrong in reversing the decision of the Court of first instance in favor of the gomastah-defendant who had not appealed. That portion of the decision of the Judge must therefore be modified, and the decision of the first Court against the gomastah restored.

On the second point, we find that the Judge, after going into the whole case, found that the gomastah was not liable; it follows, therefore, that the surety was not liable. The surety took two pleas—*first*, a denial of being surety; *second*, non-liability of his principal. The latter having, in the presence of the surety, been found in his favor, we cannot interfere in special appeal. Subject, therefore, to the above modification of the Judge's decision, the special appeal is dismissed with costs and interest.

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The 20th September 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Rent—Receipts—Evidence.**

Case No. 1598 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Rungpore, dated the 2nd April 1866, reversing a decision passed by the Deputy Collector of that District, dated the 30th December 1864.*

Anund Moyee Dossia (Defendant), *Appellant,*

*versus*

Ranee Shurno Moyee (Plaintiff), *Respondent.*

*Mr. R. E. Twidale* and *Baboo Bhowanee Churn Dutt* for Appellant.

*Baboos Unnoda Pershad Banerjee* and *Bhugobuttee Churn Ghose* for Respondent.

A Judge is not bound to decide the genuineness of the receipts if he is satisfied that the rent at which *the land is held* has been changed within 20 years. The amount of rent paid is not conclusive evidence of the amount of rent at which land is held, but may be rebutted by showing that the actual rent is greater or less.

THERE is no ground for this appeal. The Judge was not bound to decide the question of the genuineness of the dakhilas if he was satisfied that the rent at which *the land was held* had been changed within 20 years. The amount of rent paid, though very strong evidence of the amount of rent at which land is held, is not conclusive, and may be rebutted by shewing that the actual rent is greater or less.

The Lower Court was, therefore, right in remanding the case for enquiry as to what rent was fair and equitable. The quantity and quality of land held by the appellant will also at the same time be enquired into. This appeal is dismissed with costs.

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The 21st September 1866.

*Present:*

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

**Witnesses (Examination of).**

Case No. 1633 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Rajshahye, dated the 19th May 1866, reversing a decision passed by the Deputy Collector of that District, dated the 16th November 1865.*

Messrs. R. Watson & Co. (Plaintiffs), *Appellants,*

*versus*

Nukee Mundul (Defendant), *Respondent.*

*Messrs. R. T. Allan* and *J. S. Rochfort* for Appellants.

*Baboo Mohinee Mohun Roy* for Respondent.

A Court ought not to reject any witnesses in attendance whom the parties wish to call.

APPELLANT'S ground is that the first Court, being satisfied by hearing some of his witnesses, stopped his case, saying, "I have not thought it necessary to take any more evidence," and that the Lower Appellate

Court, not being satisfied by the evidence on the record, should not have decided against him without hearing him out. The appellant applied to the Judge for a review on this ground, but the Judge rejected the application, saying that it seldom happens that some witnesses are not sent away unexamined, and that such a pretext would re-open almost every case. We cannot agree with the Judge. It may well be that it often happens that many witnesses named do not appear, or, appearing, are not examined by the parties who named them; but we hope it is not common, and it certainly is not proper for the Court to reject any witnesses in attendance whom the parties wish to call. In this case it is to be gathered that the witnesses were actually in attendance, and the Deputy Collector distinctly takes on himself the responsibility of not examining them. That being so, appellant is entitled to be heard out before a decision is passed against him; and we remand the case to the Judge, with the direction that he will hear the rest of the evidence and then decide.

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The 22nd September 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble W. Markby, *Judge*.

**Limitation (Section 92, Act X. of 1859)—Execution.**

*Petition against an order of the Deputy Collector of Howrah.*

Heeraloll Seal and others, *Petitioners*,

*versus*

Poran Matteah and others, *Opposite Party*.

*Baboo Asootosh Dhur* for Petitioners.

No one for Opposite Party.

The meaning of Section 92, Act X. of 1859, is that no execution shall issue upon a decree, unless a proper application for execution be made within three years from the date of decree.

We think that, giving a reasonable construction to Section 92, Act X. of 1859, the meaning is that no execution shall issue upon a decree, unless a proper application for execution be made within three years from the date of decree. If the meaning of the Section is that the warrant of execution must be signed within three years, a party might be deprived of the fruits of his judgment in a case in which he has to execute it against heirs or representatives of the judgment-debtor, though he may have acted with the greatest diligence. So, if he makes his application within three years, he may lose the benefit of his judgment by the delay of the Judge in hearing the application and deciding the point.

No one could know with any certainty what is the latest period for making his application, as he cannot calculate how long any particular Judge will be in deciding upon it. One Judge might take up the application immediately, whilst another from press of business or otherwise might fail to give his decision within three years of the date of the judgment, when it would be too late to issue the warrant of execution.

The Deputy Collector has declined to issue the warrant without entering into the merits, on the ground that he has no jurisdiction to issue a warrant after three years from the date of the judgment, notwithstanding the application was made to the Collector, and the tullubana lodged within the period of three years. We think that he had jurisdiction, and he must be directed to hear and determine the case upon its merits.

Let a copy of this judgment be sent to the Deputy Collector, together with the order drawn upon it.

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The 25th September 1866.

*Present:*

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

**Enhancement—Alluvial Land.**

Case No. 1520 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Backergunge, dated the 13th March 1866, reversing a decision passed by the Deputy Collector of that District, dated the 11th November 1865.*

Baboo Gopal Lal Thakoor (Plaintiff), *Appellant,*

*versus*

Kumur Ali (Defendant), *Respondent.*

*Mr. R. T. Allan* and *Baboo Onookool Chunder Mookerjee* for Appellant.

*Baboos Unnoda Pershad Banerjee* and *Sreenath Doss* for Respondent.

In a suit for enhancement in respect of an accretion, the plaintiff is not bound to show any established talookdaree rates; but, if entitled to enhance, ought to obtain a decree for enhancement at a rate proportionate to that paid for the parent tenure.

In the case of accretions to recently created tenures, the question for enhancement will mainly depend on the engagements of the parties.

*Campbell, J.*—THIS is a suit by a landlord against the holder of a kaimee tenure, that is, a holder at a fixed rate of a tenure described as a mouzah or village, the quantity of the land not being specified.

The plaintiff claims enhancement on the ground that a certain quantity of land had accreted from the river.

The Judge dismissed the suit on the ground that the plaintiff had failed to show any established talookdaree rates.

We think that this ground of dismissal is quite insufficient. If the plaintiff is entitled to enhance, he ought at any rate to obtain a decree for enhancement at a rate proportionate to that which he pays for the parent tenure.

But the first question which arises in this case is whether the defendant is liable to any enhancement. It appears that the tenure is not an ancient tenure, but one recently created under an express arrangement, *viz.*, a pottah dated in 1257 (1848), and the talook, therefore, is not protected from enhancement by Section 15 of Act X. of 1859. The question would then be whether under ordinary law, especially with reference to Regulation XI. of 1825, the tenure is of that description that, by virtue of the engagements of the tenant, or by established usage, it is liable to enhancement in case of accretion. In the case of so recently created a tenure, the question will mainly depend on the engagements of the parties.

But we find that the plaintiff has failed to put in either the original engagement or any other evidence to show that the tenant is liable. The issue not having been properly tried, we think it necessary to remand the case, the plaintiff paying the costs of the regular and special appeals, that an opportunity may be given to plaintiff to putting in the original engagement, and proving that, under that engagement, the defendant is liable to enhancement on account of the increment of the land. If from the engagement it appears that the defendant is liable to enhancement, we are disposed to think that the enhancement should be at a rate in proportion to that paid for the parent tenure, unless the engagement contains any provision to the contrary.

From the lease which has been referred to, but which is not proved, it appears that the tenant was obliged to pay a certain rent for the talook demised whether it was "wet or dry, or washed away by the river or not;" and it appears to us that, if that document is a genuine lease, the natural construction to be put upon it would be that the party who was to bear the losses should also receive the profits, so that it does not seem that much good is likely to result to appellant from the remand.

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The 4th December 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Right of Suit—Sale in execution under Act X. of 1859.**

Case No, 1656 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of the 24-Pergunnahs, dated the 29th March 1866, affirming a decision passed by the Sudder Ameen of that District, dated the 29th August 1865.*

Ram Coomar Holdar and others (Plaintiffs), *Appellants,*

*versus*

Brojo Coomar Chowdhry (Defendant), *Respondent.*

*Baboo Bama Churn Banerjee* for Appellants.

*Baboo Chunder Madhub Ghose* for Respondent.

The incident of a deposit gives a tenant no right to institute a civil action to set aside a sale made in execution of a decree under Act X. of 1859.

*Shumbhoonath Pundit, J.*—THE landlord ordinarily could not sue any other person than the tenant registered in his serishtah; and, on the death of the tenant so recorded, the landlord caused the name of the son of the deceased to be entered in his books as successor. The landlord then sued this son of his deceased tenant, who is one of the plaintiffs in the present case, and one of the other two plaintiffs appeared in that case claiming to have an interest in the jote.

The defence of both the tenants was that the landlord could not sue for the rents demanded; but that he should pay himself from some money in deposit in the Collectorate. This plea was rejected, and a decree given to the landlord, who, in execution of this decree, sold the tenure.

The three plaintiffs now sue to set aside the sale on the ground of its illegality, owing to the previous alleged deposit.

The landlord is not charged with fraud in suing only the son of his deceased tenant, and the fact of the other two plaintiffs being aware of the suit of the landlord, and having no defence separate from the third plaintiff sued by the landlord, is not denied. The incident of a deposit would not give to the tenants sued any ground to institute a civil action to set aside a sale made in execution of a decree under Act X. of 1859; and, as the other two tenants are not in a better situation than the third plaintiff properly sued by the landlord, the Lower Appellate Court was right in dismissing this suit.

We accordingly reject the special appeal with costs.

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The 4th December 1866.

*Present:*

The Hon'ble C. B. Trevor and W. S. Seton-Karr, *Judges.*

**Non-attendance of party as witness—Section 170, Act VIII. of 1859.**

Case No. 1682 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Additional Judge of Hooghly, dated the 23rd April 1866, reversing a decision passed by the Deputy Collector of Jehanabad, dated the 15th August 1865.*

Raj Chunder Ghose (Plaintiff), *Appellant,*

*versus*

Koylash Chunder Banerjee (Defendant), *Respondent.*

*Baboo Tarucknath Sein* for Appellant.

*Baboos Woomesh Chunder Banerjee* and *Nubo Kishen Mookerjee* for Respondent.

It is not imperative on, but discretionary with, the Court, under Section 170, Act VIII. of 1859, to give a decree against the non-attending party.

*Trevor, J.*—PLANTIFF sued defendant, after an issue of notice under Section 13 of Act X. of 1859, for an enhanced rent, on the ground that the present rent was below the rate for such lands in the vicinity.

The defendant pleaded that he had improved the land by his own labour and expense, and that, consequently, he was not liable to any increase of rent.

The first Court, without procuring the attendance of the defendant as desired by the plaintiff in a petition presented to it, gave plaintiff a modified decree, finding that the defendant had, to a certain extent, improved the land. The Lower Appellate Court found that the increased productive power was entirely owing to the labor and expenditure of the defendant, and, therefore, dismissed the plaintiff's suit.

Plaintiff now appeals specially, urging that the Lower Appellate Court has taken no notice of his plea that defendant's vendor, and not defendant, improved the land; and that, as defendant is not a tenant with a right of occupancy, he cannot successfully raise the plea adopted by him; and, 2ndly, that, even if he could, he ought to have been examined on the subject as requested by him; but, not having attended after summons, the suit should have been decreed against him under Section 170, Act VIII. of 1859.

On the second point of special appeal, we observe that it is not imperative on the Court to give a decree against the non-attending party; such a course of procedure is simply discretionary. We see no ground, therefore, for interfering on this score.

As to the first point urged by special appellant, we do not find that the question of defendant's status was raised regularly by the plaintiff. He merely urged that the improvements were made by defendant's vendor, with a view of showing that defendant could not benefit by them, and not of showing that he was a mere ryot without a right of occupancy. Be that as it may, the Court below has clearly found that the improvements *were made by the defendant, and not by his*

*vendor*. As the parties were content, whether rightly or wrongly, to go to issue on this point, the Court sees no ground for interfering, but dismisses the special appeal with costs.

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The 4th December 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges*.

**Enhancement—Plea of Lakheraj—Onus probandi—Limitation.**

Case No. 1731 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Additional Judge of Hooghly, dated the 8th May 1866, reversing a decision passed by the Deputy Collector of that District, dated the 19th August 1865.*

Ram Coomar Ghossal (Defendant), *Appellant*,

*versus*

Debee Pershad Chatterjee (Plaintiff), *Respondent*.

*Baboos Khetturnath Bose* and *Tarucknath Sein* for Appellant.

*Baboo Onookool Chunder Mookerjee* for Respondent.

**In a suit for enhancement where the defence is that part of the land is *mâl*, the plaintiff should prove that he has collected rents from such part as *mâl* land, before he can call upon the defendant to prove his lakheraj title; and even then the plaintiff must sue subject to the Law of Limitation.**

*Bayley, J.*—PLAINTIFF sued for enhancement of rent on 19 beegahs 1 cottah 7 chittacks of mâl land, for which he alleged that he received Rs. 20-12-10 hitherto.

Plaintiff issued a notice under Act X. of 1859, stating the grounds on which he made the demand, *viz.*, that defendant paid at rates below those paid by others in the neighbourhood for lands of a similar quality, and that the productive powers of the land were increased.

Defendant stated that he paid Rs. 20-12-10, for 5 beegahs 15 cottahs of *mâl* land, and that 11 beegahs 16 cottahs which plaintiff claimed to enhance were partly purchased, and partly ancestral lakheraj; and that for the mâl lands the rents paid were those paid for similar lands in the neighbourhood; and that consequently plaintiff's suit for enhancement should be dismissed.

The first Court found that, of the above 11 beegahs 16 cottahs, 5 beegahs 16 cottahs were *not* lakheraj, but that 6 beegahs 16 cottahs were so.

On appeal the Lower Appellate Court held that the 5 beegahs 15 cottahs of land which defendant admitted to be mâl was liable to enhancement; that the 5 beegahs 10 cottahs of alleged purchased lakheraj were not proved either to have been purchased, nor was the identity of the land. In respect to the 6 beegahs 6 cottahs of alleged ancestral lakheraj, the Lower Appellate Court held that it was not proved to have been such lakheraj.

The Lower Appellate Court then decreed the right to enhance, leaving the amount and rates to be ascertained by the Court below.

There is a special appeal by defendant, urging—

I.—That plaintiff should prove that he had collected mâl rents over the lands as laid down in the case in page 115 of the Full Bench Special Reports, June 1st, 1863.

II.—That the Lower Appellate Court gives no grounds for enhancement.

We consider the *first* plea is valid according to the precedents of this Court. Plaintiff should, we think, prove that he collected rents from this land as mâl before he can call upon defendant to prove his lakheraj title, and plaintiff even then must sue subject to the Law of Limitation.

In this view we decree this special appeal, and remand the case for re-trial with reference to the above remarks.

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The 4th December 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges*.

**Enhancement—Declaratory decree passed before Act X. of 1859.**

Case No. 1704 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Dacca, dated the 20th April 1866, reversing a decision passed by the Deputy Collector of that District, dated the 15th January 1866.*

Mr. A. B. B. Mackintosh (Plaintiff), *Appellant*,

*versus*

Adar Monee Dossee and others (Defendants), *Respondents*.

*Mr. Barrow* and *Baboo Nil Monee Sein* for Appellant.

*Baboos Romesh Chunder Mitter* and *Luleet Chunder Sein* for Respondents.

A suit under Act X. of 1859 will not lie for arrears of rent at enhanced rates, in conformity with an unexecuted decree declaring the plaintiff's right to enhance passed before that Act.

*Shumbhoonath Pundit, J.*—THE special appellant says that he had, some years ago, obtained a decree enhancing the rents of the tenure held by the defendant-respondent, and so his present suit should not be considered as a case for arrears at enhanced rate under the notice which he served under Section 17 of Act X. of 1859. He further contends that his case is for obtaining a kubooleut.

We find that it is admitted that the plaintiff did not execute the decree for enhancement, and for several years collected rents paid by the tenant before the decree was passed. It is also clear that the plaintiff brought this action under Section 17 of Act X. of 1859, and he cannot be allowed to recover under that decree and against the provisions of this law. In other words, plaintiff cannot be allowed to execute the former decree through a suit under Act X. of 1859.

The decision reported in pages 10 and 11 of Act X. Rulings in Volume V. of the Weekly Reporter, 15th January 1866, supports this view of the case.

We accordingly see no reason to interfere, and reject the special appeal with costs.

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The 5th December 1866.

*Present :*

The Hon'ble C. B. Trevor and W. S. Seton-Karr, *Judges.*

**Lease (by Lessee from Government).**

Cases Nos. 1692 and 1693 of 1866 under Act X. of 1859.

*Special Appeals from a decision passed by the Officiating Judge of Chittagong, dated the 5th April 1866, reversing a decision passed by the Deputy Collector of that District, dated the 17th July 1865.*

Bomeezoonissa Sahoba and another (Defendants), *Appellants,*

*versus*

Mr. N. Joachim (Plaintiff), *Respondent.*

*Baboo Greeja Sunkur Mojoomdar* for Appellants.

*Mr. R. E. Twidale* and *Baboo Sreenath Banerjee* for Respondent.

A pottah granted by a lessee from Government, whose lease fell in by his own default, cannot enure beyond the temporary interest of the grantor.

BOTH these cases turn on the same point, and they are disposed of together in one judgment. The plaintiff sued certain ryots for kubooleuts at an enhanced rate, and the Deputy Collector dismissed the suits on the ground that the plaintiff was bound by a pottah granted by his predecessor, the late lessee from Government, and also that the terms of the pottah, granted to the plaintiff himself by Government, prevented him from realizing any thing beyond the rent taken by the late lessee.

The late lessee, it appears, defaulted after 16 out of 20 years of his lease had expired, and the plaintiff took the remainder of the lease under a fresh agreement from Government.

The Judge reversed the decisions of the Deputy Collector, holding that the plaintiff was not bound by any pottah which his predecessor had granted, and he further held that, as the defendants had only occupancy-rights, they must execute kubooleuts at the rate demanded by the plaintiff.

We think that the Deputy Collector is wrong, and that the Judge is right in his ruling. The pottah granted by the late lessee, whose lease fell in by his own default, cannot enure beyond the temporary interest of the grantor; and, on reference to the plaintiff's own pottah, by which it was urged that he was bound not to enhance the rents of the mehal, we find that the terms of that document are much too vague and general to bind the plaintiff in the manner contended for. The plaintiff, in general terms, thereby agrees to collect rents according to the settlement-papers, and he is declared entitled, amongst other things, to the rents of all lands newly cultivated or not included in the settlement. But he is nowhere precluded from exercising his legal rights as a farmer, or from enhancing the rents of ryots where the law entitles him to do so, unless expressly bound by the terms of the jumabundee; and this holding is not shown to be within the settlement or jumabundee.

On this point, then, we see nothing to find fault within the Judge's decision.

A second point urged on us is that the value of the land was increased by the pains and expenditure of the defendants. But no evidence was adduced on this head, nor is

there anything to show that the rates are higher than they ought to be.

So far, then, we should affirm the decision of the Judge. But it is urged that no enquiry has been made as to the quantity of land actually in the possession of the defendants, who distinctly urged that the plaintiff claimed rent for more than was really held, and it is also pressed on us, as the last point in the case, that the defendants have parted with their lands by conveyance to a third party.

We think both these points deserve some enquiry. If the ryots had a right to transfer their tenures without the consent of the zeminder or farmer, or if they had given him notice of the transfer under legal forms, there might possibly be an end of the plaintiff's case. But it is obvious that this last plea of the defendants involves the very point of the right of the tenants to make any such transfer, or of the forms under which land can be abandoned.

As regards the last point but one, *viz.*, the quantity of land actually held by the defendants, there should be an enquiry into this also. On this, the defendants must adduce evidence, or a local enquiry, if necessary, can be directed. We, therefore, while affirming the position taken by the Judge as regards the powers of the new lessee, and as regards his not being bound by his engagement with the Government, remand the two cases for a further decision by the Judge, with regard to the last two points, *viz.*, the quantity of the land in occupation of the defendants, and the alleged transfer of the tenure. The Judge will decide these points with reference to our remarks above.

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The 6th December 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Indigo Factory (Assignment of)—Rent.**

Case No. 1790 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Patna, dated the 19th April 1866, affirming a decision passed by the Deputy Collector of that District, dated the 22nd December 1865.*

Mussamut Phool Koonwar and others (Plaintiffs), *Appellants,*

*versus*

Mr. W. Chardon and others (Defendants), *Respondents.*

*Baboo Kalee Kishen Sein* for Appellants.

*Baboo Umurnath Base* for Respondents.

In the absence of any covenant by the assignee of the lease of an indigo-factory to take the liability for previous rents on himself, he is only liable for rent which accrued after the date of his assignment.

*Markby, J.*—In this case the plaintiff has sued the defendant as the manager of two persons, Prestwich and Solano, who were successive lessees of an indigo-factory, the property of the plaintiff. The claim is for the rent of the factory which accrued for the three years prior to the assignment by Prestwich to Solano. The Court below has found, as is obviously the case, that the defendant is no longer manager of Prestwich, and he, therefore, is not before the Court at all. As regards Solano, the Lower Appellate Court has held that, in the absence of any covenant by Solano to take the liability for previous rents on himself, he is only liable for rent which accrued after the date of his assignment. This is in entire accordance with the Full Bench Decision of the 8th April 1864 (*see* Sutherland's Full Bench Rulings, p. 167), and this appeal must be dismissed with costs and interest.

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The 6th December 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Enhancement—Presumption of uniform payment from Permanent Settlement.**

Case No. 2211 of 1865 under Act X. of 1859.

*Special Appeal from a decision passed by Mr. J. D. Gordon, Officiating Judge of Purneah, dated the 20th April 1865, affirming a decision passed by the Deputy*

*Collector of that District, dated the 30th December 1864.*

Prem Sahoo and others (Defendants), *Appellants,*

*versus*

Shaikh Nyamut Ali and others (Plaintiffs), *Respondents.*

*Baboo Khettur Mohun Mookerjee* for Appellants.

*Baboo Chunder Madhub Ghose* for Respondents.

In a suit for enhancement, before giving the defendant the benefit of the presumption in Section 4, Act X. of 1859, it must be specifically and expressly determined that he has established payment at uniform rates for 20 years.

*Bayley, J.*—In this case plaintiff sued to enhance.

Defendant in fact, though not in precise words, relied on the presumption in Section 4, Act X. of 1859.

The first Court disbelieved the evidence adduced by defendant to shew uniform payment and for a sufficient time to entitle him to the protection of that presumption, and also found that plaintiff's witnesses proved that the present jumma was created after the Permanent Settlement.

On appeal the Lower Appellate Court has specifically confirmed the decision of the first Court as to area and rates, and generally upholds the decision, but does not expressly state whether it considers the presumption contended for by defendant to have been established or not, or whether the plaintiffs have, as the first Court states, rebutted the presumption of Section 4, by proving the jumma to have been one of a date subsequent to the Permanent Settlement.

The Lower Appellate Court having decreed plaintiff's case, defendant specially appeals, urging—

I.—That the Lower Appellate Court should have specifically and expressly determined whether defendant had or had not established payment at uniform rates for 20 years, so as to give him the benefit of the presumption in Section 4, Act X. of 1859.

II.—That the dakhilas and other proofs of defendant to make out that presumption were not considered.

III.—That the objections of defendant to the Ameen's report were not decided on.

IV.—That the julkur was not specified in the demand for enhancement on the ground mentioned in the plaint.

We think that the Lower Appellate Court did really consider all the evidence as to area and rates including the Ameen's report, and came to its conclusion on those points upon that evidence. But, after hearing Counsel on both sides, and on reference to the record, we think that the special appellant's first and second pleas as above taken are valid, and on the fourth plea we think that the liability of the julkur to enhancement on the ground taken as to the rest of the tenure, *i. e.*, excess area, should be specifically adjudicated.

We, therefore, remand the case to be re-tried with reference to these remarks.

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The 8th December 1866.

*Present:*

The Hon'ble C. B. Trevor and W. S. Seton-Karr, *Judges.*

**Ejectment—Jurisdiction.**

Case No. 1744 of 1866.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 5th April 1866, affirming a decision passed by the Moonsiff of that District, dated the 29th December 1864.*

Mr. J. P. Wise (one of the Defendants), *Appellant,*

*versus*

Hurro Chunder Shaha (Plaintiff), *Respondent.*

*Mr. J. S. Rochfort* and *Baboo Bungshee Dhur Sein* for Appellant.

*Baboo Romesh Chunder Mitter* for Respondent.

To bring a case of ejectment within the jurisdiction of the Collector's Court, there must be some direct act on the part of the person entitled to receive the rent, either by ejecting the tenant personally or by his servants, or by joining with those who actually do so.

*Seton-Karr, J.*—The defendant in this case, who is the ijaradar from, and in the place of, the zemindar, appeals specially to us, mainly on the ground that the plaintiff's case discloses no ground of action in the Civil Court, and that the suit should have been brought in the Revenue Courts.

It is true that the plaintiff's case, as stated in the plaint, is that he purchased the mirasi right in Assin 1265, and that the vendor of the tenure, after causing the ryots to deliver their kubooleuts to the purchaser,

dispossessed him, the purchaser, in the month of Kartick following from the tenure and from the house that stood thereon, in collusion with the defendant, special appellant, and with the Pâls, ryots.

In support of, and against, this contention, several decisions of the High Court have been quoted, but we only think it necessary to advert to one of them, as the facts and the state of things in the others are not identical with the present case. That decision is to be found at page 17 of Volume III. of Wyman's Revenue and Police Journal, and it lays down the rule that, to bring a case within the jurisdiction of the Collector's Court, there must be some direct act on the part of the person entitled to receive the rent, either by ejecting the tenant personally or by his servants, or by joining with those who actually do so.

In the case before us the allegation was certainly that the defendant, special appellant, had colluded with the vendor, and had turned out the plaintiff. But the finding of the Courts on the evidence before them takes the case out of the ruling relied on. The first Court finds that no sooner had the plaintiff entered into possession, than Kalee Pershad Roy, the vendor, in collusion with the tenants, dispossessed him, and that the special appellant, becoming ijaradar, ousted the vendor himself, and collected the rents from Shib Churn Pâl, the ryot in actual possession. The plaintiff was, therefore, not ousted by any act of the zemindar, defendant.

The Appellate Court endorses this finding, and we clearly hold the effect of it to be that the plaintiff was not dispossessed by the person entitled to receive the rents, or by any collusion or act of his in connection with the tenants, defendants. The action was thus one to be brought in the Civil Court, and not in the Collectorate, and we see no cause for disturbing the results at which the action, rightly brought, has arrived.

On the second point urged, *viz.*, that the original mirasi lease has not been produced, we think there is even less to be said. The Courts have found that the plaintiff's title has been proved by other documentary, as well as by oral, evidence, and there is no occasion to alter the decree for this omission.

We, therefore, shall allow the judgment to stand, and we dismiss the appeal with costs.

The 10th December 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Enhancement—Presumption under Section 4, Act X. of 1859 (Rebuttal of)—Pleadings—Special Appeal.**

Case No. 1671 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Backergunge, dated the 3rd April 1866, reversing a decision passed by the Deputy Collector of that District, dated the 22nd December 1865.*

Anung Soonduree Chowdhrain (Plaintiff), *Appellant,*

*versus*

Doorga Monee Debee (Defendant), *Respondent.*

*Baboo Roopnath Banerjee* for Appellant.

*Baboo Romesh Chunder Mitter* for Respondent.

In a suit for enhancement, positive proof and not a negative inference of a varied jumma after the Decennial Settlement is requisite to rebut the presumption arising under Section 4, Act X. of 1859.

The plea that the defendant's dakhilas do not show uniform payment of rent was not allowed for the first time to be orally taken in special appeal.

*Bayley, J.*—The grounds taken in the *petition* of special appeal are two, *viz.*, *1st*, that the settlement-papers of 1199 B. S. relied on by defendant having been found to be false, this fact of itself rebuts the presumption contemplated by Section 4, Act X. of 1859; *2nd*, that the Judge is wrong in holding that the defendant's dakhilas from 1206 to 1249 B. S. are not directly denied by plaintiff. The special appellant's pleader asks permission to take the further plea *not* in his petition of special appeal, *viz.*, that the dakhilas of defendant from 1250 to 1269 do *not* shew uniform payment of rent.

We have heard Counsel fully on this third point; but, looking to all the facts and pleadings in the case, we are clearly and unhesitatingly of opinion that the plea was really so obvious a one, if intended to be urged in this shape, that it would be an embarrassing precedent if we allowed its omission from a certified petition of special appeal to be passed over contrary to all rules, and the plea is taken here now for the first time at this moment. The first Court's decision must have suggested it most directly to the special appellant; and, if he had no reason

for not entering it in his petition, it would have been there.

Referring, then, to the first and second pleas, we do not agree with the special appellant that the mere fact of the settlement-papers of 1199 B. S., not being found to prove defendant's case, shews thereby that there has been a varying jumma, so as to rebut any presumption which might legally arise under Section 4, Act X. of 1859. It is not a negative inference, but a positive proof of a varied jumma after the Decennial Settlement, which is required to rebut the presumption referred to.

In respect to the Lower Appellate Court's view of the absence of a direct denial by plaintiff of the dakhilas of defendant of 1206 to 1249, we have fully heard the passage on which defendant relies, and we are of opinion that there is, as the Lower Appellate Court holds, no sufficiently clear and direct denial of those dakhilas.

This being our view of the pleas taken in the special appeal, we dismiss the special appeal with costs.

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The 10th December 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Rent (Assessment of)—Bastoo and Oodbastoo lands.**

*Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 9th December 1865, modifying a decision passed by the Deputy Collector of that District, dated the 30th September 1863.*

Prem Lal Chowdhry (Plaintiff), *Appellant,*

*versus*

Mr. B. M. Brown and others (Defendants), *Respondents.*

*Baboos Dwarkanath Mitter, Gopal Lal Mitter,* and *Greesh Chunder Ghose* for Appellant.

*Baboo Jugodanund Mookerjee* for Respondents.

**When lands are liable to be assessed with rent as *bastoo*, and when as *oodbastoo* lands.**

*Shumbhoonath Pundit, J.*—THE Lower Appellate Court has, after remand, fully ascertained upon what lands houses, &c., are built, and what lands are not occupied by buildings. All the blocks of lands upon which different parts of factories, such as vats and other buildings are situated, together with such intervening lands as could properly be classed with buildings, have been assessed as *bastoo* lands, and the rest of the lands occupied by the respondent, have been assessed at the *oodbastoo* rate.

The special appellant claims a decree for *all* these lands at the bastoo rate. The case of a ryot, building a group of a few huts upon a small piece of ground, used by him as his residence and cowshed, &c., and keeping a portion of lands as the *oothan* of his house, is quite different from the case of an indigo or silk manufacturer who may have erected a number of buildings scattered over a large area of ground, upon one part of which there may be some huts and outhouses, and other parts may be waste lands, or used for other purposes than buildings.

There are not walls enclosing the whole of the lands of the respondents; and, even if there were, the fact of their existence would not justify a decree for all the lands within the enclosure at the bastoo rate, merely because they are enclosed within walls, when the buildings are only upon a small portion of the lands, and a few huts may be here, and a few there.

Looking, then, in this case to these considerations and to the definition of the word site or foundation of buildings, we see no cause to interfere, but wish to remark that, whenever any other portion of the lands now assessed as oodbastoo are used for purposes of building, and for erecting houses or huts, the plaintiff may be entitled to demand for such lands rents at the bastoo rate. At present we reject the special appeal with costs.

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The 10th December 1866.

*Present:*

The Honble G. Loch and A. G. Macpherson, *Judges.*

**Service of summons—Evidence (Nazir's report).**

Case No. 623 of 1866.

*Miscellaneous Appeal from an order passed by the Deputy Collector of Tipperah, dated the 26th August 1866.*

Ram Soondur Chuckerbutty (one of the Defendants), *Appellant,*

*versus*

Kalee Komul Dutt (Plaintiff), *Respondent.*

*Baboo Bama Churn Banerjee* for Appellant.

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No one for Respondent.

The report of a Nazir that summons has been served on a defendant is not legal proof of service.

*Loch, J.*—THE report of a Nazir that summons has been served on a defendant is not proof of service as required by law. The Court should examine the officer who served the summons, or any person on the part of the plaintiff who accompanied the officer to point out the debtor. The case is remanded, with direction to the Court below, to require plaintiff to produce evidence that the summons was duly served; and, after hearing it, to dispose of the case.

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The 11th December 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Res judicata—Rent—Abatement—Measuring rod.**

Case No. 1778 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of East Burdwan, dated the 6th June 1866, reversing a decision passed by the Deputy Collector of that District, dated the 27th February 1866.*

Sreemunt Mundul (Plaintiff), *Appellant,*

*versus*

Meer Athur Ali (Defendant), *Respondent.*

*Baboos Gopal Lal Mitter* and *Kalee Kishen Sein* for Appellant.

No one for Respondent.

A previous rent-suit which can only decide the question of liability to rent is not *res judicata* in a suit for abatement of rent on the ground of decrease of area, as to the question of what is the proper measuring rod.

*Bayley, J.*—PLAINTIFF in this case sued for abatement of rent on the plea of decrease of area to the extent of beegahs 10-15-13.

Defendant pleaded that, in a suit for arrears of rent decided in the year 1861 (9th January), the area was found by local enquiry and measurement not to be diminished by the amount stated by plaintiff, but to be 36-9-13, and that rent was decreed against plaintiff accordingly in that case.

Defendant also pleaded that the rod was to be taken by the cubit of 18 inches, and plaintiff alleged it should be a cubit of 20 inches.

The first Court held that 20 inches made the cubit, and that the area of plaintiff's tenure was 27-13-15, and the proper jumma 16-12-6.

The Lower Appellate Court, on defendant's appeal, held that the case was *res adjudicata*, by the rent-suit of 1861, and that plaintiff's present suit was therefore barred. The Lower Appellate Court accordingly dismissed plaintiff's suit.

The plaintiff appeals specially, urging that the matter is not *res adjudicata*, as in the rent-suit the issue of what was the proper measuring rod was not a matter decided, or the issue to be decided in that case, but only the liability to rent; and that the question of what is the proper measuring rod still remains to be decided in this case, and has not been so.

We think that this case must be remanded upon this plea of the special appellant. The rent-suit did not directly decide what is now in direct issue, *viz.*, whether 20 or 18 inches went to the cubit of the local standard of measurement, and further the question of the area is the direct question as *at this present time*, not what it was *before this suit.*

We, accordingly, remand this case to be re-tried with reference to the above remarks.

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The 11th December 1866.

*Present:*

The Hon'ble C. B. Trevor and W. S. Seton-Karr, *Judges.*

**Jurisdiction.**

Case No. 3013 of 1865.

*Special Appeal from a decision passed by Baboo Kalee Kinkur Roy, Principal Sudder Ameen of Chittagong, dated the 24th July 1865, affirming a decision passed by the Moonsiff of Hatazaree, dated the 5th August 1864.*

Ram Mohun Dey and another (Defendants), *Appellants,*

*versus*

Ram Surun Dey and others (Plaintiffs), *Respondents.*

*Baboo Kishen Succa Mookerjee* for Appellants.

*Baboo Romesh Chunder Mitter* for Respondents.

In a suit for a kubooleut, the Collector ought to confine himself to the matter of the kubooleut and to the previous receipt of rent. His going beyond his jurisdiction and trying the question as to whom the land belongs will not oust the Civil Courts from their jurisdiction.

*Seton-Karr, J.*—THE only point raised is that the Lower Courts are both wrong in considering that they had jurisdiction, and in entertaining the suit at all. We think the Courts were right. The Collector, in a suit which the present special appellants had brought against the present respondents for a kubooleut, had ruled that the lands belonged to the special appellants now before us. But this was a question which the Collector had no right to try. He should have confined himself to the matter of the kubooleut, and to the previous receipt of rent from the respondents. That he did not do so, and that he entered on the consideration of matters beyond his jurisdiction, will not oust the Civil Courts from theirs.

The appeal, which is on this sole point, is untenable, and is dismissed with costs.

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The 11th December 1866.

*Present:*

The Hon'ble C. B. Trevor and W. S. Seton-Karr, *Judges.*

**Suit for kubooleut at enhanced rent—Presumption under Section 4, Act X. of 1859—Evidence.**

Case No. 1857 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Hooghly, dated the 17th April 1866, reversing a decision passed by the Deputy Collector of that District, dated the 18th January 1866.*

Bykuntnath Holdar (Plaintiff), *Appellant,*

*versus*

Chunder Coomar Shadhookhan (Defendant), *Respondent.*

*Baboo Roopnath Banerjee* for Appellant.

*Baboo Judoonath Mookerjee* for Respondent.

In a suit for a kubooleut at an enhanced rent, the evidence of witnesses to the defendant's uniform payment of rent for 20 years is legally sufficient to entitle him to the presumption of Section 4, Act X. of 1859.

*Trevor, J.*—PLAINTIFF sues the defendant for a kubooleut at an enhanced rent. The defendant pleaded that he had paid an uniform rent for more than 20 years, and that therefore he is entitled to the presumption of Section 4, Act X. of 1859.

The first Court was of opinion that the defendant had not proved his plea; that he has produced two witnesses, and one only of them speaks to the fact of one of the dakhilas having been written by the person whose name it bears; and that this and the other evidence in the case are insufficient to establish his uniform payment of 20 years.

The Judge on appeal was of opinion that the two witnesses of defendant, who speak to the possession of defendant for more than 20 years, and to the payment by him of an uniform rate for more than 20 years, are not contradicted by any evidence produced by plaintiff; that, consequently, it is sufficient to establish his plea, and to raise the presumption which protects him from enhancement. He, therefore, reversed the first Court's decision, and dismissed plaintiff's claim.

Plaintiff now appeals specially, urging that the Judge has committed an error in law in accepting the evidence of the two witnesses of defendant, irrespective of the genuineness or otherwise of his dakhilas, as sufficient to establish his plea to exempt him from enhancement.

We are clearly of opinion that the Judge has committed no error of law which enables us to interfere in special appeal. The evidence of the witnesses to the defendant's possession, paying at an uniform rate for 20 years, is legally sufficient, if it be believed by the Judge; though undoubtedly it would have been better and more regular had he tested the genuineness of the dakhilas produced by the defendant. Though, therefore, not satisfied with the manner in which the Judge has made the enquiry, we do not feel ourselves at liberty to interfere, but dismiss the special appeal with costs.

The 12th December 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Enhancement—Sale of tenure for arrears of rent.**

Case No. 1836 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Jessore, dated the 2nd May 1866, affirming a decision passed by the Deputy Collector of that District, dated the 20th September 1865.*

Ram Narain Chuckerbutty (Defendant), *Appellant,*

*versus*

Banee Chunder Chatterjee (Plaintiff), *Respondent.*

*Baboo Kedarnath Chatterjee* for Appellant.

No one for Respondent.

**The purchase of a tenure at a sale for arrears of rent gives the new tenant no right of exemption from enhancement.**

*Shumbhoonath Pundit, J.*—THE special appellant's plea is not valid. He pleads that, as the tenure held by him was caused to be sold by the present plaintiff for arrears of rent due to him from the outgoing tenant, the landlord cannot enhance.

The contention of the special appellant assumes that all transferable tenures must be of a fixed nature; and that, when sales for arrears of rent can take place, no power to enhance ever remains. As this plea is erroneous, we see no reason to interfere, and reject the special appeal without costs, as nobody appears for the respondent.

The 13th December 1866.

*Present:*

The Hon'ble C. B. Trevor and W. S. Seton-Karr, *Judges.*

**Presumption under Section 4, Act X. of 1859 (how to be rebutted).**

Case No. 1896 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of East Burdwan, dated the 28th April 1866, reversing a decision passed by the Deputy Collector of that District, dated the 27th January 1866.*

Ram Lochun Goopto (one of the Defendants), *Appellant,*

*versus*

Bama Soonduree Debee (Plaintiff), *Respondent.*

*Baboo Nil Madhub Sein* for Appellant.

*Baboos Kalee Prosonno Dutt* and *Taruck-nath Sein* for Respondent.

**The legal presumption arising under Section 4, Act X. of 1859, from uniform payment of rent for 20 years, cannot be rebutted except by clear proof to the contrary. The same cannot be rebutted by a mere inference drawn from a particular fact, *e. g.*, the omission of mention of the defendant's holding in certain jumma-wassil-bakee papers from the office of the canoongoe dated 1229.**

*Seton-Karr. J.*—THIS is a suit for enhancement in which the Deputy Collector dismissed the claim holding that the defendant had shown payment at an uniform rate for twenty years, and that the plaintiff had not shown anything to the contrary.

The Judge admits that the receipts filed and attested prove payment at the same rate for twenty years, and that the presumption of law created by Section 4 of Act X. of 1859 does arise. But the Judge holds that this legal presumption has been rebutted by the plaintiff who points to certain jumma-wassil-bakee papers from the office of the canoongoe, dated 1229, which make no mention of the holding of the defendant. The Judge therefore infers that the holding was created after 1229.

The sole question before us is whether the legal presumption, admittedly arising in the defendant's favor on the facts found, can be rebutted by the inference drawn from a particular fact, or to use the words of the

law itself "whether the contrary has been shown, or whether it has been *proved* that rent was fixed at a later period."

Having heard both parties on this point, we think that the slight presumption of fact or inference drawn by the Judge from one piece of evidence is legally insufficient to rebut the presumption of law in the defendant's favor. The legal presumption has not been disproved nor rebutted, nor has the contrary been shown, nor has it been proved that the rent was fixed at a later period than 1229, nor even at what period it was fixed at all. The slight presumption which might arise from the non-existence of a fact at a particular date as in this instance is, we think, legally insufficient to rebut this legal presumption in favor of the defendant by which the burden had already been shifted to the plaintiff.

In this view, holding the Judge's decision to be erroneous in law, we reverse the same with costs, and restore that of the Deputy Collector.

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The 13th December 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

**Enhancement—Onus probandi.**

Case No. 1747 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by Mr. F. B. Simson, Judge of Mymensing, dated the 10th April 1866, affirming a decision passed by Baboo Hurranund Misser, Deputy Collector of that District, dated the 11th September 1865.*

Bhobosoondree Debia (Plaintiff), *Appellant,*

*versus*

Gour Kishore Dutt (Defendant), *Respondent.*

*Mr. J. S. Rochfort* for Appellant.

No one for Respondent.

In a suit for enhancement in which the defendant adduced in evidence a decree in a suit in 1820 between the predecessors of both parties, to show that he and his ancestors had held at a rate fixed by a sunnud prior to the Permanent Settlement, the *onus* was held to be on the plaintiff to prove that that decree was not applicable to the particular holding in dispute.

*Peacock, C. J.*—It appears to us that this decree ought to be affirmed. Although the defendant did not expressly prove that he had been holding at an unvaried rent during the last twenty years, still there was in evidence a decree in a suit in 1820 between the predecessor of the present zemindar, and the father of the present defendant through whom he claims and others, which shows that they hold at a rate which was fixed by a sunnud prior to the date of the Permanent Settlement. If the decree was not applicable to this particular holding, the zemindar could have shown that there were two holdings, one to which the decree related, and the other to which the decree did not relate. No evidence, however, has been given by the plaintiff to rebut the presumption arising from the decree adduced in evidence by the respondent, or to show that that decree is not applicable to this particular holding.

The decree of the Lower Appellate Court is affirmed, but without costs; no one appearing for the respondent.

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The 13th December 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Enhancement—Notice—Section 13, Act X. of 1859—Old rents.**

Case No. 1864 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 9th May 1866, reversing a decision passed by the Deputy Collector of that District, dated the 14th December 1865.*

Shahzada Mahomed Rohimooddeen (Defendant), *Appellant,*

*versus*

Radha Mohun Mondul (Plaintiff), *Respondent.*

*Mr. R. E. Twidale* and *Baboo Nil Madhub Bose* for Appellant.

*Baboos Mohesh Chunder Chowdry* and *Oopendur Chunder Bose* for Respondent.

The object of Section 13, Act X. of 1859, is that a suit for enhancement should not be brought without previous due notice, and not that, when a notice under that Section has been once duly given, if the tenant does not immediately on service of notice give up the tenure, a suit for enhanced rents for the next and following years must be brought within the said year.

Where a landlord fails in his claim for enhanced rent he is entitled to recover the old rents.

*Shumbhoonath Pundit, J.*—We agree with the Lower Appellate Court that the claim of the plaintiff for the enhanced rents of 1270

is in time, as it is brought within three months from the expiration of the year for which the rents demanded are due. The fact of the said rents being demanded more than 15 months after the service of notice, and the fact of the notice being served at the end of the year 1267, would not affect the merits of this case. The objection of the special appellant is that, when notice was served for the ensuing year (1268), it cannot be of any use for any other subsequent years. It appears from the record that, before plaintiff's time to sue for the enhanced rents of 1268 expired, the tenant brought an action to contest the propriety of the notice; that that case remained for some years in different Courts, but the result was unsatisfactory, as the case had been struck off for default in the Court of first instance, and the said order was maintained in all appeals. The last order was passed in the beginning of the year 1270 within nine months of the termination of this litigation, *viz.*, in the very commencement of the year 1271; plaintiff brought this suit for the enhanced rents of 1268, 1269, and 1270, and both the Courts below have dismissed the claim for the enhanced rents for the years 1268 and 1269, as this action brought in the first month of 1271 was brought more than 15 months from the commencement of these two years.

Under this view of the case, we cannot see why the notice should not be held good for the year 1270, from the termination of which year the case is brought within three months.

The object of Section 13, in our opinion, is that a suit for enhancement should not be brought without previous due notice; but it does not follow that, when a notice under that Section has been once duly given, if the tenant does not immediately on the service of the notice give up his tenure, the suit for enhanced rents of the next year must be brought within the said year, and that, under all circumstances, even such as above detailed in this case, a suit for enhanced rents cannot be brought for two or three years afterwards.

The special respondent, plaintiff, by cross-appeal, urges that the termination of the litigation by the tenant should be considered as a confirmation of the enhanced rents by a competent Court, at least so far as to relieve the plaintiff from the necessity of suing within fifteen months of the commencement of the earliest year for which the enhanced rents are now demanded.

We cannot agree with the plaintiff in this contention. The confirmation by a competent Court mentioned in the law is a confirmation which would not require any investigation or trial regarding the enhanced rents in the case for arrears; and, as no issue regarding the rate was tried in the former suit, consequently the trial of the question cannot be avoided in this case.

The plaintiff further urges that, for the two years 1268 and 1269, the Lower Court should at least have decreed old rates if they found that he could not, owing to the law as it is framed, recover enhanced rents.

As we find that the plaintiff in this case has done all that he could to carry on his case diligently for the years 1268 and 1269, and as he loses his claim for enhanced rents for these years, owing to the litigation commenced by the tenant, and not owing to any fault of his own, as his case is for arrears of rents, and if he is not entitled to enhanced rents asked, there is no law, preventing his recovering the old rents, we decree the cross-appeal, and remand the case to the Court of first instance, that it may see how much at old rates can be fairly decreed to the plaintiff for those two years, and to decree the same accordingly, together with what it may have to decree in his favor as enhanced rents for 1217 B. S.

Remand accordingly, to be re-tried with reference to the above remarks.

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The 15th December 1866.

*Present:*

The Hon'ble C. B. Trevor and W. S. Seton-Karr, *Judges.*

**Excess Lands—Enhancement—Kubooleut—Abatement—Section 17, Act X., 1859.**

Case No. 1913 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Hooghly, dated the 5th May 1866, affirming a decision passed by the Deputy Collector of that District, dated the 30th August 1865.*

Mr. M. A. David (one of the Defendants), *Appellant,*

*versus*

Ram Dhun Chatterjee (Plaintiff) and others (Defendants), *Respondents.*

*Mr. R. E. Twidale* for Appellant.

*Baboo Opendro Chunder Bose* for Respondents.

When a tenant holds excess lands for which no rent has hitherto been paid, the zemindar may treat him either as a trespasser or a tenant. In the latter case, a suit will not lie for enhancement, but only for a kubooleut and for a determination of the rate at which the same should be delivered.

A ryot is entitled to no deduction under Section 17, Act X. of 1859, for the expenses which he has incurred in cultivating excess lands for which he has paid no rent. He is a mere squatter, and that Section refers only to tenants with a right of occupancy.

*Trevor, J.*—PLAINTIFF in this case sues to enhance the rent upon 9 beegahs of land after notice served. He alleges that plaintiff holds one beegah and 18 cottahs under a lease, and the remainder without any lease at all; that the rate upon the one beegah 18 cottahs is below the rate for which defendant is liable, and he pays no rent for the remainder; hence the present suit.

Defendant pleads that he holds the whole 9 beegahs in his possession from before the Decennial Settlement, and is, therefore, not liable to enhancement.

The Lower Courts find that plaintiff holds 1 beegah 18 cottahs under a lease dated 1237, and that, as it is not mokururree, he is liable to enhancement. The rate, however, all along paid, the Judge finds to be fair and equitable. He, therefore, does not give an enhancement on them. As to the remaining lands, the Judge finds that they have been held all along without any lease at all; that the defendant has improved the lands certainly; but, considering that he has never before this been a recognized tenant for these lands, and, therefore, with any right of occupancy, he is not entitled to any deduction, on account of his expenditure on them, under Section 17, Act X. of 1859. He, therefore, gave plaintiff a decree for enhancement at certain rates found to be current after enquiry in the mofussil.

Defendant now appeals specially, urging, *1st*, that the Court has erred in finding that his pottah was created in 1237; *2nd*, that, under the precedent of this Court, Roshun Bibee *versus* Bissonath Sircar, to be found in Volume VI. of Weekly Reporter, page 57, Act X. Rulings, he is, as regards the lands in suit, a trespasser, and the present suit for enhancement will not lie; and, *3rd*, that whatever be his status, he is entitled to a deduction of rent on account of the expenses incurred by him admittedly in improving the lands.

On the *first* point urged in special appeal, we see no ground for interfering, a decree of the Civil Court clearly ruling that this tenure was created in 1237 only. On the *second* point, we are clear that the zemindar might, if he chose, have treated defendant as a trespasser on the excess lands, but he elects not so to act, but to admit him henceforth as a tenant. It is true that the form of action for these lands is incorrect; for, as to them, it is not really and essentially a suit for enhancement, but one for a kubooleut and for a determination of the rate at which the same should be delivered, no rent at all having hitherto been paid for these lands by the defendant, and he therefore not being, in legal language, a tenant. Treating, then, the suit for these lands as such, the 3rd issue is whether, considering the status of defendant, he is entitled to a deduction for the expenses which he has incurred in cultivating the lands. We are of opinion that he is not; he was a mere squatter, not a tenant, and a Section of the law cited refers only to tenants with a right of occupancy under Act X. Defendant might, by acting honestly long ago, have brought himself within that category; but by acting dishonestly and cultivating land for which he pays no rent, he cannot claim a privilege reserved for tenants of a particular character. We, therefore, dismiss the special appeal with costs.

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The 17th December 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Limitation—Deposits—Section 6, Act VI. of 1862, B.C.—Section 32, Act X. of 1859.**

*Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 9th April 1866, reversing a decision passed by the Deputy Collector of that District, dated the 9th November 1865.*

Case No. 1716 of 1866 under Act X. of 1859.

Tara Monee Koonwaree (Plaintiff), *Appellant,*

*versus*

Jeebun Mundur and others (Defendants), *Respondents.*

*Mr. R. E. Twidale* for Appellant.

*Baboo Chunder Madhub Ghose* for Respondents.

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Case No. 1727 of 1866 under Act X. of 1859.

Jeebun Mundur and others (Defendants), *Appellants*,

*versus*

Tara Monee Koonwaree (Plaintiff), *Respondent*.

*Baboo Nil Madhub Sein* for Appellants.

*Mr. R. E. Twidale* for Respondent.

The limitation of 6 months prescribed by Section 6, Act VI. of 1862 B. C., applies to deposits made after rents have *become due*, and does not interfere with the limitation for suits for enhanced rent as prescribed by Section 32, Act X. of 1859.

*Shumbhoonath Pundit, J.*—THE first is the special appeal of the plaintiff, the landlord, and the second that of the defendant, the tenant.

The landlord sued his tenant for enhanced rents of 1272 Fuslee after service of notice.

The defendant pleaded a tenure at fixed rents.

The defendant was sued before in another suit for arrears of rent of another year. In that case the landlord had asked to obtain *as arrears* rents at a rate which was proved after trial of that case to be higher than the sum which the defendant paid before. In that case the defendant pleaded a mokurruree tenure, and the Court of first instance decided that there was no proof of mokurruree. On appeal, the Lower Appellate Court held the same opinion, but, agreeing with the first Court that the tenant paid before more than he was asked by the plaintiff, dismissed his case for enhanced rents, on the ground that there was proof of the defendants having a right of occupancy; and that, accordingly, as the rents asked were virtually enhanced rents, plaintiff cannot recover them without service of a notice for enhancement.

In the present suit, the Lower Appellate Court held that the decision in the former suit was a *final* judgment on the question of mokurruree, and thus there was no necessity to re-try the plea of mokurruree set up by the tenant.

The Lower Appellate Court, however, dismissed the case of the plaintiff on limitation under Section 6, Act VI. of 1862 of the Bengal Council.

It appears that, the defendant having deposited some rents for the year 1272 on the 19th of Pous 1272 of the said year, that is to say, before the expiration of the *fourth* month from the commencement of the Fuslee year on the 19th of Pous 1272 (corresponding with 9th of January 1865), notice of the deposit was served upon the plaintiff. Plaintiff, who had served the notice prescribed by Section 13 of Act X. of 1859 so far back as the 9th of April 1864 (corresponding with 17th of Choitro Fuslee 1271), and who, according to the literal meaning of Section 32 of Act X. of 1859, could sue for enhanced rents of 1272 up to the end of Bhadur 1272 Fuslee, instituted this suit on the 1st of September 1863 (corresponding with 25th of Bhadur 1272 Fuslee).

The Lower Appellate Court deemed this action barred by limitation, because Section 6 of Act VI. of 1862, Bengal Council, requires in a case of deposit that a suit for the remainder of the money claimed for that year for which a deposit may be made should be brought within six months of the service of notice, and because notice under Section 5 of the Act had been served upon the plaintiff on the 9th of January 1865 (corresponding with 19th Pous of 1272), this action brought on the first of September 1865 (corresponding with 25th of Bhadur 1272) being more than six months after the said date of 9th January 1863.

Now, it is beyond all doubt that the deposit contemplated by Act VI. of 1862 is a deposit after the rents have *become due*, and not before the end of the year, *i. e.*, before they are due. The law does not make any provision for cases of demands for enhanced rents because, as for those demands in Bengal, landlords have an opportunity to sue within three months after the expiration of the Bengal year for which the enhanced rents are asked; and in districts where the Fuslee era prevails, suits for enhanced rents can be brought up to the last day of the year for which the notice has been served.

Now, the deposit in this case was made before the *fourth* month was over of the year for which the enhanced rents are asked; and if, from the date of the service of the notice of such an irregular and uncalled for deposit, the right of the plaintiff to sue for the enhanced rents is to be reduced to six months, plaintiff will be obliged to sue before the expiration of the year for the rents of which he has occasion to sue, and for which he cannot and need not sue before the expiration of the year. It is clear that the Bengal Law (Act VI. of 1862) did not contemplate the deposit of rents before they were due, or to interfere with the limitation for suits for *enhanced* rents, as prescribed in Section 32 of Act X. of 1859.

We, accordingly, think that the Lower Appellate Court is wrong in holding that the claim of the plaintiff is barred by limitation.

The law passed by the Bengal Council did not intend to make any change in the Law of Limitation for or against landlords as regards suits for enhanced rents as provided

for in Section 32 of Act X. of 1859, and it relates to deposits made *after* the expiration of a year of former rents tendered by the tenant and refused by the landlord on grounds other than that of a previous service of notice for enhancement.

On the merits we do not think that the former decision between these parties *has settled definitely* the nature of the lease of the tenants. It was necessary in the former case to decide whether the defendant held from before at the rate asked by the plaintiff, and it was no part of the direct issues of such a case whether the tenure of the defendant was a mokurruree or not.

The former decision, therefore, is in our opinion *not* binding as an *estoppel* as it has been treated by the Lower Appellate Court.

The Lower Appellate Court has not, in the present case, tried the question of mokurruree on the evidence in *this* case, but only upon the decision in the suit, which, as before remarked, it wrongly holds to be a final decree on the matter in dispute. Thus, as we do not agree with the Lower Appellate Court on this point, we remand the case to it to re-try the pleas of the defendant on the merits, with reference to the above remarks.

The appeal of the defendant is to the effect that, having dismissed the case of the plaintiff on limitation, the Lower Appellate Court had no reason to pronounce any opinion upon the merits of the case. As we are remanding the case to the Lower Appellate Court, after reversing its decision as to limitation, and have already recorded that the judgment of the Lower Appellate Court on the merits is not correct, and the reasons for our opinion, it is not necessary to enter further into the appeal of the defendant.

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The 18th December 1866.

*Present :*

The Hon'ble H. V. Bayley and F. A. Glover, *Judges.*

**Enhancement—Lakheraj—Onus probandi.**

Case No 1937 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Additional Judge of Hooghly, dated the 23rd April 1866, affirming a decision passed by the Deputy Collector of that District, dated the 19th August 1865.*

Dhun Monee Debee (Plaintiff), *Appellant,*

*versus*

Suttoorghun Seal and others (Defendants), *Respondents.*

*Baboo Bungsee Dhur Sein* for Appellant.

*Baboo Luckhee Churn Bose* for Respondents.

Where a ryot is sued for enhanced rent in respect of lands part of which he admits to be rent-paying and the remainder lakheraj, the *onus* of proving that any part was exempted is not shifted from the zemindar to the ryot.

*Glover, J.*—THIS was a suit on the part of the special appellant to recover enhanced rent on the defendant's holding, consisting of 8 beegahs 6 cottahs of land, after notice.

The defence was that only 8 cottahs of the land was rent-paying, and that that had been held at an uniform rate from time immemorial, and was not liable to enhancement; whilst the remainder was lakheraj, and not assessable at all.

The first Court dismissed the plaintiff's suit as regards the lakheraj land, but gave a decree upon the rent-paying land at the rates prevailing in the vicinity.

Both parties appealed to the Judge, who, (we may briefly say, for all the purposes of this appeal) confirmed the Moonsiff's decision.

The zemindar now appeals specially, urging (1) that, as the plaintiff admitted holding a portion of the land on payment of rent, the *onus* of showing that any part was exempted was shifted from the zemindar to the ryot; and (2) that, under the circumstances, it was incumbent on the ryot to make out a good *primâ facie* case, and to show that he had some grounds for resisting his landlord's claim on the plea that the land was lakheraj.

Neither of these objections appear to us tenable.

The first is an evident endeavour to get rid of the Full Bench Ruling of this Court in the case of Sunatun Ghose by a side wind. There can be no possible reason why, when a ryot really holds two different descriptions of land, he should be forced by his opponent's form of allegation to put them both in the same category, or to discharge an *onus* from which the law has distinctly relieved him as to one of them. It is now settled law that a zemindar, seeking to assess land alleged to be lakheraj, must prove that, at some time or other posterior to the Decennial Settlement, that land paid rent, and he cannot force the ryot to proof of his lakheraj title until he has so started his case.

For the rest the ryot, pleading a lakheraj title, has nothing further to do, until the zemindar has made out a *primâ facie* case that the land has paid rent. He is entitled to retain his holding rent-free until the party suing to assess it has discharged the *onus* laid upon him.

This case coming clearly under this rule, we dismiss this special appeal with costs.

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The 18th December 1866.

*Present:*

The Hon'ble L. S. Jackson and Shumbhoonath Pundit, *Judges.*

**Estoppel—Decree of Revenue Court.**

Case No. 1822 of 1866.

*Special Appeal from a decision passed by Baboo Kalee Kinkur Roy, Principal Sudder Ameen of Chittagong, dated the 24th April 1865, reversing a decision passed by Baboo Puddo Lochun Doss, Moonsiff of Sitakoond, dated the 18th November 1865.*

Mahomed Azim (Plaintiff), *Appellant;*

*versus*

Ram Kant Chowdhry and others (Defendants), *Respondents.*

*Mr. R. E. Twidale* for Appellant.

*Baboo Kishen Succa Mookerjee* for Respondents.

In a former suit for assessment in which the defence was that the land in question formed a part of the defendant's istemraree talook, the Collector found that it was not a part of such talook, and decreed the assessment—HELD that the then defendant could not now sue in the Civil Court to establish his istemraree talookdaree rights.

*Jackson, J. (Shumbhoonath Pundit, J., concurring).*—I THINK it is unnecessary to call upon the opposite side in this case. It seems to me that the decision of the Lower Appellate Court is right, and ought to be affirmed. The plaintiff sued in this case for what he called the establishment of his istemraree talookdaree rights, and he alleged his cause of action to arise from the decision of the Collector's Court under Act X. of 1859. The decision in that suit is not before us; but, as far as we can gather from the statement of the vakeel for the special appellant, it appears that in that case the zemindar sued the now plaintiff (special appellant), seeking to assess certain land in his occupation. The defence in that suit was that the land in question formed a part of the defendant's istemraree talook. The Collector apparently found that it was not a part of such talook, and decreed the assessment. At any rate, it is perfectly clear that the plaintiff (special appellant) has sought to raise in this suit precisely the issue determined by the Court of the Collector. This was an issue which the Collector's Court was legally competent to decide, and, that being so, it appears to me that the same issue cannot be now raised in the Civil Court.

The decision of the Lower Appellate Court is affirmed with costs.

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The 18th December 1866.

*Present:*

The Hon'ble L. S. Jackson and Shumbhoonath Pundit, *Judges.*

**Suit for Kubooleut—Right of Fishery.**

Case No. 1854 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 11th April 1866, reversing a decision passed by Moulvie Abdool Goffoor, Deputy Collector of that District, dated the 16th December 1865.*

Mohun Gobind Sein and others (Plaintiffs), *Appellants,*

*versus*

Nittaye Holdar (Defendant), *Respondent.*

*Baboo Doorga Dass Dutt* for Appellants.

*Baboo Mohinee Mohun Roy* for Respondent.

A suit for a kubooleut will not lie for a right to fish in certain waters.

*Jackson, J.*—THIS case was a suit on the part of a zemindar against a fisherman to compel delivery of a kubooleut for the right to fish in certain waters which the zemindar alleged to belong to his estate. The defendant, on the other hand, alleged that he and others had been from time immemorial entitled and accustomed to fish in these waters without paying rent. The suit, after one decision by the Deputy Collector, was remanded for a new trial by the Lower Appellate Court. The Deputy Collector decided it afresh in favor of the plaintiff. This decision came in appeal a second time before the Judge, who reversed it, and dismissed the plaintiff's suit.

The plaintiff now comes up here in special appeal, and advances certain objections to the decision of the Judge.

It appears to me, however, unnecessary to go into the merits of this particular case, because I am clearly of opinion that the present suit would not properly lie. A suit for a kubooleut lies against a ryot who cultivates land, or holds tenements under a zemindar in circumstances where a pottah is granted or tendered to the ryot. This is not the case of a ryot holding land or tenements under a zemindar. It is the case of a person who claims to exercise, in common with a great many other persons, the right of fishery in certain waters. The plaintiff, a zemindar, contends that the defendant and others in the same position, as the defendants are not entitled to fish in those waters, without his leave or license, and without payment of rent to him. However this may be, it seems to me that he could not properly sue these parties for a kubooleut, and, therefore, this suit ought to have been dismissed without enquiry into the merits. I propose, therefore, to dismiss the special appeal, and, for the reason above stated, to affirm the decision of the Lower Appellate Court with costs.

*Shumbhoonath Pundit, J.*—I agree in the opinion expressed by Mr. Justice Jackson, but think that the landlord might have served notice, and then brought a suit for assessing the defendant with the annual rents that he thinks the defendant should pay.

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The 19th December 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Ejectment—Auction-purchasers under Act I. of 1845.**

Case No. 1363 of 1866.

*Special Appeal from a decision passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 2nd February 1866, affirming a decision passed by Mr. W. Wright, Principal Sudder Ameen of that District, dated the 30th June 1865.*

Raj Monee Dossee and others (Plaintiffs), *Appellants,*

*versus*

Goluck Chunder Sircar and others (Defendants), *Respondents.*

*Baboos Onookool Chunder Mookerjee* and *Dwarkanath Mitter* for Appellants.

*Baboos Sreenath Doss* and *Bhugobutty Churn Ghose* for Respondents.

The rights of an auction-purchaser under Act I. of 1845 are modified by Section 1 of Act X. of 1859.

*Macpherson, J.*—We dismiss this appeal with costs. The suit is simply a suit to eject the defendant who evidently (by the plaintiffs' own showing) is not a mere trespasser, whether he succeeds or not in proving the pottahs he sets up. But, although the plaintiffs (who are the appellants in this Court) claim, as auction-purchasers under Act I. of 1845, their rights under that Act are modified by Section 1 of Act X. of 1859; and it is only under the provisions of the latter law that the defendant can be proceeded against. (*See* the judgment of Trevor and Glover, JJ., of 3rd February 1866 in Special Appeal No. 2518 of 1865.)

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The 20th December 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, *Judge.*

**Limitation—Section 140, Act X. of 1859.**

Case No. 2091 of 1866.

*Special Appeal from a decision passed by Baboo Koonj Lall Banerjee, Principal Sudder Ameen of Hooghly, dated the 30th May 1866, affirming a decision passed by Moulvie Khyrut Hossein, Moonsiff of Hurreepal, dated the 9th September 1865.*

Gooroodoss Gangooly (Plaintiff), *Appellant,*

*versus*

Gobind Chunder Bhooya and others (Defendants), *Respondents.*

*Baboos Mohendro Lall Seal* and *Taruck-nath Dutt* for Appellant.

*Baboo Umbica Churn Banerjee* for Respondents.

The word "Collector," as used in the proviso of Section 140, Act X. of 1859, must be taken to mean the Collector or Deputy Collector who makes the final decision, from which the limitation of one year for suing in the Civil Court to establish title will begin to run.

*Peacock, C.J.*—We think that the word "Collector," as used in the proviso of Section 140, Act X. of 1859, must be taken to mean the Collector or Deputy Collector who makes the final decision. If the decision is that of a Deputy Collector, and no appeal is preferred or lies from his decision to the Collector, then the word "Collector" would probably include the decision of the

Deputy Collector. But, if there is an appeal from the decision of the Deputy Collector to the Collector, and a decision is passed by the Collector thereon, then we think that that decision is the decision of the Collector within the meaning of Section 140.

That being the case, we think that the decision of the Lower Appellate Court was wrong in holding that limitation began to run from the time of the decision of the Deputy Collector, and not from the decision of the Collector.

Consequently, the decision of the Lower Appellate Court must be reversed, and the case remanded to be tried on its merits, independently of limitation.

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The 20th December 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

**Suit for Kubooleut (for part of holding).**

Case No. 2105 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by Mr. H. A. R. Alexander, Officiating Judge of Chittagong, dated the 5th June 1866, reversing a decision passed by Baboo Gour Chunder Roy, Deputy Collector of that District, dated the 23rd November 1865.*

Ram Doss Bhuttacharjee and another (Plaintiffs), *Appellants*,

*versus*

Ramjeebun Poddar and others (Defendants), *Respondents*.

*Baboos Romesh Chunder Mitter* and *Sreenath Banerjee* for Appellants.

*Baboo Bamachurn Banerjee* for Respondents.

A suit for a kubooleut will not lie for a portion only of the land included in an entire holding.

*Peacock, C.J.*—We think that this suit is wrongly proved. The suit is for a kubooleut for part of the land for which a pottah was given. A tenant cannot have a kubooleut for a portion only of the land included in an entire holding. The objection is not a mere technical one. We could not give the plaintiff a decree without doing injustice.

The decision of the Lower Appellate Court is affirmed with costs.

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The 20th December 1866.

*Present:*

The Hon'ble C. B. Trevor and W. S. Seton-Karr, *Judges*.

**Enhancement—Short crops—Increased value of produce.**

Case No. 2057 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by Mr. A. Abercrombie, Judge of Dacca, dated the 19th May 1866, affirming a decision passed by the Deputy Collector of Furreedpore, dated the 14th March 1866.*

Showdaminee Dossee (Plaintiff), *Appellant*,

*versus*

Haran Chunder Surmah and others (Defendants), *Respondents*.

*Baboos Romesh Chunder Mitter* and *Chunder Madhub Ghose* for Appellant.

*Baboo Greeja Sunker Mojoomdar* for Respondents.

In a suit for a kubooleut at an enhanced rent, where, in spite of the shortness or deficiency of the crops, their value, owing to the additional care and labor expended by the ryot, had increased considerably above that

in former years, it was laid down that the Court must try and discover what the ryot was entitled to as a set-off against the increased value of the produce for the additional care and labor expended by him, and whether or not the zemindar was not entitled to some portion of the increased value of the produce in the shape of enhanced rent.

*Seton-Karr, J.*—THIS is an appeal from a decision of the Judge confirming one of the Deputy Collector which wholly dismissed a suit of the plaintiff for a kubooleut at an enhanced rate.

The main ground taken by the Judge is, as we understand his judgment, that, although the value of the crops is now double what it used to be, the crops themselves are short crops, and would never fetch the prices which they do fetch, were it not for the additional care and labor expended by the ryots on their lands.

In appeal several points are pleaded. As regards the *first*, that the Judge should have looked to the rise in prices only, and have given the plaintiff a decree on this fact as found or admitted, we think the contention quite untenable. The Judge must look at the whole of the circumstances, and so far he was not in error in considering the rise in prices, together with the increased labor and with the deficient crop.

On the *second* point that the Judge was wrong to allow the benefit of Clause 2 of Section 17 of Act X. to the ryot, we think the Judge was not wrong, to a certain extent, in giving the ryot the benefit of this Clause, though we think he was wrong in the mode of his application of the Clause to this particular case.

The *third* point is that the Judge has based his decision mainly on the notoriety of the deficiency of the crops in late years. But we find that the Judge has noticed the Ameen's report, and to some extent has based his judgment on it.

The *fourth* point is that the Judge has given no opinion on the plea that the rate paid by the defendant is less than that paid by holders of similar tenures in the places adjacent.

This point does not appear to have been pressed on the Judge's notice; but, while we cannot admit that the plaintiff is entitled to a decree as the case stands, we think there is something not satisfactory in the process by which the Judge has arrived at his present result.

It is pointed out to us that the Ameen's report, which seems a careful report, shows that, while crops in past years yielded 30 or 40 khattas at 6 or 7 khattas the rupee, the same kind of crops at the present time yield only 20 or 25 khattas, but at 2 or 2½ khattas the rupee.

It is clear from this that, in spite of the shortness or deficiency of the present crops, the return owing to the rise in prices and to the additional care and labor expended by the ryot has increased the value of the produce, not to double what it formerly was as the plaintiff contended, but to something considerably in excess of the value of the same in former years.

What the Judge, therefore, has failed to decide, and what he must endeavour to decide, is this. He must try and discover what the ryot is entitled to as a set-off against the increased value of the produce, for the additional care and labor which he has expended in raising the same; and he must say whether or not the zemindar is not entitled to some portion of the increased value of the produce, in the shape of enhanced rents, although the ryot may justly claim something on account of his increased expense and trouble. In short, the Judge must consider all the circumstances of the rise in prices, of the short crops, and of the increased expenditure together, and must say if the zemindar may or may not claim some increase of rent on the whole facts which the Judge finds. If the zemindar has such valid claim, the rent to be fixed must be fair and equitable; and the Judge must decide this point after giving it his best consideration, and after taking fresh evidence, if necessary, with reference to our remarks. With these general observations for his guidance, we remand the case.

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The 20th December 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Institution of suit—Return of Plaint.**

Case No. 2006 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Mymensing, dated the 17th May 1866, affirming a decision pass-*

*ed by the Deputy Collector of that District, dated the 23rd December 1865.*

Kalee Churn Chowdhry (Plaintiff), *Appellant,*

*versus*

Ram Gobind Mozoomdar and others (Defendants), *Respondents.*

*Baboo Pearee Lall Roy* for Appellant.

*Baboo Bhugobutty Churn Ghose* for Respondents.

Where a suit was, by the Collector's order, instituted at the sudder station instead of at the Sub-Division Deputy Collector's office—HELD that it was a case in which the plaint might have been returned to the plaintiff to file it in the Sub-Division Deputy Collector's office.

*Bayley, J.*—IN this case the suit was instituted at the sudder station instead of the Sub-Division Deputy Collector's office.* The Judge is right in holding that it should have been instituted at the latter. But, as it was so instituted by the Collector's order, although that order is, of course, not binding upon the Lower Appellate Court, still we think it was a case in which the plaint might have been returned to the party to file it in the Sub-Division Deputy Collector's office.

We direct that this be now done, but special appellant must pay his own and the respondent's costs, as he erred in law.

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The 20th December 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Issues (Recording of)—Section 65, Act X. of 1859.**

Case No. 1389 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Purneah, dated the 23rd February 1866, affirming a decision passed by the Deputy Collector of that District, dated the 19th August 1865.*

Shookoomar Singh (Plaintiff), *Appellant,*

*versus*

Mr. H. Cruise (Defendant), *Respondent.*

*Messrs. R. E. Twidale* and *C. Gregory* for Appellant.

*Mr. R. T. Allan* for Respondent.

Where both parties are at issue on any question upon which it is necessary to hear further evidence, the Collector is bound under Section 65, Act X. of 1859, to declare and record such issue.

*Loch, J.*—BOTH the Lower Courts have disposed of this case in a very unsatisfactory manner. Plaintiff sued to recover a certain amount of rent after service of notice, stating the defendant to be in possession of 939 beegahs of land. The defendant did not deny the service of notice, but stated that he held upwards of 4,000 beegahs at a uniform rate at 2½ annas per beegah, which he has paid for the last forty years. Plaintiff states that the defendant had a farming lease of the village which has expired, and that defendant has held over.

The Judge says: "No issue is necessary under Section 65, unless the Collector may think so." The law says: "If on such examination (Sections 59 and 60) as aforesaid it appears that the parties are at issue on any question upon which it is necessary to hear further evidence, the Collector shall declare and record such issue." It appears to us that several issues arise in the case which should have been recorded. The plaintiff states that defendant is holding over after the expiry of a lease which covered the area for which enhanced rent is now demanded. The defendant says nothing about the lease, and pleads that he has held a much larger area than that for which rent is claimed at an invariable rate for 40 years. His length of occupancy clearly does not exempt him from enhancement.

The *first* issue between the parties seem to be whether up to 1270 the defendant paid rent on account of 939 beegahs as stated by plaintiff, or on 4,265 beegahs as stated by defendant; *2nd*, if it be proved that the rent has hitherto been paid on the

* See Section 162, Act X. of 1859.

area mentioned by the plaintiff, whether the enhanced rent now claimed is fair and equitable. The plaintiff will have to show on what grounds he is entitled to enhancement; *3rd*, if it be proved that the rent hitherto paid has been paid on account of the area stated by the defendant, can the plaintiff recover in this suit the rent now claimed, or at any enhanced rate, or must his present suit be dismissed. This Court do not intend to restrict the enquiry to the issues recorded above, as others may arise between the parties which it may be necessary to determine.

The case is remanded for disposal with reference to the above remarks.

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The 21st December 1866.

*Present:*

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

**Rights of occupancy—Enhancement—Notice—Excess lands—Ejectment—Kubooleut.**

Case No. 2062 of 1866 under Act X. of 1859.

*Special Appeal from a decision passed by the Judge of Hooghly, dated the 19th May 1866, affirming a decision passed by the Deputy Collector of that District, dated the 31st October 1865.*

Rajmohun Mitter and others (Plaintiffs), *Appellants,*

*versus*

Gooroo Churn Aych (Defendant), *Respondent.*

*Baboo Umbika Churn Banerjee* for Appellants.

*Baboo Oomesh Chunder Banerjee* for Respondent.

Where a landlord in his notice of enhancement styles the ryot's land jotedaree land, and there is no question of the land being so, the mere use of the word "khamar" in some of the ryot's dakhilas cannot affect his *status*, or place him in a different position from what the landlord's own notice declares him to hold, so as to deprive him of the right of occupancy or of exemption from enhancement under Section 6, Act X. of 1859.

A ryot who holds lands in excess of his tenure is a trespasser and not a tenant, and cannot be sued for enhancement. The landlord's remedy is to eject him by process of law, or to sue for a kubooleut in respect of the excess lands.

*Glover, J.*—SPECIAL appellant in this case sued his ryot for enhanced rent after notice, on two grounds: *1st*, that he held more land than he was entitled to, his tenure consisting properly of 38 beegahs, whereas it had been found on measurement to contain 42 beegahs; and, *2nd*, that the whole area was liable to enhancement, it being held at rates below those prevailing in the vicinity for the same kind of lands.

The tenure is said to be made up of four jummas which have been consolidated and held by the special respondent for a considerable period, and, besides these, he holds a fifth jumma containing 3 cottahs of land.

Both Lower Courts have found that the ryot has proved his payment of an uniform rate of rent for the whole 4 jummas for a period of upwards of 20 years, and have, therefore, given him the benefit of the presumption arising under Section 4, Act X. of 1859.

It is now urged in special appeal—

(1.) That, in respect to some portion at least of the tenure, the ryot's dakhilas show that it was of the nature of "khamar" land, which by Section 6 of Act X. cannot give rights of occupancy or save from enhancement, how many years so ever it may have been held.

(2.) That, in any case, the excess 4 beegahs ought to have been assessed at enhanced rates; and—

(3.) That no adjudication was made on the claim of the special appellant to enhanced rent on the 5th jumma of 3 cottahs.

With regard to the *first* objection we observe that the special appellant, coming in to enhance rent after notice, is bound by the terms of that notice. He has distinctly called the special respondent's holding an ordinary jote of which the ryot had been in possession sufficient time to give him a right of occupancy, and he, therefore, demanded from him the rates that an occupant ryot would have ordinarily to pay, *viz.*, those prevailing for the same kinds of land in the

vicinity. Special appellant nowhere styled the land, or any portion of it, "khamar;" and it is perfectly clear, indeed, the special appellant himself cannot contest, that the land is not of the description mentioned in Section 6 of Act X. of 1859, but ordinary jotedaree land held for many years by ordinary tenants. The word "khamar," therefore, in some of the special respondent's dakhilas, cannot affect the ryot's status, or place him in a different position from what the landlord's own notice declares him to hold. For the rest the Judge has found, as a fact on evidence, that the dakhilas filed by the special respondent are genuine, and carry back his allegation of payment of an uniform rate of rent for more than 20 years, thus giving him the benefit of Section 4; and with this finding, we, in special appeal, cannot of course interfere.

Then, as to the *second* ground of special appeal. The special appellant admits that the excess 4 beegahs do not and did not belong to the original holding, but have been gradually encroached upon by the ryot since. This being so, no suit for enhancement can lie. A ryot who holds lands in excess of his tenure is a trespasser and not a tenant, and cannot be sued for "*enhancement*" of a rent which he has never paid. The landlord's remedy is to eject him by process of law, or, if he prefer it, to sue for a kubooleut in respect of the excess lands (*vide* 6 Weekly Reporter, page 57, 29th August 1866).

It is true that no adjudication was made regarding the special appellant's right to enhanced rent on the 5th jumma of 3 cottahs; but it is evident from the Judge's proceedings that this was not a point in dispute between the parties. Special appellant, when the case was first heard by the Deputy Collector, distinctly limited his claim to the 4 old jummas, and never preferred his present objection, either in his original petition of appeal to the Judge, or in the exceptions filed against the 2nd finding of the Deputy Collector. We think, therefore, that in special appeal we are precluded from considering the objection, and equally so from remanding the case for enquiry into the point.

The landlord can, if he be so advised, bring a fresh suit for enhanced rent of the jumma created as he alleges in 1228 B. S., but the appeal as now brought must be dismissed with costs.

The 21st December 1866.

*Present:*

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

**Resumed invalid lakheraj land within Government khas mehal (Liability of—to rent).**

Cases Nos. 2009 and 2010 of 1866 under Act X. of 1859.

*Special Appeals from a decision passed by the Judge of the 24-Pergunnahs, dated the 11th May 1866, affirming a decision passed by the Deputy Collector of that District, dated the 29th December 1865.*

Huro Pershad Chowdhry and others (Defendants), *Appellants,*

*versus*

Shama Pershad Roy Chowdhry and others (Plaintiffs), *Respondents.*

*Mr. R. T. Allan* and *Baboos Anund Chunder Ghosal* and *Bhowanee Churn Dutt* for Appellants.

*Baboos Onookool Chunder Mookerjee* and *Mutty Lal Mookerjee* for Respondents.

The holder of resumed invalid lakheraj land within a Government khas mehal is bound to pay rent according to the settlement of the revenue authorities under Regulation VII., 1822, until he sues in the Civil Court to set aside that settlement, or sues under Act X. of 1859 for a mitigation or re-settlement of rent.

*Shumbhoonath Pundit, J.*—THE special appellant complains that the Lower Appellate Court has given a decree to the plaintiff, the ijaradar of the Government khas mehal, against the special appellant for rents on the ground of a certain jummabundee to which he (the special appellant) was no consenting party.

The special appellant was holding certain invalid lakheraj land within a Government khas mehal, and that was resumed. For some years Government took no steps to settle. Then the revenue authorities, under the provisions of Regulation VII. of 1822, while settling the whole estate, settled and assessed the said resumed lands.

It appears that the special appellant having failed to appear under the notice issued according to the provisions of the law of settlement, the jummabundee was prepared in his absence.

The Lower Appellate Court has, we think, rightly held that the special appellant, having failed to sue in a Civil Court to set aside the settlement of the revenue authorities, is bound to pay the rents now demanded according to the said jummabundee.

It is argued by the special appellant that the plaintiff, as representing the khas mehal rights of the Government, must first prove that he has any rights to treat the special appellant as a tenant, and quoting the decision in page 5 (Act X.) of Volume VI of the Weekly Reporter, 18th June 1866, argues that, even if he be a tenant, the plaintiff must serve him with a notice before he can demand any assessment from him for lands for which he, the special appellant, admits he has not since resumption paid any rents at all.

We think that the fact of the resumption of the lakheraj tenure and of the settlement of it by the revenue authorities created the legal relation of landlord and tenant between the Government and the special appellant; and under Act X. of 1859, anybody holding through Government the khas mehal within which the invalid lakheraj was situated, has a right to ask and demand rents at the rates mentioned in the jummabundee.

If the special appellant has any right to contest the jummabundee, he had his remedy in the Civil Courts as the law prescribes; and if he has any ground to ask for a mitigation or re-settlement of rents, as allowed by Act X. of 1859, he may even now, under the provisions of that law, bring an action in the Collectorate.

As to the precedent cited by the special appellant, it is clear it does not apply to this case. The plaintiff in that case had sued for rents at *enhanced* rates on the ground that, as the jummabundee he relied upon shows that other ryots are paying more than they paid before, he, the plaintiff, is entitled to obtain a decree for the enhanced rate, asked also from the defendant of that case. The Court deciding that case, thinking that the authority of the revenue-officers is confined to settlements and rents and does not extend to enhancement, held that the revenue authorities, when making a jummabundee at enhanced rates, with reference to Act X. of 1859 then in existence, had not a power to enhance without following the rules of the latter law.

In this case the rents payable by the special appellant, and now demanded from him by the plaintiff, were for the first time fixed by the settlement-proceedings; and the law distinctly provides that such acts of the settlement officers are vaild and binding as long as they are not properly set aside by a Civil Court at the request of the party interested to see them set aside.

The special appellant further quotes a case decided by the late Sudder Dewanny, dated 17th of September 1859; but, as these facts did not apply to that litigation, and it was a quite different case, it cannot affect the decision of the present case.

In this view of the case, we dismiss both these special appeals with costs.

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The 8th June 1866.

*Present:*

The Hon'ble G. Loch and L. S. Jackson, *Judges.*

**Attachment of property before judgment—Injunction—Appointment of receiver or manager.**

Case No. 221 of 1866.

*Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Midnapore, dated the 23rd March 1866.*

Joynarain Geeree (Defendant), *Petitioner*,

*versus*

Shibpersad Geeree (Plaintiff), *Opposite Party.*

*Baboos Dwarkanath Mitter, Hem Chunder Banerjee*, and *Onookool Chunder Mookerjee* for Petitioner.

*Mr. R. T. Allan* for Opposite Party.

Sections 81 to 84 of the Code of Civil Procedure are applicable only to cases where it is probable that the defendant is going to make away with his property so as to make it impossible for the plaintiff to execute any possible decree against him, and empower the Court in such a case to make an order calling upon the defendant for security, and, in default thereof, to attach the property.

Section 92 applies to a case where it is shown to the satisfaction of the Court that the defendant in possession is likely to endamage or make away with any property in dispute in the suit, and empowers the Court in such a case to issue an injunction to the defendant to refrain from the particular act complained of, and in case of necessity to appoint a receiver or manager of so much of the property only as is in dispute.

*Semble.*—A Principal Sudder Ameen cannot, like the Court of Chancery, appoint a receiver in a case where the defendant has kept the plaintiff for a considerable time out of assets to which he is jointly entitled with the defendant.

We think it unnecessary to call upon the pleader for the appellant to reply. The case has been extremely well argued on both sides. But we have from the commencement had no doubt as to the order which it would be necessary to make.

The Principal Sudder Ameen appears to have a somewhat incorrect understanding of the law upon this point. He has acted under Sections 83 and 84, and under Section 92 of the Code of Civil Procedure. He seems to have imagined that the first named of those Sections had reference to moveable and the last to immoveable property, and he made an order under both Sections accordingly.

Now, the fact is that these two Sections relate to very different subjects, and to applications which have to be made under quite different circumstances. An application is made under Sections 81 and 82, and an order made under Section 83, when the plaintiff has reason to apprehend that the defendant, with intent to obstruct or delay the execution of a decree that may be passed against him, is about to dispose of his property or remove it from the jurisdiction. In such a case as that, the Court is authorized by Section 83 to issue a warrant calling upon the defendant, within a time to be fixed by the Court, to furnish security or to show cause why he should not furnish such security; and, in default of his furnishing security or showing cause, the Court is afterwards authorized by Section 84 to proceed to attachment of the property.

In this case, if it appeared to be probable that the defendant was going to make away with his own property so as to make it impossible for the plaintiff to execute any possible decree against him, it was open to the Court below to make an order calling upon him for security, and to attach his property for that particular purpose, and that only.

Then, under Section 92, in any suit in which it shall be shown to the satisfaction of the Court that any property which is in dispute in the suit is in danger of being wasted, damaged, or alienated, it shall be lawful for the Court to issue an injunction. The property in dispute in this suit was not the entire moveable and immoveable property in the possession of the defendant, but the half share to which the plaintiff laid claim. If, therefore, it were shown to the satisfaction of the Court that the defendant in possession was likely to endamage or make away with the half share which the plaintiff claimed, it was open to the Court to make an order under Section 92. What that order might have been will be stated presently.

Now, the first thing to be done when a plaintiff desires to set the Court in motion

in such a case as this is to present to the Court a *primâ facie* ground for proceeding. Such a *primâ facie* ground, no doubt, would have been the deposition which the plaintiff personally made before the Principal Sudder Ameen in this case. On such a *primâ facie* ground being made out, it would be the duty of the Court to give notice to the defendant of the application being made, for it is only in extreme cases, when the necessity for such a course is unmistakeably shown, that the Court ought to make the order for security at once, the usual proceeding being an order to show cause. Notice being given, both parties would appear in Court and show such evidence and such cause as they may respectively be able to show for and against the application.

In this case what was done? In this case the plaintiff appears a few days after the plaint has been filed (a plaint, be it observed, which speaks of eight years out of possession) with two witnesses before the Principal Sudder Ameen, and he and the witnesses give evidence in support of the general application. That evidence, we are quite justified in saying, is of the most vague, the most general, and the most unsatisfactory description, being, as nearly as possible, in the precise words of the Sections under which the application was made. Upon that, the defendant is summoned. The defendant appearing desires that the plaintiff and the witnesses should be recalled in order to their being re-examined in his presence. The Principal Sudder Ameen directs that the plaintiff be recalled. But then it is manifest that recalling only the plaintiff in this case could be of no real consequence, for the plaintiff had no personal knowledge of the facts. He professed to have acquired knowledge from other parties, from letters, and from researches in the Collectorate. This, therefore, when the defendant had appeared, was the proper time for bringing forward the persons from whom he had received the information, the letters in which he had found the information, and the researches in the Collectorate on which he relied. None of these things were shown, and upon the very vague and unsatisfactory evidence which we have mentioned, the Principal Sudder Ameen goes on to pass two orders, one of them placing the Collector in absolute charge of the entire real property in the possession of the defendant without specification of the plaintiff's share or defendant's share as alleged; and then he goes on, under a different Section (as he says), to make an order that the defendant shall, within a certain time, give security to cover the entire amount of the personal (moveable) property claimed in the plaint (although the defendant had objected that the amount of that moveable property had been greatly overstated, still the Principal Sudder Ameen orders that the security shall cover the entire of that amount); and, in default of such security being given, the whole moveable property of the defendant shall be placed under attachment. Now, the effect of these two orders, taken together, was to place the defendant, bound hand and foot, at the feet of the plaintiff, and to disable him from either dealing with his own property or defending himself in this suit; and yet up to this time the Principal Sudder Ameen had not before him one single vestige of proof that the claim of the plaintiff was a just one.

Under these circumstances, we are bound to say that the order of the Principal Sudder Ameen in this case exhibits an amount of credulity and a haste to exercise an extraordinary jurisdiction, which cannot but excite the greatest surprise in the mind of the Court. If he saw necessity for acting under Section 92, he might have contented himself with issuing an injunction to the defendant commanding him to refrain from the particular act complained of; and, if there was any extreme case, he might have given an order appointing a receiver or manager of the property which the plaintiff claimed. But he has gone beyond the very utmost limit to which he could possibly have gone under Section 92, because he has placed under attachment and appointed a receiver for the entire property, moveable and immoveable, in the hands of the defendant, and not merely the share claimed by the plaintiff. It is quite clear that that order cannot stand.

Then Mr. Allan contends that the order, if it be not sustained as it stands, should stand at any rate as to the 8-annas share claimed by the plaintiff; and he cites before us an authority from Daniell's Chancery Practice, where it is laid down that the act of a defendant in having kept the plaintiff for a considerable period of time out of assets to which he is jointly entitled with the defendant, is sufficient to justify the appointment of a receiver. Now, that certainly was not the ground upon which the Principal Sudder Ameen proceeded in this case; nor could he have proceeded in this case

upon any such ground, because up to that time he had not before him either written statement, evidence, or anything relating to the merits of the case except the plaint. The Principal Sudder Ameen did not advert to the merits of the case advanced by the plaintiff, but he proceeded on the ground that the defendant was actuated by malice, and that, merely on hearing of the suit against him, the defendant had given way to spite, and at once began to deal with the whole property in such a way as to show a determination that, rather than the plaintiff should succeed in recovering any portion of it, not a particle of the property, moveable or immoveable, should remain—conduct, we need hardly say, which might be expected of a lunatic, not of a sane man.

But, besides this, it would be going a great deal too far to say that the Principal Sudder Ameen had all the powers of a Court of Chancery. The Civil Procedure Code has laid down, with precision, the cases in which the Mofussil Courts can grant injunctions or attachments before decree, and we should not lightly be disposed to extend their jurisdiction in this respect.

In any case, it appears to us that we ought not, in the present circumstances, to take upon ourselves the duty of the Court of first instance. It may be that the plaintiff may have a sufficient and adequate ground for invoking the assistance of the Court under one or other of the Sections referred to. It may be that he might be able to substantiate his grounds for such an application. It is sufficient for us to say that, when such an application is made, and when it is properly heard in the presence of the defendant and supported by adequate proof and adequate reason, the Principal Sudder Ameen may proceed to make such order as the law warrants; and, when so made, it will doubtless be supported by this Court.

At present, the Court must reverse the order which the Principal Sudder Ameen has made, with costs.

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The 11th June 1866.

*Present:*

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

**Putteedaree Estates in Sylhet—Pre-emption (Claim to—under Section 14, Act XXIII. of 1861, how to be asserted).**

Case No. 273 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Sylhet, dated the 10th February 1866, reversing an order of the Principal Sudder Ameen of that District, dated the 8th August 1865.*

Syud Abdool Jaleel, *Petitioner,*

*versus*

Kalee Koomar Dutt, *Opposite Party.*

*Baboo Debendro Narian Bose* and *Mr. C. Gregory* for Petitioner.

No one for Opposite Party.

Petitioner was a co-sharer in an estate in Zillah Sylhet The right and interest of another co-sharer in the same estate being put up for sale in execution of a decree, the petitioner claimed it under Section 14, Act XXIII. of 1861. The Principal Sudder Ameen thereupon substituted him for the actual purchaser. The Zillah Judge in appeal reversed this order on the ground that *putteedaree* estates were unknown in Sylhet. Petitioner asked for the interference of the Court under Section 35 of the same Act.—HELD that, in such circumstances, the Court executing a decree had no authority to substitute the claimant for the actual purchaser without the consent of the latter, and that a party claiming a share under the Section cited is simply in the position of a party who, having a right of pre-emption, has observed the requisite formalities to enable him to assert the right, and must resort to a civil suit to obtain the benefit thereof. The orders of the Lower Courts were set aside accordingly.

*Jackson, J. (Glover, J., concurring).*—THIS case came before me sitting alone, on a reference from the Deputy Registrar. It appears that the petitioner states himself to be a co-sharer in an estate in Zillah Sylhet; and on the interest of another co-sharer being put up for sale in execution of a decree, petitioner came forward and claimed, under Section 14, Act XXIII. of 1861, to be declared the purchaser of that interest. The Principal Sudder Ameen entertained his claim and proceeded to substi-

tute the petitioner for the actual purchaser. The actual purchaser on that appealed to the Zillah Judge. The Zillah Judge at first confirmed the order of the Principal Sudder Ameen, but subsequently, on application from the purchaser, set aside his first order and reversed the decision of the Principal Sudder Ameen on the ground that *putteedaree* estates were unknown in Sylhet. Petitioner now seeks to bring the case before this Court, abandoning his right of appeal as stated in his petition, but availing himself of the language of Section 35, Act XXIII. of 1861.

It appeared to me that there could be no appeal in such a case, and that the terms of Section 35 would not apply. But, as it appeared unsatisfactory to dispose of the application merely on this ground, I thought it advisable to call in my learned brother, Mr. Justice Glover, and to dispose of the whole matter arising upon the application.

It appears to me that, whether or not *puttees* and *putteedaree* estates are known in Zillah Sylhet, the Principal Sudder Ameen had no authority, under Section 14, Act XXIII. of 1861, absolutely to substitute the petitioner for the actual purchaser of the interest which was sold. It appears to me that the effect of the Section referred to is merely to enable a person, being a co-sharer in such *putteedaree* estate, to come forward and advance his claim to pre-emption at a sale in execution of decree; and I think that the party who has come forward and advanced such claim in the mode prescribed by the Section is precisely in the situation of any other party entitled to pre-emption who has observed the requisite formalities in asserting such right. It is obvious that, before a claim for pre-emption in this case as in any other case can be allowed, various questions of fact and of law will have to be determined. It would be inconvenient that the Court, which is merely performing the ministerial function of selling an interest in execution of decree, should on that occasion take up and decide summarily such questions as those. I think, therefore, that a party claiming pre-emption under the circumstances stated in the Section must come into Court and assert his right in a civil suit. The order, therefore, of the Principal Sudder Ameen was wrong, and ought to have been set aside on that ground.

The application is rejected, but the proceedings are declared null from the commencement, and the petitioner will be at liberty to proceed as above indicated.

The 11th June 1866.

*Present:*

The Hon'ble L. S. Jackson, *Judge.*

**Right of Appeal to Privy Council—Value of portion of property below Rs. 10,000.**

Case No. 120 of 1866.

*Privy Council Appeal from a decision passed by this Court on the 31st August 1865.*

Onooroop Chunder Mookerjee, *Appellant to England,*

*versus*

Pertab Chunder Paul and others, *Respondents to England.*

*Baboo Otool Chunder Mookerjee* for Appellant.

*Baboo Hem Chunder Banerjee* for Respondents.

**An appeal to the Privy Council, involving a question or demand respecting property which on the whole is of the value of more than 10,000 rupees, is admissible, although the portion of the property to which the appeal relates is below that value.**

It appears to me that this appeal to Her Majesty in Council ought to be admitted.

The matter at issue relates to an alleged right of the plaintiff to assess rent upon a quantity of land in the occupation of the defendant. The claim was at first made in respect of the whole land which was then stated to be 164 beegahs; and the value of the claim, assessed under the provisions of the Stamp Law for fiscal purposes, was 12,400 rupees. The Court of first instance dismissed the plaintiff's suit as to a portion of the land, but gave him a decree for the larger portion, which, according to the same rule, was valued at 9,232 rupees.

The defendant, being dissatisfied with this portion of the decree, appealed to this Court. The result of the appeal was eventually that the plaintiff's suit was dismissed as to the entire claim.

The plaintiff now desires to carry that portion of the case which has been decided by this Court, in appeal to England. The defendant, on the other hand, objects that the value or sum involved in the appeal to this Court, and, consequently, in the appeal to Her Majesty in Council, falls short of 10,000 rupees, and that, consequently, the appeal is inadmissible.

It appears to me, however, that this appeal does fall within the meaning of the terms of the 39th Section of the Letters Patent of the High Court of Judicature,

Calcutta. The words are "that such judg-"ment, decree, or order shall involve, "directly or indirectly, some claim, demand, "or question to or respecting property "amounting to or of the value of not less "then 10,000 rupees." Now, the whole property to which this demand or question related was admittedly of the value of more than 10,000 rupees. It is true that, as to a portion of the demand, the plaintiff failed in the Court of first instance, and by his omission to bring that matter in appeal before this Court, the decision on that part of the case has become final. Notwithstanding this, it appears to me that the claim which he still maintains respecting his right to enhance the remainder of the property, brings him within the meaning of the words I have quoted.

In the case of Mussamut Ameena Khatoon (7 Moore, p. 261), the Counsel for the appellant, referring to the words which then governed the admission of appeals, namely, "the value of the matter in dispute in any such appeal to Her Majesty in Council," contended (and, it would seem, successfully contended) before their Lordships that those words related to the whole matter involved in the suit which was the subject of judicial enquiry in the Court below. Their Lordships, in the order which they passed, did not expressly say that they sanctioned this contention, but they granted leave to appeal conditionally on the facts contained in the petition appearing to be correct. Those words, it appears to me, were infinitely less wide than the words of the present Charter. It cannot be doubted that, if, in the case before me, the claim of the plaintiff had been dismissed in this Court as to the less portion of the land and their claim decreed as to the greater portion of the land, each of the parties separately would have had the right of appeal to Her Majesty in Council in respect of the question which each was entitled to raise respecting the entire property.

It does not appear to me that the fact of appeal by the opposite party (as bringing that share of the property in respect of which he has been successful into question) is what determines the right of the other party to appeal, and, consequently, I think that in this case, even as the fact stands, the party who is dissatisfied with a judgment which has been passed, is entitled to bring his portion of the case before Her Majesty in Council. In this case, the amount even of the portion comprised in the appeal very nearly approaches to the appealable value (10,000 rupees). It appears quite possible that, if enquiry were instituted, or if the possible amount of wasilat which might be awarded were taken into consideration, the value might amount to 10,000 rupees. But I prefer admitting the appeal upon the ground I have stated, *namely*, that a party, having involved in his appeal a question or demand respecting property which, on the whole, is of the value of more than 10,000 rupees, is entitled to bring his appeal, especially where the whole property was originally involved in the suit.

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The 15th June 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

**Pleaders (Dismissal of).**

*Petition of Sheikh Ahmeenooddeen Ahmed complaining of an order passed by Mr. E. G. Birch, Judge of Shahabad, dated the 22nd January 1866, dismissing him from his office as a Pleader of that District.*

*Messrs. W. E. Peacock* and *C. Gregory* for Petitioner.

A Zillah Judge has no power after the 1st January 1866 to make an order under Act XVIII. of 1852 dismissing a pleader. He should proceed under Section 16, Act XX. of 1865, and refer the matter, with his report, to the High Court.

Even under Act XVIII. of 1852 under which the Judge erroneously acted in this case, a pleader was liable to dismissal only on proof of conviction of a criminal offence by a competent Court, or on proof of a declaration or finding by a competent Court (in a suit or proceeding to which the pleader was a party) that he was guilty of a breach of trust, or for fraudulent or dishonest conduct in the discharge of his professional duty; and this also after notice and adjudication as prescribed by Section 4.

*Peacock, C.J.*—On the 22nd January last, Mr. Birch, who was the Judge of Shahabad, dismissed the petitioner Sheikh Ahmeenooddeen Ahmed from his office as a pleader of that district. The order was passed after Act XX. of 1865 came into operation. That Act came into operation on the 1st January 1866, and by the 3rd Section of the Act it is enacted that, "so far as they affect the "territories to which the Act extends, the "enactments set forth in the first Schedule "hereto are repealed, except so far as they "repeal any other enactment, and except as "to the recovery and application of any "penalty for any offence which shall have "been committed before the commencement "of this Act."

One of the Acts mentioned in the Schedule as repealed was Act XVIII. of 1852, called the Pleaders' Act, and it is clear, I think, that the dismissal of a pleader under that Act cannot be considered as the recovery and application of a penalty as provided for in Section 3. Therefore, the Judge, when he passed that order, had no power to make it. He ought to have proceeded under the provisions of Section 16, and to have referred the matter with his report to the High Court, if he thought that there was ground for dismissing the petitioner.

On the 6th April last, this Court made an order to the effect that the order of the Judge dismissing the petitioner will be quashed unless the Judge, within one fortnight after the receipt of the order of this Court, shall show cause to the contrary.

On the 14th April 1866, the Judge sent a letter commencing :—

"I have been called on by the High Court "to 'show cause' why my decision of the "22nd January last should not be reversed. "My order has been quashed without any "reference to the records upon which it was "based.

"As this mode of procedure is novel to "me and I do not know what I am required "to do, and as I consider that my order "is perfectly justified by the records of "the cases I now submit, I have only to "ask that the Judges will be pleased to "go through these cases. I have made my "notes on the pleader's petition, which is "full of misrepresentations. More than this "I do not consider myself bound to do."

But then the Judge thinks it right to remonstrate against the order of the Court. He says :—

"I beg respectfully to remonstrate against "the procedure adopted in this case. My "order has been reversed without the Ap-"pellate Court looking at the records on "which I had founded my opinion. The "pleader has returned, giving out that he "is to be allowed to practise at once. I "submit that the Judges of the Appellate "Court should assume that a Judge has "come to a right decision until they are "in a position to show, from the records "upon which the Judge has based his "decision, that he is not justified in coming "to the conclusion he has arrived at."

Now, this Court did not set aside the order without hearing the Judge. They made their order in the form in which they framed it, rather out of consideration to him; they did not call upon the Judge to show cause why his order should not be reversed, and they did not reverse his order without giving him an opportunity of supporting it if he wished. They merely say that the order will be quashed if he does not show cause to the contrary. If Mr. Birch had been called upon to show cause (he being a Judge of a subordinate Court), it might have looked as if the Court had decided that he had acted improperly and called upon him for an explanation.

With regard to the Judge's remonstrance, the Court did not assume that the Judge had come to a wrong decision without having looked into the case. His own order upon the face of it showed that he was *primâ facie* wrong, and, therefore, the Court said in substance that they would quash it unless he should show that it was right.

Now, the proceeding against the petitioner commenced as far back as the 22nd July 1863. He was then called upon to show cause why he should not be dismissed, and he was actually suspended from appearing in the Judge's Court.

The Judge, in his order dismissing the petitioner, says :—

"Sheikh Ameenooddeen, pleader of the "Judge's Court, was *quasi* suspended by my "predecessor in consequence of a number "of charges preferred against him of "dishonest conduct in the discharge of his "professional duty. He was called upon by "my predecessor to answer to the charges, "and his answers were filed. The case "was not, however, taken up by my pre-"decessor, but, though ripe for decision, was "left to me to dispose of."

I do not know what the Judge meant by "*quasi* suspended." Probably he meant that the petitioner was not suspended altogether, but only so far as appearing in the Judge's Court. Be that, however, as it may, the pleader was actually suspended, and he had the imputation of dishonesty cast upon him as far back as the 22nd July 1863, nearly two and a half years ago, and the matter was not finally disposed of, one way or the other, until the 22nd January in the present year. I must say that it appears to me a very improper thing to suspend a pleader for misconduct, and then to leave the matter undecided whether he is to be dismissed or the suspension is to be removed for any long period. That, probably, was not Mr. Birch's fault, but the fault of his predecessor in not taking up the case, and deciding it as soon as it was ripe for hearing.

The Judge says:—

"The first charge is that the pleader "in the case of Sokhee Roy fraudulently "applied for a sum of money which his "client had realized before the Mutiny. "The pleader filed an answer denying that "his client had ever received the money. "It was proved that he had, and the Prin-"cipal Sudder Ameen sent the pleader to "the Magistrate. The case came before the "Joint Magistrate, who, crediting the plead-"er's statement that he did not know the "money had been paid, let him off. The "present petitioner urges that conduct such "as this should be noticed, although the "pleader has been let off by the Criminal "Court."

With reference to this charge, the petitioner says:—

"That the first charge is wholly answered "by the fact that your petitioner was ac-"quitted by the Magistrate, nor is there "any proof that your petitioner applied for "that money with a knowledge that his "client had previously realized the same. "Your petitioner, as a vakeel, received in-"structions in regard to that matter, and "acted on the instructions he had received; "and thus your petitioner submits that no "intentional misrepresentation has been "made out, nor could be."

Upon this, the Judge remarks:—

"Reference has only to be made to the "formal decision of the Principal Sudder "Ameen, dated 3rd October 1861, to show "the falsity of this statement."

The Principal Sudder Ameen at that time did not decide that the pleader had been guilty of misconduct. He only found that a *primâ facie* case existed against him, upon which he sent the pleader before the Magistrate upon a criminal charge. The mere order of reference to the Magistrate in a case in which the pleader acted as a pleader, and was not even a party, cannot be taken as conclusive evidence against the petitioner to justify his dismissal for an offence for which he had been tried and acquitted by the Magistrate. But the case did not stop there. On the 22nd December 1862, Mr. DaCosta, the Principal Sudder Ameen, passed an order on a petition against the petitioner. Mr. DaCosta went into the case, and found that the pleader had been acquitted by the Magistrate, and he dismissed the petition, and made the petitioner pay costs. How, then, can anything said by the Principal Sudder Ameen, before the case was heard and finally determined by the Magistrate and Mr. DaCosta in favor of the pleader, be taken as evidence of his guilt?

The pleader, then, has been acquitted by the Magistrate, and acquitted by Mr. DaCosta in 1862; and yet, more than 3 years afterwards, he is convicted by Mr. Birch of an alleged previous offence, merely upon the statement made by the first Principal Sudder Ameen when he sent him before the Magistrate. But Mr. Birch in his letter says: "His acquittal of the criminal charge by "an inexperienced young officer does not "remove the stigma attached to his name "by the formal record of his dishonest "conduct as a pleader by the Principal "Sudder Ameen, and the Judge of the "time should have dismissed him upon the "Principal Sudder Ameen's decision."

I think that Judges, before they act in this way, ought to reflect upon what they are about. The petitioner had obtained his sunnud 20 years ago, and he ought not to be dismissed unless a case were proved against him. It is ruin to a man to be dismissed from the officer of pleader, and deprived of the right of carrying on a profession in which he has been engaged and been supporting himself and his family for a period of 20 years. But he is not only dismissed, but dismissed with a ruined character. Is a man to be ruined in his character and in his prospects in life upon the charge of having committed an offence of which he has been acquitted, merely because a Principal Sudder Ameen 3 or 4 years ago made some remarks against him, and charged him with an offence of which he was acquitted by the tribunal which had jurisdiction to try him? Or is he to be dismissed in 1863 for the very same charge for which the Principal Sudder Ameen had dismissed with costs a petition against him in 1862? If such a proceeding as this is to be upheld, no man would be safe!

The second charge is that, "being the "vakeel of Chowdry Sheo Suhai Singh, who "sued for possession in virtue of a mort-"gage-deed, he purchased the land, the "subject of the suit in another execution "of decree case, and threw up his appoint-"ment of vakeel to Sheo Suhai Singh, "thereby acting dishonestly by his client. "Having purchased the land under mortgage "to the detriment of his client, he is ac-"cused of dishonest and unprofessional con-"duct."

In reference to this charge the Judge, in his order of dismissal, remarked as follows :—

"I consider that the pleader's conduct in "purchasing in execution in another case "a property under litigation, of which liti-"gation he had the management, is of itself "a breach of trust sufficient to render him "deserving of dismissal. His subsequent "reconciliation with his client in no way "affects the dishonesty of his conduct."

The pleader, in his answer to this second charge, says: "That there is no one of the "elements for which a dismissal is provided "by Act XVIII. of 1852. The purchase "of the property in auction jointly with "others, which property was alleged to be "pledged under a bond upon which a suit "has been instituted, is, your petitioner "submits, not fraudulent conduct. Your "petitioner, upon the purchase, withdrew "from the case with notice to his client, who "made no objection. If the bond was "true, the purchase by your petitioner joint-"ly with others of the rights of the "original proprietor would in no way pre-"judice the plaintiff in that suit. The "Judge is wrong both in law and in fact in "saying that your petitioner's conduct was to "the detriment of his client, and that he is "accused of dishonest and unprofessional "conduct, whereas there is no charge pre-"ferred against him by any person."

Now, it is well known that a purchaser at a sale in execution purchases only the rights of the judgment-debtor, and that, if he purchases an estate under mortgage, he does not take it free from the mortgage. When the property in question was put up for sale, the petitioner joined other persons in purchasing it. Of course, his interest as a purchaser would be in conflict with his duty as a pleader for the mortgagee who was endeavouring to establish his mortgage. As a pleader, it would be his duty to endeavour to establish the mortgage. As a purchaser, it would be his interest to get rid of the mortgage, so as to acquire the property free from the mortgage. It is unnecessary, for the present purpose, to determine whether the pleader, having been retained by his client for the purpose of establishing the mortgage, could have abandoned his retainer, and joined with others in purchasing the property. That is not the charge on which the Judge has dismissed him. He dismissed him for dishonest conduct. Remarking on the pleader's answer to the second charge, the Judge says :—

"Reference to the formal decision of the "Principal Sudder Ameen, 15th December "1860, in which he comments with severity "on the pleader's dishonesty, will show "what an officer of his experience thought "of this case, and the pleader ought "to have been dismissed there and then "under Section 2, Act XVIII. of 1852."

But when we look at the decision to which the Judge refers, we find that the Principal Sudder Ameen, having gone into the question as to whether the bond was a genuine document or not, said: "In my "opinion, the bond is not a valid document; "its very existence is founded on fraud and "fiction." Now, the bond is found by this judgment to be a forged bond, and founded on fraud and fiction. The pleader, having been retained to enforce the bond, joined others in purchasing the property. But the pleader does not do it secretly. He gave his client information of his having joined others in purchasing the property as he alleged, and he threw up his retainer with the consent of his client, or at least after notice to the client and without objection. If the pleader had concealed from his client the fact of his having purchased, or if he had purchased *benamee*, and continued to act for his client as if nothing had occurred, and allowed his client to lose his case by having his mortgage set aside, there would have been dishonesty. But where was the dishonesty in throwing up the retainer and becoming the purchaser?

The Principal Sudder Ameen proceeds to remark: "And it is not unlikely that the "first party defendant too had a hand in "this fraud, because to be indifferent after "what had transpired argues complicity in "the fraud. It is certainly surprising for "Sheikh Ameenooddeen Ahmed, pleader of "this Court, to act in the manner he has "done. Although he was plaintiff's plead-"er, still he purchased at an auction-sale the "same property that was pledged in the "bond; afterwards disengaging himself from "pleadership to plaintiff, appears on the side "of the defendant to set aside the bond, and "again having entered into a Razeenamah "with the plaintiff, resumes his pleadership, "and while engaged as his pleader, he "gave his evidence deposing that he cannot "say whether the instalment-bond was "genuine."

By allowing the pleader to resume his pleadership, it would seem that the client did not think that the pleader had committed an act of dishonesty. The Judge does not find that the pleader purchased without

notice to his client or that his client objected to his throwing up the retainer, nor is it anywhere found that the mortgage was concocted and set up fraudulently by the pleader and his client in order that the pleader might become the purchaser at a low rate upon the supposition created that the land sold was subject to the mortgage.

Section 2, Act XVIII. of 1852 provides: "Any pleader practising in the said Courts "shall be liable to dismissal on proof of "his conviction, by a competent Court of "a criminal offence, or on proof of a de-"claration or finding by a competent Court "*in a suit or proceeding to which such* "*pleader was a party*, that he has know-"ingly committed a breach of trust, or for "fraudulent or dishonest conduct in the "discharge of his professional duty."

Surely this was not a suit against the pleader for a breach of trust. This was a suit to enforce a mortgage against the purchaser. If the pleader had kept the retainer, his duty as a pleader would have been adverse to his interest as a purchaser. The suit was brought to determine whether the mortgage ought to be enforced against the pleader as purchaser, and it was settled by compromise. The suit was not brought by the owner of the land for depreciating the sale by setting up a fictitious sale. The owner of the land made no complaint. How, then, can it be said that this was a suit instituted against the pleader in which a Court of competent jurisdiction decided that he knowingly committed a breach of trust? What breach of trust? Surely, not the throwing up of his retainer in a suit to enforce a forged bond. If there was a breach of trust, who was the trustee, and who was the person beneficially interested in the trust?

The third charge against the pleader is that he filed a petition in the name of Mussamut Padmawut Kooer, which petition he was not authorized to file, and that he filed it with fraudulent intent.

In reference to this charge, the Judge says:—

"My predecessor appears to have taken "this case up, but to have let it drop on "the representation of other pleaders of "the Court that they had to rely upon "Mooktars who applied to them to file peti-"tions."

In pronouncing the judgment of the Court in this case dismissing the pleader, the Judge passed from the 2nd to the 4th charge, thereby letting the 3rd charge drop, as his predecessor had done.

In reference to this charge, the pleader says: "That the 3rd charge against your petitioner "was one that had been investigated and "dismissed; your petitioner should not "again be harassed with it. Besides, the "Judge is wrong in saying that the matter "was dropped by the former Judge on the "representation of the pleaders. The party "who had preferred that charge was called "upon to support it by oath, but did not "do so, and therefore the Judge dismissed "the charge."

In commenting on the pleader's answers, the Judge takes up the charge again which he had passed over in his judgment. He says:—

"The lady petitioned the Court that she "had never authorized the pleader to file the "petition he had filed on her behalf, and "which was injurious to her interests. On "this, Mr. Leycester called on the pleader "to defend his conduct (3rd March 1862). "Mr. Tucker then ordered the lady to ap-"pear in Court, and give her deposition. "She of course objected, being a lady of "rank, and asked that a commission might "issue. This was refused, and the case "was struck off, *because the lady would* "*not come into Court.* Reference to Mr. "Leycester's Roobakaree will show what "he thought of the pleader's conduct."

In answer to this same charge, the pleader "goes on further to say: "That your "petitioner had put in his defence in that "matter, and had completely refuted the "charge preferred against him, and further "there is no evidence whatever in this in-"vestigation that your petitioner acted with "a guilty knowledge or was a party to the "fraud, if there was any, for the subsequent "conduct of Mussamut Pudmawut clearly "shows that she was playing 'fast and loose,' "for she compromised the suit afterwards "on the very terms of that petition."

The Judge says that the charge was allowed to drop, because a commission was refused, and the lady would not come into Court. I thought it very unlikely that Mr. Leycester would have refused to issue a commission, and have compelled a lady of rank to appear in Court. The Judge has not ascertained the facts with accuracy. A commission was not refused. The persons who appeared for the lady were asked if she would declare that she never signed the docu ent. They stated that she was away from home, that she could not appear in Court, but that, if a commission were issued, they had no doubt she would prove that she

had not signed. Three weeks were given to them. At the end of that time, they did not appear. But what is very remarkable, the suit was afterwards compromised by the lady on the terms of the petition which the pleader was charged with having filed without her authority. The Judge does not deny that part of the statement of the pleader.

The next charge is the 4th charge, namely, "that the pleader having taken a "Vakalutnamah to file an objection to a "sale, instead of filing it, kept it back, let "the sale proceed, and purchased the pro-"perty sold in the name of his wives and "defendants, and that, in so doing, he was "guilty of dishonest conduct in the dis-"charge of his professional duty."

The pleader answers:—

"The 4th charge is wholly unfounded. "Your petitioner never took any Vakalut-"namah to put in an objection to the sale. "The very petition of 18th November 1862, "by which the complaint as to the irregu-"larity of sale was made on behalf of the "judgment-debtor, places the matter beyond "a doubt that your petitioner refused to "receive the Vakalutnamah. Those were "enough; but your petitioner distinctly de-"nied the fact that he was even offered that "Vakalutnamah, and it has never been "proved that that Vakalutnamah was of-"fered to your petitioner. Further, the "person who is said to have acted as Mook-"tar was not then a Mooktar of the Judge's "Court, and that is clear from that very "petition. Besides, your petitioner was "not a Vakeel of the Sudder Ameen's "Court. The object of that petition is "quite clear from its contents, that it was "only to create evidence of a purchase "for the judgment-debtor himself, and was "nothing but a vituperation, as is usual "among natives Your petitioner would "also submit that there is not a tittle of "evidence in support of such charge."

With reference to the pleader's answer, the Judge merely says that "reference must be made to Mr. Solano's petition." Now, it ought to be known that pleaders are not to be ruined in their character and prospects in life on a mere petition without proof. There was no evidence whatever in this case to prove the charge against the petitioner. No man would be safe if every statement made in a petition filed in the Mofussil Courts is assumed to be true without any evidence given in support of it. In this case, Mr. Solano himself did not even verify his petition. This charge, therefore, like the others, falls to the ground.

The next is the 5th charge, which is "that "the pleader fraudulently and dishonestly "filed a petition on behalf of Mussamut "Moula Bux which she had not authorized "him to file."

On this charge, the Judge, in his order of dismissal, says:—

"As regards his conduct in the last men-"tioned case, it has been commented on "with severity by the Judges of the High "Court in the case of Moula Bux *vs.* "Hossein Jan. The pleader is pronounced "to be wanting in strict integrity, and the "evidence given by him is pronounced "to be utterly unreliable by one of the "Judges."

But it should be borne in mind that the pleader was no party to that suit; and whatever remarks the Judge may have made in that case as to whether he was worthy of credit or not, they were remarks made in a suit *inter alias*, against which the pleader had no means of defending himself. They were probably not even made in his presence. Pleaders and witnesses who are not parties to a suit cannot call witnesses on their own behalf to disprove any charge which may be made against them. If a Judge states his reasons for disbelieving a witness, whether the Judge be a Judge of the High Court or not, his remarks are not sufficient to justify the conviction and punishment of the witness. If a Judge says: "I wholly disbelieve the witness"—or if he goes farther and says: "I believe the witness has perjured himself"—this is not sufficient to warrant the punishment of the witness for perjury without a trial. Is it no punishment, I would ask, for a man to be dismissed from a profession with degradation? Statements made behind a person's back, and which he has no means of answering, are surely not to be used as evidence on which to convict him of a crime or to dismiss him with disgrace from practising his profession. There is only one course to be pursued by Judges in dealing with pleaders guilty of misconduct. They should enter a charge and decide the case according to the evidence. Act XVIII. of 1852, under which the Judge appears to have been erroneously acting, says (Section 2) that a pleader shall be liable to dismissal on proof "of his conviction by a competent Court of a criminal offence," or on proof "of a declaration or finding by a competent Court, in a suit or proceeding to which such pleader

was a party," that he is guilty of a breach of trust.

There has been no proof of a conviction by a Criminal Court of a criminal offence. Nor was the decision of the High Court referred to by the Judge a decision in a suit in which the pleader was a party. It was a proceeding *inter alias*, and could not be taken as evidence against the pleader, or be used as a ground for dismissing him without giving him an opportunity of defending himself.

The third ground mentioned in the Act to justify the dismissal of a pleader is "fraudulent or dishonest conduct in the discharge of his professional duty." But to justify such a dismissal, it is necessary for the Court to find, either from the conduct of the pleader which they themselves witness in Court or from evidence produced before them, that the pleader is guilty of fraudulent or dishonest conduct; and this also must be done after notice to the pleader and allowing him to be heard. The observations, therefore, of the High Court in the case referred to did not warrant the Judge in dismissing the pleader.

The Judge goes on (and I must say that I could scarcely have believed that a Judge of Mr. Birch's judgment and experience could have fallen into such an error as he has done):—

"The pleader bears a bad character in "the Courts of the Sudder Station, *and were "I to search for other evidence against him, "I am informed that it would be forth-"coming*. I consider it unnecessary to do "so."

Could anything be more dangerous or unsatisfactory than for a Judge to allow his mind to be influenced by such considerations as these? or could anything be more improper than for one entrusted with a judicial office, on pronouncing a decision which must necessarily ruin a man's character and prospects in life, to declare and to register against him on the records of his Court that, if he were to search for other evidence, he is informed that it would be forthcoming?

It appears to me that the charges against the petitioner are not made out, and that, until he is proved to have been guilty of dishonest conduct, he must be presumed to be innocent. A pleader is not to be dismissed from the practice of his profession merely upon suspicion and without proof.

The Judge says in his letter: "If the "Court is not satisfied with the expression "of my opinion of the pleader's acts and "character, I would suggest that Mr. "Tucker, and Moulvie Imdad Ali Khan, "Small Cause Court Judge of Tirhoot, be "called upon for their opinions. I am in-"formed that it was Mr. Tucker's intention "to dismiss the pleader."

But pleaders are not to be dismissed merely upon Judges' opinions, nor is one Judge to dismiss a man, because he is informed that it was his predecessor's intention to do so. A pleader, like any other man, is entitled to be heard and to defend himself, like any other person, against any charges against his character or conduct. He is entitled to an open trial, and not to be convicted without proof.

The Judge says further: "His restoration "to office will have a bad effect and neutral-"ize my efforts to purify the Courts." But if a pleader has been dismissed illegally, he must be restored; and, if the Courts are to be purified, they must be purified by lawful means.

Having heard all that the Judge has said in support of the order, I am of opinion that the order cannot be supported, and that it must be quashed.

*Jackson, J.*—I am of the same opinion. As the Judge has taken upon himself to act in this matter, and to dismiss the petitioner from his office of pleader, it must be assumed that he considered himself to be acting, not under the existing law, but under the law in force previous to 1st January last.

Under the repealed Act XVIII. of 1852, there were three causes for which a pleader might be dismissed. One was on account of his conviction by a competent Court of a criminal offence. The second was on account of its being declared or found by a competent Court, in a suit or proceeding to which the pleader was a party, that he has knowingly committed a breach of trust. The third was on account of fraudulent or dishonest conduct in the discharge of his professional duty. The 3rd Section of that Act points out the mode in which either of the two first mentioned causes is to be shown—the first to be shown by the production of an authenticated copy of the judgment containing such conviction—the second, in like manner, to be supported by an authenticated copy of the decision containing such declaration or finding; and, in addition to that, the Court is to be satisfied in each case by proof that such judgment or decision has not been set aside or reversed,

and that the pleader is the party to whom such conviction or decision relates.

The third of these causes is to be established by proof to be taken and set up in the presence of the accused party before the Judge who enquires into the matter.

In this case, there were five charges made against the petitioner and alluded to in the course of the proceedings. The first it may be supposed the Judge considered as coming under the first category, namely, criminal charge. But, although the person was charged with a criminal offence, and made over to the Magistrate, so far from being convicted, I find that he was acquitted, and that the judgment of the civil authority referring him to the Magistrate was afterwards virtually set aside by another Principal Sudder Ameen in the same district.

Then, as to any finding, in a suit or proceeding to which the pleader was a party, that he had knowingly committed a breach of trust, certainly there is nothing of that kind. There are two cases here—the 2nd and 5th instances—the Judge seems to consider may have come within that category. But certainly there were no suits or proceedings to which he was a party, or any decision of a Court of competent jurisdiction that the petitioner had committed a breach of trust. Nor was there any compliance with the procedure prescribed by Section 4 by which he could have been properly convicted. Section 4 says:—

"When any pleader is charged with "fraudulent or dishonest conduct in the dis- "charge of his professional duty by any "person or Court, the Court competent to "make an order for his dismissal shall serve "or cause to be served upon such pleader "a copy of the charge or charges brought "against him, and also a notice of the day "appointed by the said Court for the hearing "of such charge or charges, and such copy "and notice shall be served upon the said "pleader at least twenty clear days before "the day appointed for such hearing, and "on the hearing of the said charge or charges "the Court shall receive all such relevant "evidence as shall be properly tendered by "or on behalf of the Court or party bringing "the charge or charges, or by the said "pleader, and shall proceed to adjudicate "on the said charge or charges in a "summary way, and shall record its deci- "sion and the reasons on which the same "is grounded."

Can it be said that there was any such adjudication as this—that the party was called upon to answer any charges brought against him—that any evidence was tendered to and received by the Judge? He has done nothing of the kind. He has acted merely on opinions contained in a mass of papers, upon charges made long before, some disproved, some dropped, and some not amounting to misconduct at all, such as to warrant a dismissal.

It is a privilege of vakeels, and I think it is very much to the interest of the public at large that they should have that privilege. They are admitted to that honorable profession on proof of their capacity, and of their good moral character. Unless it is shown that they are possessed of the requisite capacity and good moral character, they cannot be admitted; but, when once admitted, unless on proof of specified misconduct, they cannot be removed from that profession.

It appears to me that there has been no such proof on this occasion, and that no ground existed under Act XVIII. of 1852 for the removal of the petitioner.

Therefore I entirely agree in the judgment of the Chief Justice, and in quashing the order passed by the Judge of Shahabad.

The 19th June 1866.

*Present :*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

**Surplus proceeds of sale in execution—Mortgage.**

Case No. 808 of 1865.

*Miscellaneous Appeal from an order passed by Mr. F. B. Simson, Judge of Mymensingh, dated the 13th September 1865.*

Mirza Futeh Ali *alias* Nanna Meah (Judgment-debtor), *Petitioner*,

*versus*

Mr. A. A. Gregory (Decree-holder), *Opposite Party.*

*Messrs. W. E. Peacock* and *C. Gregory* for Petitioner.

*Mr. R. E. Twidale* and *Baboo Onookool Chunder Mookerjee* for Opposite Party.

**The mortgagee of the property sold subject to his mortgage is not entitled to have the surplus proceeds paid to him in satisfaction of the decree which he had obtained upon his mortgage, and upon which he had issued execution.**

We think that the order that the surplus proceeds of the sale under Kally Narain Roy's execution is to be paid out should be set aside. Section 271, Act VIII. of 1859, says: "If, after the claim of the person "on whose application the property was at-"tached has been satisfied in full from the "proceeds of the sale, any surplus remain, "such surplus shall be distributed rateably "amongst any other persons who, prior to "the order for such distribution, may have "taken out execution of decrees against "the same defendant, and not obtained sa-"tisfaction thereof. Provided that, when "any property is sold subject to a mortgage, "the mortgagee shall not be entitled to "share in any surplus arising from such "sale."

Now, the proviso, being annexed to an enactment which gave rights to execution-creditors. must be intended to refer to a mortgagee being an execution-creditor, and is in accordance with the rule laid down in the case cited in argument (Karoo Lal *vs.* Dalaram, Sudder Dewanny Adawlut Reports, 1859, page 953).

We think that Mr. Gregory, being a mortgagee of the property which was sold subject to his mortgage, was not entitled to have the surplus proceeds paid out to him in satisfaction of the decree obtained upon his mortgage upon which decree he had issued execution. The order should be set aside, and he should be ordered to return the surplus proceeds which were paid to him under the order, and proceed forthwith with the execution under his decree by the sale of his interest in the 13 gundahs and 1 kag included in his mortgage. The purchaser purchased only the mortgagor's interest in the property mortgaged to Gregory, and, if Gregory be satisfied out of the surplus proceeds, it may be a question whether his lien will not be destroyed. It is not equitable that the purchaser who purchased and paid for only the mortgagor's interest in this property should hold it released from Gregory's lien. The money brought into Court by Mr. Gregory will remain there until after his execution shall have been executed. In the event of the sale under execution not producing sufficient to satisfy his decree, Mr. Gregory will be at liberty to apply to attach the money in Court in execution for any balance which may remain unsatisfied. In case Mr. Gregory's execution be not executed within one month, the appellants will be at liberty to apply to this Court for an order that the money to be brought in by Mr. Gregory be paid out to them.

The appeal will be decreed with costs.

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The 19th June 1866.

*Present :*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Mesne-profits—Section 11, Act XXIII. of 1861.**

Case No. 102 of 1866.

*Miscellaneous Appeal from an order passed by Baboo Nurottun Mullick, Principal Sudder Ameen of Bhagulpore, dated the 21st December 1865.*

Mussamut Hookum Bibee (Decree-holder), *Appellant*,

*versus*

Khajah Mahomed Moosa Khan and others (Judgment-debtors), *Respondents*.

*Mr. R. E. Twidale* for Appellant.

No one for Respondents.

Mesne-profits for the period during which the decree-holder was executing the decree, and was kept out of possession by the opposite party, may be awarded by the Court under Section 11, Act XXIII. of 1861.

In this case, the decree of this Court, dated 13th December 1864, gave mesne-profits for six years, not including the years 1271 and 1272.

The petitioner claimed the mesne-profits for those years during which petitioner was executing the decree, and was kept out of possession by the opposite party.

The Principal Sudder Ameen refused them for these years on the ground that the mesne-profits of those years were not included in the decree.

The petitioner appeals here, and urges that, under Section 11, Act XXIII. of 1861, it was competent for the Lower Court to adjudicate upon any question of mesne-profits payable in respect of the subject-matter of suit between date of institution of suit and execution of decree.

These mesne-profits for 1271 and 1272 were matters, we think, coming under the purview of this Section.

We, accordingly, reverse the decision of the Principal Sudder Ameen, and decree this appeal.

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The 20th June 1866.

*Present :*

The Hon'ble H. V. Bayley and E. Jackson, *Judges*.

**Limitation—Execution of decrees in force at time of passing Act XIV. of 1859.**

Case No. 69 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Backergunge, dated the 25th November 1865, affirming an order passed by the Moonsiff of that District, dated the 21st August 1865.*

Doorga Churn Roy and others (Decree-holders), *Appellants*,

*versus*

Dino Moyee Debia (Judgment-debtor), *Respondent*.

*Baboo Bungshee Dhur Sein* for Appellants.

*Baboos Romesh Chunder Mitter* and *Peare Lal Roy* for Respondent.

On the first application to execute, after the passing of Act XIV. of 1859, a decree in force at the time of the passing of that Act, Section 21 applies; but on the next and subsequent applications, the rule contained in Section 20 is to be followed.

The Judge is in error in the view he has taken of the law. Section 21, Act XIV. of 1859, does not lay down that all processes of execution on judgments in force at the passing of the Act must be finally closed within three years after the passing of that Act, and that the decree is, in the words of the Judge, dead after that time has elapsed. The words "nothing in the preceding Section shall apply to any judgment, decree, or order in force at the time of the passing of the Act" refer to the first execution which is taken out on a judgment in force at the passing of the Act. But after that execution has been taken out within the term prescribed in Section 21, further proceedings can then be taken in execution unless the provisions of Section 20 bar them. The phraseology of these Sections may admit of some doubt in their interpretation, but we have no doubt that the intent and spirit of the law is as above stated. The decision quoted at page 17, Miscellaneous Appeals, Volume V., Weekly Reporter, takes the same view of the law.

The Judge's orders are reversed and the case remanded.

It is said that some other questions on the point of limitation have been raised. If this is so, the Judge will decide those questions.

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The 20th June 1866.

*Present :*

The Hon'ble H. V. Bayley and E. Jackson, *Judges*.

**Limitation—Enforcement of decree.**

Case No. 78 of 1866.

*Miscellaneous Appeal from an order passed by the Officiating Judge of Dacca, dated the 1st December 1865, affirming an order passed by the Sudder Ameen of that District, dated the 23rd August 1865.*

Ram Coomar Chowdhry (Judgment-debtor), *Appellant*,

*versus*

Brojessuree Chowdhrain (Decree-holder), *Respondent*.

*Baboos Kalee Mohun Doss* and *Romesh Chunder Mitter* for Appellant.

*Baboo Pearee Lal Roy* for Respondent.

A suit by a decree-holder to set aside orders passed under Section 246, Act VIII. of 1859, and to declare his right to sell a certain estate as the property of his judgment-debtor in execution of his decree, is a proceeding, within the meaning of Section 20, Act XIV. of 1859, to enforce such decree.

THE question raised in this case is whether a suit, preferred by a decree-holder to set aside orders passed under Section 246. Act VIII. of 1859, and to declare his right to sell a certain estate as the property of his judgment-debtor in execution of his decree, is a proceeding within the terms of Section 20, Act XIV. of 1859, to enforce such decree. The Judge has held that it is a proceeding keeping the decree in force. A judgment of this Court, Miscellaneous Appeal No. 445 of 1864, to be found in page 3, Weekly Reporter, Volume II., has ruled that such a suit is in furtherance of the decree. We concur with the Judges who gave that judgment. The law requires in general terms that some proceeding shall be taken to keep the decree in force. It does not say that that proceeding must be taken in the Execution Department. If proceedings have been carried out in that Department as far as the law allows of it, and then take the shape of a regular suit to contest the orders passed in the Execution Department, that suit is also a proceeding keeping the decree in force. This has been the course of the proceedings in this case.

We dismiss this appeal with costs.

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The 21st June 1866.

*Present:*

The Hon'ble L. S. Jackson and W. Markby, *Judges*.

**Security in execution of decree—Appeal.**

*Petition of Bhugwan Chunder Ghose and Gobind Chunder Ghose, praying that they be absolved from giving further security, and that the execution of a decree passed against them be stayed till the decision of Her Majesty in Council in another case appealed by them.*

*Baboo Gopal Lal Mitter* for Petitioners.

The High Court cannot, under Section 36, Act XXIII. of 1861, direct the Lower Courts to take security in the execution of a decree against which no appeal has been preferred to it.

WE think that the Court has no jurisdiction to make the order asked for by the petitioner. The case is one of a decree which is being executed by the Zillah Court of Jessore. In that suit no appeal has ever been preferred to this Court, and the suit is not in any shape before the Court. Section 36, Act XXIII. of 1861, gives authority to the Court which pronounced the decree to require security to be given in the execution of a decree against which an appeal has been preferred, and also provides that the Appellate Court may in any such case (*i.e.*, a case in which an appeal has been preferred) direct the Court which pronounced the decree to take such security. But that does not enable this Court, when it has no appeal before it, to make any such order.

The application must therefore be refused.

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The 21st June 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges*.

**Execution of decree—Irregularity of form in application—Interest—Limitation.**

Case No. 86 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Cuttack, dated the 22nd December 1865.*

Chowdhry Purladh Mohapattur and others (Decree-holders), *Appellants*,

*versus*

Chowdhry Junardun Mohapattur (Judgment-debtor), *Respondent*.

*Baboo Romanath Bose* for Appellants.

*Baboos Obhoy Churn Bose* and *Gopeenath Mookerjee* for Respondent.

Section 15, Act XXIII. of 1861, does not authorise a Judge to reject an application for the execution of a decree, on the ground of an irregularity in form. Where

the application is irregular, the Judge should either return it immediately to the applicant for correction, or with his consent cause the necessary correction to be made.

In this case, the Judge, after the lapse of six months, rejected the original application on the ground that the decree-holder asked for costs and interest on costs, whereas on enquiry it was found that the decree did not specify interest on costs. The decree-holder thereupon presented a corrected application which the Judge rejected as barred by limitation.—HELD that interest was chargeable on costs whether actually stated in the decree or not; and that, even if the Judge was right in ruling that interest could not be paid, the second application must be considered merely a correction of the original application, and was therefore not barred by limitation.

THIS appeal is preferred by a decree-holder from the orders of the Judge of Cuttack, holding that execution of the decree is barred by the Law of Limitation, no proceeding to enforce execution having been taken within three years of the present application. The appellant obtained a decree on the 19th February 1861. He took out execution of so much of the decree as regarded possession of the land decreed on the 5th June 1861. He again applied for execution as respects the costs due to him in September 1861, but allowed this execution to be struck off on default on the 21st February 1862. On the 7th January 1865, he again applied for execution to recover his costs and interest. The Judge called for a statement from his Office Amlah as to whether the application was correct in form. This statement was not furnished until May, and no order was passed upon it until the 11th July, when the application was rejected. The appellant renewed his application on the 20th July, and the Judge held that it was then barred by the Law of Limitation.

The Judge says that the mere presenting an application which was irregular, and which the Court could not act upon, was not such a proceeding as would keep the decree in force.

The question in this case is not whether a mere application without any further steps will keep a decree in force, because there is every reason to presnme that the decree-holder was prepared to take further steps. but in consequence of the extreme delay of the Judge to pass orders on his application, he was unable to take any such steps for six months. It would be extremely hard if such delay is held prejudicial to a party in the suit. The application of the 7th January 1865 was clearly in time. If that application was irregular, the Judge should, under Section 15, Act XXIII. of 1861, either have returned the application for correction to the person making it, or, with the consent of such person, have caused the necessary correction to be made. The law does not authorize the Judge to reject the application. The Judge should either have returned the application for correction as soon as it was put in, or, if he could not pass an order upon the application for six months until any further application was barred by limitation, he should have then required the application to be corrected. There has been in this case no *laches* on the part of the decree-holder. There has been excessive delay on the part of the Court in passing an order on his application, and the order ultimately passed seems to have been contrary to the law. The only irregularity in the application was that the decree-holder asked for costs and interest on the costs, and on enquiry it was found that the decree did not specify interest on the costs. It has been ruled in this Court that interest is chargeable on costs whether actually stated in the decree or not. If, however, the Judge was right in ruling that interest could not be paid, he should have required that the application so far should be corrected, and not, after keeping the decree-holder in ignorance of what order would be passed on his application for six months, and thereby allowing limitation to bar any further application, have then struck off and rejected the application.

We are of opinion that the application of the 11th July 1865 must be considered merely a correction of the application of 7th January 1865, having been put in within a few days of the date on which the order pointing out wherein correction was required was passed; and, in this view, we think that the appellant, decree-holder, was in time, and, reversing the Judge's decision, remand the case in order that the execution may be allowed to proceed.

We trust that the delay which appears in these proceedings of six months in passing orders on an application for execution is not usual in the Judge's Court. Orders on such applications should be passed immediately the applications are made, or, at the utmost, within a day or two of the presentation of the applications. If the regularity or irregularity of form of the application is a matter referred to the head officer of the Court, that officer should be responsible for reporting upon it to the Court without delay. No notice has been taken in this case of his keeping the application without any report for four months, and of his even then not bringing the matter before the Judge, but allowing it to remain pending for another two months.

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The 23rd June 1866.

*Present:*

The Hon'ble L. S. Jackson, *Judge.*

**Time for Appeal to Privy Council—Valuation—Evidence.**

*Petition of Kishen Bundhoo Roy and Kishen Chand Roy.*

*Baboo Kally Prosunno Dutt* for Petitioner.

*Primâ facie* evidence to show that the value of the property (which was the subject of an appeal to the Privy Council), though stated at less, was in reality more, than 10,000 rupees, not having been tendered until after the six months allowed by law within which the Court can receive applications of this nature, the Court held that it had no jurisdiction to admit the appeal.

PETITIONER came before this Court in March last with an application to be allowed to appeal to Her Majesty in Council. The value of the property in suit had been stated at Rs. 523. But it was alleged that the value was in reality much larger. No *primâ facie* evidence generally of such value (*i.e.*, of its being above the value of 10,000 rupees) was at that time shown, and the Court could not make any order. The petitioner now comes up again, and, tendering what he considers *primâ facie* evidence of the value of this property, renews the application for leave to appeal. But the six months allowed by law within which this Court can receive applications of this nature having elapsed, it appears to me that I have no jurisdiction to admit the appeal. The petitioner must, therefore, go before the Privy Council for leave to appeal.

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The 23rd June 1866.

*Present:*

The Hon'ble L. S. Jackson, *Judge.*

**Appeal to Privy Council—Procedure on admission of.**

Petition of Ramnath Chowdry and Rughoobur Dutt Chowdry.

*Mr. R. E. Twidale* and *Baboo Onookool Chunder Mookerjee* for Petitioner.

When an appeal to the Privy Council has been admitted, all that the High Court can do is to proceed, under Section 4, Regulation XVI., 1797, to stay the execution of the decree on the appellant giving security for the due performance of the decree of the Privy Council. But the Court cannot continue an attachment of money made under Regulation II., 1806, during the pendency of the suit in the Zillah Court after the decree of the Zillah Court has been reversed by the High Court on appeal.

THIS petition contains two prayers. One is for a stay of execution of the decree against the petitioner, pending appeal to Her Majesty in Council. The second is with respect to a sum of 13,000 rupees which was in deposit standing in the name of the defendant (Respondent to England), which sum on the application of the plaintiff (now Appellant) had been attached under the provisions of Regulation II. of 1806 during the pendency of the suit in the Zillah Court. That sum of money, on the decree of the Zillah Court having been reversed by the High Court on appeal, the defendant had applied to take out, and the petitioner's prayer is that the injunction or attachment may still continue. It appears to me that this Court has no jurisdiction to grant the latter part of the prayer. All that the Court can do, when an appeal to Her Majesty in Council has been admitted, is to proceed under Section 4, Regulation XVI. of 1797, to stay the execution of the decree on the appellant giving security, or to order that the respondent, in executing his decree, shall give security for the due performance of the decree of Her Majesty in Council.

In conformity, therefore, with the first prayer, let a rule *nisi* calling upon the opposite party to show cause why execution should not be stayed on the appellant giving security. The rule to be returnable within 15 days. The other part of the prayer is rejected.

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The 25th June 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Limitation—Execution of decree.**

Case No. 81 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Backergunge, dated the 18th November 1865, affirming an order passed by the Sudder Ameen of that District, dated the 29th July 1865.*

Kool Chunder Chuckerbutty (Decree-holder), *Appellant,*

*versus,*

Kumul Chunder Roy and others (Judgment-debtors), *Respondents.*

*Baboo Woomesh Chunder Banerjee* for Appellant.

*Mr. C. Gregory* for Respondents.

Proceedings taken in execution of decree under either Section 20 or Section 21, Act XIV. of 1859, are without authority of law unless taken within the time allowed by law.

THIS is an appeal from the orders of the Judge of Backergunge rejecting decree-holder's claim to execute his decree on the ground that such execution is barred by Section 21, Act XIV. of 1859. The decree was in force at the time of the passing of the Act; *i.e.*, in 1859. No attempt was made to execute it until 1863, and it seems clear that, if the judgment-debtor had then urged that execution was barred under the provisions of Section 21, Act XIV. of 1859, the execution must then have been declared to be barred by that law. But no such objection was then taken; execution was proceeded with, and property was attached and sold in 1864. The decree-holder now claims to carry on further execution-proceedings against other property. But the Judge has dismissed the claim on the ground that the execution-proceedings in 1863 and 1864 were irregular, inasmuch as they were taken out after the period allowed by the Law of Limitation.

This view of the law is objected to on special appeal. The respondent, in support of the Judge's decisions, refers to the judgment of this Court in Miscellaneous Appeal No. 713 of 1865, Weekly Reporter, page 20, Volume V.

There is one distinction between the two cases; in that now before us, the proceedings in execution after the period allowed by law were not ineffectual, whereas in the case quoted they were abortive. But we think that the result of the proceedings cannot determine whether they were authorized under the law. The Judges who tried the appeal above alluded to were of opinion that proceedings in execution in a decree in force at the time of the passing of the Act are "without authority," unless such proceedings are commenced within three years of the passing of the Act. We concur in that view of the law. We consider that the terms of both Sections 20 and 21, Act XIV. of 1859, are imperative. Proceedings taken in execution of decree under either Section after the time allowed by law cannot be held to be authorized by the law. If, as in this case, a decree-holder is allowed to carry on such proceedings without objection on the part of the judgment-debtor and the Court, all that can be said is that he is fortunate if he has recovered any portion of his decree in such proceedings; but those proceedings remain, nevertheless, proceedings conducted without authority of law. We think the Judge was right in his determination on this point.

It is then said that the Judge has omitted to consider certain proceedings taken in execution in the year 1861, which the decree-holder states kept his decree in force, and which the judgment-debtor states were carried on behind his back and without notice to him. The Judge appears not to have made any mention of these proceedings in his present judgment.

We dismiss the appeal, but remand the case for an order on the points not decided in the Judge's previous judgment. Costs of this appeal to follow the final judgment.

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The 25th June 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Appeal (from favorable decision)—Guardians of Minors—Limitation—Keeping alive decree (by proceeding taken by one of several defendants)—Attachment and sale in execution (as between separate defendants).**

Case No. 106 of 1866.

*Miscellaneous Appeal from an order passed by Baboo Peary Mohun Banerjee, Principal Sudder Ameen of Bauleah, in Rajshahye, dated the 26th January 1866.*

Mrs. Mary Eliza Stephenson and another (Objectors), *Appellants,*

*versus*

Unnoda Dossee (Decree-holder), *Respondent.*

*Mr. R. V. Doyne* and *Baboo Nil Monee Sein* for Appellants.

*Baboos Dwarkanath Mitter, Romanath Bose,* and *Kishen Dyal Roy* for Respondent.

There is nothing in strict law to prevent a party, acting for himself or through his guardian, from appealing against a decision in his favor.

A guardian's acts may appear hostile to his ward, and yet be done in perfect good faith.

The law makes no distinction between the different defendants liable under a decree; the decree is kept wholly in force if any effectual proceeding is taken under it within the prescribed time to keep it alive. But where a decree, though nominally in one document, really contains separate decrees against separate individuals, the Law of Limitation may be put into force in execution against the different defendants as if there were separate decrees.

Where a decree directs the sale of *A's* property first and then of *B's*, if the decree-holder is unable, from opposition, to sell *A's* property, and proceeds against *B's*, and cannot realize his decree therefrom, he has not lost his right to attach and sell *A's* property.

THIS appeal arises out of execution proceedings in a suit preferred by Baranoshee Banerjee against Mr. H G. French, both personally and as guardian of his minor daughter. The particulars of this suit, and the decree passed in it on appeal to the Sudder Court, are detailed at page 332 of the Sudder Dewanny Adawlut Reports for 1857. The following was the judgment :—

"Suit laid at Rs. 12,276, principal and "interest on a bond debt.

"This suit was brought for the above "sum on a bond executed by Mr. Henry "Gloster French, as *Woolee* and *Woossee* "of his minor daughter, Miss French, be-"ing balance of the purchase-money of a "putnee granted by Issur Chunder Mus-"tuffee, zemindar, for the use and benefit "of Miss French. The bond also recites "that one-half of the putnee purchased is "pledged as security for the debt, which is "payable after sixty days, and in default "of payment, the half share so pledged is "first liable to be sold in liquidation there-"of, and afterwards all property owned and "possessed by Mr. French himself.

"The Principal Sudder Ameen, on the "ground that Mr. French admitted having "executed the bond, after overruling some "objections as to his personal liability "under the contract, decreed the whole "amount against him as a money-debt.

"Mr. French has appealed, and his plead-"er, aftar submitting some pleas and objec-"tions which were found not to be "included in his written grounds of appeal, "confined his appeal to the point that, as "the debt was obviously contracted by Mr. "French for the purchase of a putnee ex-"clusively intended for the use and benefit "of his minor daughter, and for the security "of which debt the half share of the "putnee was specially pledged, that the "decree be allowed to declare the liability "of the property so pledged in the first "instance, and the decree-holder be per-"mitted to proceed against Mr. French only "for such balance of the decree as may "not be satisfied by the sale of the property "pledged.

"As the pleader on the other side "signified to the Court that he should be "satisfied if the Lower Court's decree be to "this extent amended, it is therefore "ordered that the amount decreed by the "Principal Sudder Ameen be confirmed: "but, with reference to the above arrange-"ment, the decree-holder will first proceed "to satisfy the decree by sale of the pro-"perty pledged, so far as that property may "be liable under the terms of the bond "executed by Mr. French as *Woolee* and "*Woossee* of his daughter, and any balance "still remaining will then be levied from "Mr. French unreservedly until the whole "amount of the decree be realized. Costs "on the appellant.

It appears that, in execution of this decree, Baranoshee Banerjee attempted to attach and sell the eight annas putnee talook referred to in the judgment, but was successfully opposed by one Kishen Coomar Mitter, who then satisfied the Court that he was in possession of the putnee, and the result was that the putnee was released from attachment. Subsequently, Miss French, then Mrs. Stephenson, brought a suit to obtain possession of this putnee from Kishen Coomar Mitter, and obtained a decree on the 30th January 1865. Baranoshee Banerjee is now again attempting to execute his decree of the 5th March 1857 against the 8 annas putnee talook, and he is now opposed by Mrs. Stephenson. She urges that she is not liable under the decree, and that her estate cannot be sold to satisfy it; and that, even if the estate is liable under the terms of the decree, execution is barred under the Law of Limitation, Section 20, Act XIV. of 1859.

The Principal Sudder Ameen of Rajshahye, before whom the execution proceedings in the Lower Court were conducted, seems to have considered that Mrs. Stephenson was not a party to the original suit, but was a third party raising objections to the attachment of the 8 annas putnee talook in execution of the decree against her father. This may be gathered from the form of his judgment on the objections put forward by Mrs. Stephenson. But if that was his opinion, he should have, in his enquiry, confined himself solely to the points stated in Section 246, Act VIII. of 1859. If, on the other hand, he considered that it was sought to attach this estate against Mrs. Stephenson as a party to the original suit, he should

then have confined his enquiry, *first*, to the liability of Mrs. Stephenson under the decree, and, *secondly*, the liability of the estate to attachment and sale under that decree. Instead of taking either of these courses, the Principal Sudder Ameen seems to have tried the question as if it was before him in a regular suit preferred by Baranoshee Banerjee against Mrs. Stephenson.

The first point which has to be settled is whether the decree-holder has sought out execution against Mrs. Stephenson as a party liable under the final decree of the Sudder Dewanny Adawlut, or not. Baboo Dwarkanath Mitter, for the decree-holder, states that his contention is that Mrs. Stephenson was a party to the original decree. Mr. Doyne, for appellant, contends that she was not. His argument is that Baranoshee Banerjee's claim against Mr. French as his daughter's guardian, and, therefore, against the daughter, was dismissed by the Principal Sudder Ameen before whom it was tried; that Baranoshee Banerjee did not appeal from that decision; that, as against the daughter, no person but Baranoshee Banerjee could have appealed; that Mr. French did appeal against so much of the decision as affected him, but that Mr. French, as defendant, could not appeal as regards any orders passed in the suit against his co-defendant,; that even if he did appeal against those orders, any judgment passed on such an appeal is null and void, as his daughter was not represented on that appeal, and no attempt was made to bring her before the Court; that the interests of Mr. French, at the time his appeal was brought, were directly hostile to those of his daughter; that, in fact, he was attempting to exonerate himself from the decree obtained by Baranoshee Banerjee, and to throw at least a portion of the burden of it upon his daughter, who had been already wholly exonerated from it; and that, therefore, whatever decree may have been passed on the appeal of Mr. French may stand good as between Baranoshee Banerjee and himself, but cannot in any way affect the interests of Mrs. Stephenson; and that it follows that plaintiff's claim to bring in Mrs. Stephenson as liable under the decree must be rejected, and the property released from attachment.

Baboo Dwarkanath Mitter, on the other side, has contended that Mrs. Stephenson was before the Court represented by her guardian, that her guardian appealed on her behalf as well as his own, and that, on the appeal, all the parties entered into certain arrangements upon which a decree was passed to which decree Mrs. Stephenson was a party, and, under it, 8 annas of the putnee talook, now sought to be attached, is liable to be sold.

We must, in deciding this point, bear in mind that we are not now trying the question of the liability of Mrs. Stephenson and of her putnee talook in a regular suit, but have solely to enquire whether under the terms of the decree passed by the Sudder Court in 1857, that Court declared her liability. It is admitted that no money-decree was passed against Mrs. Stephenson for the amount due on the bond, and that she was not then declared personally liable, even if the sale of the estate did not satisfy the decree; but it is said that the liability of the estate made over to her was distinctly declared. We think there can be no doubt that the 8 annas putnee talook Zillah Sewal was declared liable to be sold for the realization of the amount due on the bond. It was not only made liable in so many words, but it was ordered that the decree-holder "will first proceed to satisfy the decree by the sale of that property." And we think also that Mrs. Stephenson was then before the Court as a party to the appeal. It is true that, in the published judgment, there is no mention made of Mr. French having appealed from the decision of the Lower Court in the capacity of her guardian, as well as on his own personal account; but the vernacular proceedings, such as the memorandum of appeal and the decree founded on the judgment, show that Mr. French preferred the appeal as his daughter's guardian. It is said that, as the daughter had been exonerated in the Lower Court, she could not appeal. We see nothing in strict law to prevent any person from appealing against a decision of a Lower Court even though that decision may have been in favor of that party. If this can be done by any party acting for himself, it can be done by a guardian acting for his ward. But whether it was correct in law or not, it certainly was done in this case in the late Sudder Court, and was allowed. It cannot be said that Mrs. Stephenson was not represented in the appeal because she was represented by her guardian. It may be that, looking to the strict legal bearings of the interests of the father and daughter as affected by the decree of the first Court, irrespective of their natural position and of all other interests, the appeal of Mrs. Stephenson's guardian was hostile to her interest; and it may be that, under such circumstances, the proper legal course to pursue in an English Court would have

been to confide the interests of Mrs. Stephenson, who was then a minor, to some third party, and that the Court should have, in determining the appeal, looked most carefully to the interests of the ward. But these are all questions which, though they might with great force be urged in review of the judgment of the late Sudder Court, cannot, we think, now be considered in execution of the decree passed upon that judgment. It is quite possible, however, on the other hand, that, looking to the interests of the two parties, it may not have been the most advisable or most beneficial course for the daughter to have pursued to act against her father and stand upon her strict legal rights. We are far from certain that the late Sudder Court did not, in deciding the appeal, pay every attention to the interests of the ward. We think we should presume that that Court did consider these points; and in declaring the 8 annas of the putnee talook liable for the payment of the money with which a large portion of it at least had been purchased, we may fairly presume that it was passing a decree of the highest equity. Mr. French's acts, looked at in the strictest legal bearings, may have in appearance been hostile to his daughter, but they may also have been carried on in the most perfect good faith. However this may be, we are precluded, at this stage of execution, in interpreting this decree from looking behind it and ascertaining under what circumstances it was passed, and deciding whether it was a proper decree, or not, under those circumstances. We must look to the decree alone, and there we find that, under an agreement entered into between Baranoshee Banerjee on the one hand, and Mrs. Stephenson, then represented by her guardian Mr. French, on the other, the decision of the first Court was amended, and the 8 annas putnee talook Zillah Sewal was declared and decreed to be primarily liable for the payment of the money due on the bond. That decree founded on that agreement stands good unless set aside in review, and we must enforce it.

The next point taken up by Mr. Doyne is that, even if Mrs. Stephenson is liable under the decree so far as this 8 annas of her putnee talook is concerned, still further execution of this decree against her is barred under the Law of Limitation, Section 20, Act XIV. of 1859, as no proceeding has been taken to enforce that decree against her within three years next preceding the present application. It is said that her interests and those of Mr. French are distinct, and that, though execution may have been carried on against Mr. French within the past three years, those proceedings will not keep alive the decree against Mrs. Stephenson. We cannot concur in this argument. The law makes no distinction between the different defendants liable under a decree. The decree is kept wholly in force if any proceeding is taken under it within the prescribed time to keep it alive. It may be that some decrees, though passed nominally on one document, are in reality separate decrees against separate individuals. In such cases, the Court might, and probably would, consider them to be separate, and, in execution, put the Law of Limitation into force against the different defendants as if they were separate. But we do not look upon this decree as containing separate decrees against Mr. French and against his daughter. It is for a certain sum of money for which the estate standing in Mrs. Stephenson's name, whether belonging to Mrs. Stephenson or Mr. French, is, on their own consent, declared to be primarily liable, and all property found in Mr.. French's possession is also liable. As far, then, as the estate was concerned, Mrs. Stephenson and H. G. French were jointly liable. It does not follow that, because in a suit between Mrs. Stephenson and Kishen Koomar Mitter that estate has been declared to be the property of Mrs. Stephenson, the same result would have followed if Baranoshee Banerjee had contested her title. All such questions were waived, and the estate for which the debt due on the bond was incurred was held liable to the repayment of that debt in the presence and on the joint consent of Mrs. Stephenson and Mr. French. The decree-holder did his utmost to take out execution against the estate, but failed from no *laches* on his part, and he continued to execute his decree against Mr. French's property. He thereby kept the decree in force as against both Mr. French and Mrs. Stephenson.

Mr. Doyne then finally urged that the decree-holder, being required under the decree first to sell the estate of Mrs. Stephenson, and then to act against the property of Mr. French, has lost his right to take further steps against the estate by proceeding against Mr. French's property. This argument also, we think, is not sustainable. We read the terms of the decree declaring the putnee talook as first liable, to have been inserted solely in the interest of Mr. French and to protect him from

execution until the decree-holder had done his utmost in satisfying himself from the sale of the putnee talook. If that putnee could not be proceeded against, then Mr. French was personally liable. If it could be proceeded against, Mr. French might object to his property being assailed until that putnee had been sold. The decree laid down that the putnee was primarily liable, that that could always be taken and sold in execution, and, as long as it could be so taken, Mr. French's property could not be taken. The decree-holder does not lose his right to attach and sell the estate, because, being unable, owing to opposition from the parties holding the estate, to sell it, he then went upon the other alternative of the decree. He realized what he could from Mr. French personally, and, when the estate was again available, took proceedings against it. We think he was justified in these proceedings under the terms of the decree.

For these reasons, we confirm the order passed by the Principal Sudder Ameen, and dismiss this appeal with all costs.

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The 28th June 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Security—Hindoo widow with Life-interest—Privies—Consent of immediate reversioner (during widow's lifetime).**

Case No. 137 of 1866.

*Miscellaneous Appeal from an order passed by Baboo Koonj Lal Banerjee, Principal Sudder Ameen of the Twenty-four Pergunnahs, dated the 4th December 1865.*

Mr. G. Rodgers (Decree-holder), *Appellant,*

*versus*

Bama Soonduree Debia (Judgment-debtor) and others (Objectors), *Respondents.*

*Baboo Baneenath Bose* for Appellant.

*Baboo Bhowanee Churn Dutt* for Respondents.

Where a Hindoo widow held und a decree only a life-interest in certain land or in the money which subsequently represented that land, any one holding in her place the same decree can have no higher position than she had and cannot have the money without security. Under such a state of facts, the consent of the immediate reversioner, during the widow's lifetime, cannot dispense with the necessity of taking such security.

THE question in this case is whether the petitioner Rodgers is entitled to draw from the treasury of the Collector of the 24-Pergunnahs a sum of 25,000 rupees, deposited there as compensation for certain lands taken for public purposes, these lands being then the estate of one Bama Soonduree, a Hindoo widow.

Rodgers subsequently obtained the rights of the decree-holder in a decree held by Bama Soonduree, and in execution sought to take this money. His request was rejected by the Principal Sudder Ameen of the 24-Pergunnahs, Baboo Grish Chunder, on the 25th July 1864, on the ground that Rodgers could not have the money without a judicial determination of the rights of the reversioners.

On appeal, this Court, on the 13th December 1864, held as follows:—

"We confirm the order of the Lower Court "in this case, *though not on the same* "*ground.* We find that the decretal order "provided that Rodgers might have the "25,000 rupees on giving security. This "order was clearly for the protection of the "reversioners; and, without the consent of "the reversioners, the terms of the decree "cannot be overstepped. Now, we find "that Mon Mohinee is the *immediate* rever-"sioner, and will succeed to a life-interest "in this property after Bama Soonduree, "and she has not consented to the money "being made over to Rodgers without "security; and, in the absence of her con-"sent, that of the more distant reversioners "cannot be admitted as entitling Rodgers "to receive the money on any other terms "than stated in the decree."

Rodgers subsequently did obtain the consent of Mon Mohinee, the immediate reversioner, and again sought to take the money, Rs. 25,000, without security.

The present Principal Sudder Ameen, Baboo Koonj Lal, in the decision now appealed from, has again refused the request, on the ground that Mon Mohinee might cease to be the immediate reversioner before

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Bama Soonduree's death, and that there might thus be other contending reversioners, without whose consent, or a judicial determination of their rights, it would not be proper to allow Rodgers to receive the money.

From this decision Rodgers appeals, and it is urged on his behalf that, by *this* Court's order before cited, the only condition which Rodgers had to fulfil in order to obtain the money was to get the consent of Mon Mohinee, and that, as he has done this, the Lower Court was wrong in refusing him the payment of the money.

On the other hand, it is contended that Rodgers cannot in any way be in a better position than Bama Soonduree, whose place he takes; and that, by the original decree of the Zillah Court (which all parties admit is final, as never having been appealed), it was ordered that Bama Soonduree would only have the life-interest of a Hindoo widow, without power to use or alienate, except under the restrictions imposed by the law on Hindoo widows; that thus Rodgers cannot take and use the sum of Rs. 25,000 without security, but can only have the interest of it. Further, it is urged that this Court, in its order above cited only, ruled the *one* point before it *then*, *viz.*, that, at any rate, without the consent of the immediate reversioner, Mon Mohinee, Rodgers could not take the money without security; and that this Court did not go further into the case, and did not order that by no other possibility could any obstacle legally exist to prevent Rodgers having the sum in question.

We are of opinion that this contention of the opposite party is a valid one.

Bama Soonduree's rights were clearly restricted by the original (and now final) decree to the *life-interest* of a Hindoo widow. She could, as such, only have held either the land, or the money which subsequently represented the land, as a Hindoo widow, and could not therefore have the absolute use or disposal of the one or the other, but could only so far avail herself of the money as might be compatible with the restricted life-interest of a Hindoo widow.

If, then, Bama Soonduree's rights were restricted to these limits, Rodgers, holding in her place the same decree, can have no higher position than she had; and, this being so, we do not think he can have the Rs. 25,000 without security. We accordingly dismiss this appeal with costs.

The 29th June 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Certificate of Administration—Estate of Minor—Suit by Guardian.**

Case No. 141 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Jessore, dated the 4th January 1866.*

Saroda Soonduree Dossee, *Appellant,*

*versus*

Tarinee Churn Chowdhry, *Respondent.*

*Baboo Onookool Chunder Mookerjee* for Appellant.

*Baboos Sreenath Doss* and *Dwarkanath Mitter* for Respondent.

A person is entitled to a certificate of administration, under Act XL. of 1858, to the estate of her minor son with a view to bringing a suit to recover the estate of his grandfather.

THIS is an appeal from the orders of the Judge of Jessore, on an application for a certificate of administration to the estate and property of a minor under Act XL. of 1858.

The application was made by one Saroda in behalf of the estate of her minor son Seetul Chunder, and the special cause of making the application is stated to be that Saroda intends to institute a suit on the part of the minor regarding the estate of his grandfather Mohim Chunder, now in the possession of his widow, who has set up an adopted son.

The Judge has refused to give the certificate. His judgment is that "Section 3, "Act XL. of 1858, says that every person "who shall claim a right to have charge "of property in trust for a minor may apply "to the Civil Court for a certificate of "administration. This right, however, the "petitioner herself admits, does not exist at "present. She admits that, as long as "Mohim Chunder's widow Parush Monee "is alive, she cannot touch the property. "I consider that this admission puts Sharoda "out of Court, and reject her application."

Special appellant urges that, under Section 3, Act XL. of 1858, she is entitled to a cer-

tificate to enable her to bring a suit, if so advised, and, if she does not obtain one, her claim to bring a suit may be rejected.

Baboo Dwarkanath Mitter, for respondent, Parush Monee, urges that the application is for a certificate to the estate of Mohim Chunder; that Parush Monee is his next heir and the person entitled to that certificate; that Saroda can sue without obtaining any certificate under the proviso to Section 3, Act XL. of 1858; and that Saroda does not claim to have the right of administration to any other estate of the minor except that of Mohim Chunder.

We think that the Judge has completely mistaken the law, which cannot be interpreted as the respondent's pleader has attempted to interpret it.

The following are the terms of Section 3, Act XL. of 1858:—

"Every person who shall claim a right "to have charge of property in trust for a "minor under a will or deed, or by reason "of nearness of kin or otherwise, may "apply to the Civil Court for a certificate "of administration; and no person shall be "entitled to institute or defend any suit "connected with the estate of which he "claims the charge until he shall have "obtained such certificate. Provided that, "when the property is of small value, or for "any other sufficient reason, any Court "having jurisdiction may allow any relative "of a minor to institute or defend a suit "on his behalf, although a certificate of "administration has not been granted to such "relative."

To apply them to this case. The petitioner Saroda claims a right to have charge of property in trust for the minor, Seetul Chunder, by reason of nearness of kin. She does not claim a right to have charge of the estate of Mohim Chunder. She claims a right to have charge of the property of the minor. It is not necessary to detail the property. If she can make good her claim—and, as a mother asking to have charge of the property of her minor son, there can be no doubt that she is entitled to it—the Civil Court is bound to give her a certificate of administration. The Judge seems to have considered that this certificate would allow Saroda to administer to the estate of Mohim Chunder, whereas it will only empower her to administer to the estate of the minor. It is necessary that Saroda should have this, because if she does not obtain it, and is advised, as she states she is, to institute a suit against Parush Monee to recover Mohim Chunder's estate, her plaint may be rejected on the next sentence of the law, *viz.*, that "no person shall be entitled to "institute any suit connected with the "estate of which he claims the charge until "he shall have obtained a certificate." The Judge before whom Saroda instituted a suit might refuse to receive her plaint until she produced a certificate. Here again the Judge has considered the words "the estate of which he claims the charge," to allude to Mohim Chunder's estate, whereas they allude to the minor's estate. Saroda cannot institute a suit connected with the estate of the minor until she shall have obtained a certificate of administration to that estate. Act XL. of 1858 refers only to the estates of minors. Certificates of administration to the estate of a deceased person are dealt with in a separate law—Act XXVII. of 1860. Saroda claims no certificate of administration to the estate of Mohim Chunder, but she claims a certificate of administration to the estate of her minor son, with the view of bringing a suit to recover the estate of Mohim Chunder. She is entitled to this certificate, and we reverse the Judge's orders, and direct that he give the certificate applied for. The respondent will pay all the costs of these proceedings.

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The 3rd July 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Compensation for excessive attachment.**

Case No. 80 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 18th November 1865.*

Shaikh Mahomed Rezaooddeen (Decree-holder), *Appellant,*

*versus*

Hossein Buksh Khan (Judgment-debtor), *Respondent.*

*Baboo Roopnath Banerjee* for Appellant.

No one for Respondent.

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**Where a suit was for 3,000 rupees, and the plaintiff, who was declared entitled to 677 rupees, without sufficient grounds attached the defendant's property to the amount of 3,000 rupees, the defendant was held entitled to compensation.**

In this suit, the plaintiff's claim for Rupees 3,000 was dismissed *in toto* by the Judge of Sarun, and Rupees 300 compensation was given to the defendant under Section 88, Act VIII. of 1859. On appeal to the High Court, the orders of the Judge were confirmed except as to a sum of Rupees 677, which was decreed to plaintiff. In execution, defendant has asked to have his 300 rupees set off against the plaintiff's decree for Rupees 677, and the Judge has allowed it. On appeal, it is said that the High Court's decree virtually set aside the order for compensation. It certainly did not do so as far as the words of the decree go, and we think that it is quite possible that the order for compensation might have been held good, though the plaintiff did obtain a portion of his claim. If the attachment has been applied for on insufficient grounds, and it shall appear to the Court that there was no probable ground for instituting the suit, the Court may award a reasonable compensation to the defendant. The suit here was for Rupees 3,000, and it may be that there was no probable ground for instituting a suit for that sum, though the plaintiff might be entitled to Rupees 677; and, if in such case defendant's property to the amount of 3,000 rupees has been attached without sufficient grounds, defendant would be entitled to compensation; otherwise any person with a claim for Rupees 500 might sue for Rupees 5,000, and attach property worth Rupees 5,000, and put defendant to infinite inconvenience without incurring penalty under the law quoted.

We dismiss the appeal with costs.

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The 3rd July 1866.

*Present:*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Limitation—Joint decree for costs—Keeping alive decree.**

Case No. 118 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Patna, dated the 28th November 1865, affirming an order passed by the Principal Sudder Ameen of that District, dated the 1st April 1865.*

Shaikh Buneead Ali and others (Decree-holders), *Appellants,*

*versus*

Juggessur Singh and others (Judgment-debtors), *Respondents.*

*Mr. R. E. Twidale* for Appellants.

*Baboo Kishen Kishore Ghose* for Respondents.

**Where a judgment-creditor took out execution of his decree for costs against all the judgment-debtors, and recovered a portion from some of them and released those particular debtors from any further payment under the decree, his suit to recover the amount due from the other debtors, having been brought within three years from the date of the proceeding last taken by him was held not barred by limitation under Section 20, Act XIV. of 1859.**

The Judge of Patna has on appeal confirmed the order of the first Court dismissing the petitioner's application for execution of decree, on the ground that it was barred by limitation (Section 20, Act XIV. of 1859). It is shewn us that the petitioner, within three years of the date of application, took out execution against all the judgment-debtors, and recovered a portion from some of them, and released those particular debtors from any further payment under the decree. The Judge says that, by releasing these judgment-debtors, he changed the decree from being joint against all the debtors to a several decree against each set of debtors.

The decree is for costs. The petitioner has recovered from one set of judgment-debtors the amount of costs calculated according to their share in the estate which was the subject of the suit. The petitioner now goes on within three years to recover the amount still due from the other sharers. We think the petitioner is entitled to carry on the execution. Limitation does not bar him. He has taken proceedings to enforce the decree within three years of his present application. The decree is not several, and has not become several. There might be circumstances under which execution of decree against one debtor might not be sufficient to keep alive a decree against other debtors. But no such circumstances are to be found in this case. The petitioner, acting very fairly, executes his decree against each debtor for the amount which is equitably due from him.

We reverse the decision of the Judge and remand the case for execution. Costs to be paid by respondent.

The 5th July 1866.

*Present :*

The Hon'ble G. Campbell and A. G. Macpherson, *Judges.*

**Jurisdiction (of High Court to interfere with decisions of Small Cause Courts).**

*Application for admission of an appeal from a decision passed by Mr. J. Weston, Judge of the Small Cause Court of Magoorah, in Jessore, dated the 21st March 1866.*

Messrs. R. E. Bell and Campbell (Defendants), *Appellants,*

*versus*

Thakoor Dass Gossain (Plaintiff), *Respondent.*

*Baboo Anund Gopal Paleet* for Appellants.

No one for Respondent.

Where a Small Court Cause acts without jurisdiction in a suit, the Hight Court cannot interfere unless the Small Cause Court has been moved to refer the case for the decision of the High Court under Section 22, Act XI. of 1865.

THIS is an application to this Court to call for the record of a case decided in the Court of Small Causes of Magoorah, in Jessore, on the ground that the Small Cause Court acted without jurisdiction, and that this Court can, under the provisions of Section 35, Act XXIII. of 1861, call for the record of the case and set aside those proceedings.

It appears that, the petitioner having illegally dispossessed one Thakoor Doss Gossain from certain lands, Thakoor Doss sued him under Section 15 of Act XIV. of 1859, and obtained a decree for possession. Thakoor Doss then sued the petitioner in the Small Cause Court for damages done to his crops. The petitioner alleges that the Small Cause Court had no jurisdiction to entertain that suit. It appears from the judgment of the Small Cause Court that the question of jurisdiction was not then urged, and, if it had been, the law provides a certain procedure by which a party may move the Small Cause Court to bring the matter to the notice of this Court, namely, by stating a case and referring it to this Court for an opinion and orders under Section 22 and subsequent Sections of Act XI. of 1865. It is admitted that the petitioner has not followed this course open to him under the law, and, under these circumstances, we decline to interfere.

The application is therefore rejected.

The 6th July 1866.

*Present :*

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

**Interest (from date of decree to date of payment).**

Case No. 145 of 1866.

*Miscellaneous Appeal from an order passed by Moulvie Anwar Ali Khan, Principal Sudder Ameen of Tipperah, dated the 9th February 1866.*

Beer Chunder Joobraj (Decree-holder), *Appellant,*

*versus*

Ram Koomar Dhur (Judgment-debtor), *Respondent.*

*Baboos Onookool Chunder Mookerjee* and *Romesh Chunder Mitter* for Appellant.

*Baboo Mohesh Chunder Chowdhry* for Respondent.

A Court executing a decree can award interest, from date of decree to date of payment, on the amount decreed to be paid by the judgment-debtor to the decree-holder, if the Court which passed the decree made no order on that point.

*Jackson, J.*—THE question before us is whether a Court executing a decree has authority to award interest from date of decree to date of payment on the amount decreed to be paid by the judgment-debtor to the decree-holder if the Court which passed the decree made no order on that point. The Lower Court has refused to give the decree-holder such interest, because the decree makes no mention of it. The Lower Court is of opinion that it has no authority to go beyond the decree, and that the only Court which has authority to amend the decree is the Court which passed it. The Lower Court considers that to give the decree-holder interest from date of decree to its execution would be amending and enlarging the decree.

In deciding this point, we must look to the terms of Sections 10 and 11, Act XXIII. of 1861. Section 10 gives the Court passing the decree authority to order interest to be paid on the sum adjudged from the date of the decree to the date of payment. Section 11 goes on to say that "all questions regarding the amount of "interest which may be payable in respect "of the subject-matter of the suit between "the date of institution of the suit and "execution of the decree, shall be determined by order of the Court executing the

"decree, and not by separate suit." It is said that this Section relates only to the *amount* of interest payable under the decree, and does not give the Court executing the decree authority to give interest after date of decree, unless the decree specially gives it. The words used in this Clause of the Section are peculiar, and we see no ground for placing more stress on the word "amount" in this Clause than would be placed on it in the other Clauses. The words of this Clause are "mesne-profits and interest not payable under the decree," but "*which may* "*be payable with respect to the subject-* "*matter of a suit.*" The question is, whether these words do not extend the jurisdiction of the Court executing the decree, and require it to determine the amount of interest or mesne-profits due to the decree-holder between the date of institution of the suit and the date of execution of the decree, if the decree itself is silent upon it. If the Court passing the decree has decided that point under Section 10, that decree is final. If the Court has omitted to decide it, the above terms of Section 11 seem sufficiently wide to enable the Court executing the decree to decide it; and they seem to have been specially introduced, because the law at the same time directed that no separate suit shall be entertained for such matters. This Clause of the Section would be superfluous if the Court executing the decree was only to have authority to determine the amount of interest which by the terms of the decree had been reserved for adjustment in the execution of the decree, as that is specially mentioned in the first Clause of the Section. The second Clause must allude to some state of facts to which the first Clause did not allude. If the terms of this Clause are wide enough to allow the Court executing the decree to decide the question of interest when the decree is silent upon it, no sufficient reason appears for restricting it and requiring parties to take the long roundabout course of referring again to the Court which passed the decree. The practice of the Court, before Act VIII. of 1859 was passed, was to allow such points to be amended in the decree by a simple application to the Judges who passed it; and, under the old law, a party could have brought a separate suit for any amount of mesne-profits or interest upon which the decree had been silent. The alteration caused by the new procedure was that this power to bring a separate suit was taken away, and in its place the Court executing the decree was required to determine such question.

Under the above words of Section 11, Act XXIII. of 1861, if a plaintiff had sued for possession and mesne-profits, and had obtained a decree, and the amount of the mesne-profits to date of institution had been fixed, the Court executing the decree might go beyond the decree and determine the amount of mesne-profits due from the institution of the suit to the execution of the decree for possession, even though that was not specially reserved by the decree for enquiry in execution. To determine the amount of such mesne-profits would not be an amending of the decree, but only carrying out the decree to its fair and legitimate result. The Legislature, in declaring that no separate suit should be allowed, at the same time gave authority to the Court executing the decree to determine such questions. In this case, interest was awarded in the decree to the decree-holder up to date of decree. Execution of the decree has been deferred for many years in consequence of the judgment-debtor having appealed to the Privy Council. The decree-holder is fully entitled to the interest upon the whole sum decreed to him from the date of decree to the date of payment.

The Judge's orders are reversed, and the case remanded to him for further orders.

*Bayley, J.*—I concur with Mr. Justice Elphinstone Jackson in the above view. But I would add that I think the case might also be brought within these words of the same Section 10, Act XXIII. of 1861—"any "other questions arising between the parties "to the suit in which the decree was passed, "and relating to the execution of the "decree."

A case is cited on the other side (20th March 1866, Seton-Karr and Shumbhoonath Pundit, JJ.) to show that, under circumstances similar to those of this case, this Court declined to give any order for interest. But that case has no reference to the special matter which is prominent in this case before us, *viz.*, that the interest sought is *not* (as in the case cited) upon the principal of a *debt sued for*, but interest on a *judgment-debt decreed*, and thus a sum of money due to the decree-holder, directly the judgment was passed.

As this Divisional Bench concur in the application of Section 11, Act XXIII. of 1861, to the case, the Lower Court will have now to see whether, *after decree* to date of realization of the principal decreed, in-

terest should not be allowed and be payable in execution. The decree, it is true, is silent as to the interest from date of decree. There is nothing, however, in the decree to prohibit this interest. On the contrary, the judgment contemplates that the plaintiff shall get the sum adjudged to him on the passing of the said judgment. If, then, the money decreed is not paid on judgment being given, it is but fair and equitable that the decree-holder should not lose that interest on the money which, if the money had been paid on being adjudged to him, would have been otherwise obtainable from the use of the money.

I may add that, as to costs, it is a fixed rule of practice that interest accrues on unrealized costs to date of realization, unless it be expressly stated in the decree that this is not to be the case.

The principle of the rule is the same as that I have above stated, *viz*, that the costs ought to be paid when decreed; and, if not then paid, interest *ipso facto* accrues.

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The 6th July 1866.

*Present:*

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

**Mesne-profits.**

Case No. 603 of 1866.

*Miscellaneous Appeal from an order passed by Mr. A. Hope, Judge of Sarun, dated the 27th November 1865, reversing an order of the Sudder Ameen of that District, dated the 26th November 1864.*

Bhunnoo Singh, *Petitioner,*

*versus*

Hunuk Singh and others, *Opposite Party.*

*Baboo Luckhy Churn Bose* for Petitioner.

*Baboo Tarucknath Sein* for Opposite Party.

Where a plaintiff names by estimation a certain sum as the amount of mesne-profits, and prays the Court to ascertain the amount definitively by local enquiry, he is entitled to receive the sum which the local enquiry may show to be really due.

THE Judge is in error in limiting the amount of mesne-profits to the rate of 3 rupees per beegah. It has been repeatedly held that, where a plaintiff names by estimation a certain sum as the amount of mesne-profits, and prays the Court to ascertain the amount definitively by local enquiry, he is entitled to receive the sum which the local enquiry may show to be really due.

The Judge's order is, therefore, to be modified to that extent. The appellant is entitled to the costs of this appeal.

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The 6th July 1866.

*Present:*

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

**Execution of decree—Mesne-profits.**

Case No. 66 of 1866.

*Miscellaneous Appeal from a decision passed by Baboo Juggobundhoo Banerjee, Principal Sudder Ameen of Nuddea, dated the 9th December 1865.*

Bisnoo Chunder Biswas, *Petitioner,*

*versus*

Troyluckanath Banerjee, *Opposite Party.*

*Baboo Boykant Nauth Paul* and *Moulvie Murhumut Hossain* for Petitioner.

*Baboo Chunder Madhub Ghose* for *Opposite Party.*

*A* obtained a decree declaring him entitled to possession, under a mortgage, of one-third of the property in dispute with mesne-profits. *B* subsequently obtained a decree against *A* and the other co-sharers for possession of the whole estate with mesne-profits under another mortgage, but, instead of taking full advantage of his decree, he received from all the co-sharers the amount due to him on the original transaction, and restored the property to them.—HELD that *A* was entitled to recover mesne-profits due to him under the original decree.

*Jackson, J. (Markby, J., concurring).*—IT appears to me that there is no reason to interfere with the decision of the Principal Sudder Ameen in this matter.

Golam Hossain, as assignee of Chunder Hurree Paramanick, got a decree from the late Sudder Court on the 27th April 1859, by which he was declared entitled to possession under a mortgage from Ramgutty of one-third of the property in dispute with mesne-profits. Subsequently, Rajkisto Paul sued the whole of the co-sharers of this estate for possession of the entire property with wasilat under another mortgage. To that suit Golam Hossain was made a defendant, he alleging his own previous mortgage and decree upon that mortgage. The suit was

decreed in favor of the plaintiff, and Golam Hossain's appeal to the High Court in regard to his own mortgage was unsuccessful, Rajkisto Paul being declared entitled to the whole property.

It appears that Rajkisto Paul has not taken full advantage of that decree, but has received from the co-sharers, defendants, the amount due to him on the original transaction, and has restored the property to them. The question is whether, under these circumstances, Golam Hossain can obtain the amount of wasilat owing to him under his original decree.

The first objection taken was that the decree itself did not give wasilat. But it seems to me that there could be no doubt as to what the intention of the Sudder Court was in making that decree. The suit was for possession of a third share with wasilat. The Zillah Court which heard the suit had dismissed the suit *in toto*. It was not a question whether the plaintiff might be entitled to possession of the estate, but not to wasilat The whole claim was disputed, and the suit was dismissed in the Zillah Court upon objections that went to the whole case, that is, the title of Ramgutty, the alleged mortgagor, to so much as one-third share. The decision of the late Sudder Court went likewise on that particular ground. It found that Ramgutty was entitled to the one-third share, and that the mortgage was a good one. It therefore decreed for the plaintiff that which he asked for in the plaint, and that was possession with wasilat.

Then the further and more serious question is, whether the decree-holder can at all execute this decree. The proceedings are extremely complicated. But the question really seems to reduce itself to this. Is there anything which prevents Golam Hossain from executing the decree which he obtained from the Appellate Court in 1859, which decree up to this time has not in any lawful way been set aside? No doubt, if that decree related to the possession and wasilat of the putnee—and it appears that the same wasilat and possession had, under a subsequent decree, been given to other parties—that might be a good reason for this Court to hold its hand, and to say that execution shall not proceed. But it appears that nothing of the sort happened. The defendants have only had to pay the other decree-holders a sum of money which they owed. If it was open to them to dispute the decree passed in favor of Golam Hossein, and proceed to set it aside on the ground of fraud, they ought to have done so; and, if they have not done so, we must presume that they could not do so; and, if they could not do so, the decree is still in force.

For these reasons, I would decline to interfere with the order of the Principal Sudder Ameen, and would dismiss this appeal with costs.

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The 7th July 1866.

*Present:*

The Hon'ble L. S. Jackson, *Judge.*

**Mooktears (Admission of).**

Goluck Chunder Kur, *Appellant.*

*Messrs. R. T. Allan* and *J. S. Rochfort* and *Baboos Hem Chunder Banerjee* and *Romesh Chunder Mitter* for Appellant.

The 39th of the Rules for Mooktears, lately issued by the Court, only requires that every person who had been practising as a Mooktear in the Criminal Courts should be at liberty to satisfy the Judge that he was a person of good moral character and qualified by his knowledge of law and procedure, before he could be entitled to admission under that Rule. But it was not the intention of the Court that parties should be subjected to regular examinations, or that the duty imposed upon the Judge should be delegated to the Magistrate.

LET a copy of this petition be sent to the Zillah Judge, with a direction to furnish an explanation. The petitioner's statement is that he has been for a considerable time practising as a Mooktear in the Criminal Courts of Zillah Backergunge. He was desirous of being appointed a Mooktear under the late rules for Mooktears issued by this Court. It appears that the Judge delegated to the Magistrate of the District the duty of examining the persons who presented themselves for admission as Mooktears. It was not the intention of the Court either that parties should be subjected to regular examinations, or that the duty imposed upon the Judge by the Rules of the Court should be delegated to the Magistrate. Every person who had been practising as a Mooktear of the Criminal Courts should be at liberty, under the 39th Rule, to satisfy the Judge that he was a person of good moral character, and qualified by his knowledge of law and procedure. If, on the opportunity to do so, he failed to satisfy the Judge upon this point, he could not be entitled to admission under that Rule. But the petitioner complains that the Judge has not enquired into his case at all, and that he was not permitted to appear at the examination which, by direction of the Judge, the Magistrate had

held. There is a certain presumption in petitioner's favor from the circumstance that he received a Perwannah from a former Magistrate in the year 1857, authorizing him to practise as a Mooktear. His application, therefore, ought not to have been rejected without some specific reason.

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The 9th July 1866.

*Present:*

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

**Limitation—Execution of decree.**

Cases Nos. 426 and 427 of 1866.

*Applications for review of judgment passed on the 26th April 1865, in Summary Special Appeal No. 55 of 1865.*

Raj Bullub Bhunj (Judgment-debtor), *Appellant,*

*versus*

Taranath Roy (Decree-holder), *Respondent.*

*Baboo Woopendur Chunder Bose* for Appellant.

*Baboo Gopeenath Banerjee* for Respondent.

When once Act XIV. of 1859 (the operation of Sections 19 to 23 of which was suspended by Act XI. of 1861 until 1st January 1862) actually came into operation, all cases became subject to its provisions, and a decree-holder did not get a fresh start from the beginning of 1862.

THE question before us is, whether a decree passed subsequent to the enactment of Act XIV. of 1859, and of which execution was not taken out for three years after the date of decision, can be executed, or whether execution is barred by that Law of Limitation. In our former judgment, we held that a judgment passed subsequent to the passing of Act XIV. of 1859, of which execution was sought after that law *came into operation*, which it did on the 1st January 1862, could be executed, even though more than three years had elapsed since the judgment was passed. On further consideration, however, we look upon Act XI. of 1861, by which the operation of Act XIV. of 1859 was suspended, as merely postponing the commencement of its operation; and we hold that, when once that Law came actually into operation, all cases became subject to its provisions, and that a decree-holder did not get a fresh start from the beginning of 1862. We formerly treated the present case as one under Section 21. This was an oversight, as the decree was not in existence when Act XIV. of 1859 was passed. It is a decree which should have been executed under Section 20 within three years from the date of the judgment passed in the case. We, accordingly, admit the review, and reverse our previous order of 26th April 1865, with costs. The decree cannot now be executed.

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The 10th July 1866.

*Present:*

The Hon'ble G. Loch and F. B. Kemp, *Judges.*

**Decree (Construction of)—Costs.**

Case No. 174 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of the Twenty-four Pergunnahs, dated the 5th December 1865, modifying an order passed by the Principal Sudder Ameen of that District, dated the 14th July 1865.*

Manick Chunder Lushkur (Decree-holder), *Appellant,*

*versus*

Huro Pershad Roy Chowdhry and others (Judgment-debtors), *Respondents.*

*Baboo Khetturnath Bose* for Appellant.

*Baboo Anund Chunder Ghossal* for Respondents.

A Judge ought not to apportion costs contrary to the terms of the decretal order; nor is he at liberty to put his own interpretation upon a decretal order which is unambiguous in its terms.

THE Judge is clearly wrong in apportioning the costs contrary to the terms of the decretal order.

The decree of the Court of first instance directs that the costs of the two defendants, the zemindar and the ryot, be paid by the plaintiff whose suit was dismissed.

This decree was upheld in appeal, and in the statement of costs appended to the decree of the Judge (the very Judge whose order is now before us in appeal), the amount of the costs payable to the two defendants is separately detailed.

The Judge is not at liberty to put his own interpretation upon a decretal order which is unambiguous in its terms. Order reversed, and appeal decreed with costs and interest.

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The 10th July 1866.

*Present:*

The Hon'ble G. Loch and F. B. Kemp, *Judges.*

**Sale in execution—Right of judgment-debtor to contest legality of—Smallness of price—Irregularity.**

Case No. 284 of 1866.

*Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Shahabad, dated the 31st January 1866.*

Baboo Reet Bhunjun Singh and another (Judgment-debtors), *Appellants,*

*versus*

Baboo Meeturjeet Singh (Decree-holder), *Respondent.*

*Baboo Kalee Kishen Singh* for Appellants.

*Baboo Chunder Madhub Ghose* for Respondent.

**A judgment-debtor whose right in the property in dispute was put up for sale under a previous execution, and purchased by the decree-holder himself, is in a position to contest the legality of the sale.**

**Smallness of price is not a sufficient ground for setting aside a sale, unless it be the effect of an irregularity in the sale-proceedings.**

THE Principal Sudder Ameen has declared that the debtor in this case is not in a position to bring an objection to the sale, as he has no interest in the property, his rights and interests having been sold under a previous execution. Whether this be the case or not, it is evident that the decree-holder recognized a right of the debtor in the property, for he put it up for sale and purchased it himself; and therefore, we think, the debtor is in a position to contest the legality of the sale.

Instead of following the course laid down for his guidance in the remand order, the Principal Sudder Ameen has gone on to determine the value of the property, and, having ascertained that there is a heavy mortgage, he holds that its value is reduced from Rs. 80 000 to about 20.000; and, therefore, as the decree-holder purchased for Rs. 18,000, the debtor has sustained no material injury. What the Principal Sudder Ameen should have done was to ascertain whether any material irregularity in the sale-proceedings had been committed, and, if he found that such was the case, then he should have determined whether the low price at which such valuable property was sold, was caused by that irregularity. If it were, then the debtor evidently suffered a material injury. Of course, smallness of price is not a sufficient ground for setting aside a sale, unless it be the effect of an irregularity in the sale-proceedings. We remand the case to the Principal Sudder Ameen for a clear decision on the points indicated above.

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The 12th July 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble F. B. Kemp, *Judge.*

**Power of Court to amend records—Amendment of decree at variance with judgment.**

Case No. 3165 of 1865.

*Special* Appeal from an order passed by Mr. H. R. Madocks, Officiating Judge of Bhaugulpore, dated the 21st August 1865, modifying a decree of Mr. T. Sandys, Judge of that District, dated the 1st April 1857.*

Toona and others (Plaintiffs), *Appellants,*

*versus*

Kurreemun and others (Defendants), *Respondents.*

*Messrs. R. V. Doyne* and *R. E. Twidale* for Appellants.

*Baboos Chunder Madhub Ghose* and *Romesh Chunder Mitter* for Respondents.

**It is a power which all Courts possess to amend their records when there is anything to amend by. Consequently, when a Judge finds that the decree varies from his judgment, he can set the decree right.**

WE think that the decision of the Judge must be affirmed. The plaintiff originally

* *Note.*—Erroneously filed as a Special Appeal; more properly a Miscellaneous Appeal.

sued for possession of land, stating in her plaint that she would sue for mesne-profits afterwards. The Judge gave a judgment for the land, but no judgment that the plaintiff was to recover mesne-profits. But in carrying out the judgment, the writer in the office drew up the decree beyond what the judgment warranted. The Judge had said that there was to be a decree for the land. But the decree-writer prepared the decree as for the land and for mesne-profits to be assessed in execution.

Then there was an appeal to the Sudder Court under the law in force at that time (Regulation XXVI. of 1814, Section 2, Clause 1, and Act III. of 1843). That was an appeal from the judgment or decision of the Judge, and not from the decree. The Sudder Court affirmed the decision or judgment, but they never entered into the question whether the decree for mesne-profits was warranted by the judgment for the land only, in a suit for land only, and not for the mesne-profits.

The decision of the Judge must be taken as correct, but it said nothing as to the mesne-profits. There was no judgment whatever which warranted the decree.

Suppose the plaintiff in the suit had released the mesne-profits before the suit was brought, that release could not be set up as an answer to the assessment in execution, if the decree was satisfied by the judgment, because, if the judgment decided that the plaintiff was entitled to mesne-profits, a release of the mesne-profits prior to the suit could not be set up in answer to a judgment passed after that release had been executed. If the defendant in this case had had a good defence to the mesne-profits, he could not set it up so long as the decree awarding mesne-profits stands; but that decree was not justified by the judgment.

The defendant applied for a review of judgment. The judgment itself being right, there was no ground for altering it upon review. But, when the application for a review of judgment was made, the Judge discovered that the decree varied from the judgment, and that there was no judgment which warranted the decree. He called upon the Sheristadar for a report, and the Sheristadar reported that the decree awarded mesne-profits, whereas the judgment was for the land only. The plaintiff clearly had no right to recover mesne-profits in the suit, for she had paid stamp-duty on the valuation of the land, not of mesne-profits. But we do not put the case on the ground of stamp-duty, but on the ground that there was no judgment which awarded mesne-profits.

It appears to us that the judgment of the Judge was right, that there was no warrant for the decree, and that the decree must be set right according to the judgment. That being so, there is nothing by virtue of which execution could be taken out for mesne-profits. In this case, the judgment-creditor was himself the purchaser under her own execution. It is unnecessary to determine whether the decree would have warranted a sale if the land had been sold to a third person, and the sale had been confirmed. The plaintiff did not sue for mesne-profits; she did not pay stamp-duty for mesne-profits; and she knew, or ought to have known, that the value of the mesne-profits was not included in the plaint on which the judgment was given, or in the judgment. We think it would be a very dangerous thing to uphold decrees at variance with judgments, and to hold that a Judge, when he finds that the decree varies from his judgment, is not able to set the decree right. It is a power which all Courts possess to amend their records when there is anything to amend by. In this case the decree ought to be amended to make it agree with the judgment which was recorded.

The order of the Judge is affirmed with costs.

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The 12th July 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Certificate—Hindoo Widows—Separate possession.**

Case No. 227 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Shahabad, dated the 27th February 1866.*

Chintamun Singh, *Appellant,*

*versus*

Roopa Koonwar and others, *Respondents.*

*Baboo Kalee Mohun Doss* for Appellant.

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*Baboo Mokesh Chunder Chowdhry* for Respondents.

Two Hindoo widows, in order to realize the amount of a decree which they had obtained as guardians of their deceased husband's son, applied for a certificate. The husband's step-brother opposed the grant of a certificate on the ground that they were entitled only to maintenance.—HELD that the first thing to be proved was whether the son had a separate estate, and was not in joint possession with his father's step-brother; and that the fact of the decree being in the names of the ladies did not by itself prove separate possession.

THE decision of the Judge is so very brief that we cannot gather from it either the facts of the case or the point on which the parties are at issue. But we think that the Judge is wrong in the estimate he has formed of the judgment of the Civil Court to which he alludes. That was made in a case in which the appellant, Chintamun, applied to the Court to carry out a private award of arbitrators, which determined that he and his brother Srimunth Singh were members of a joint family. The Sudder Ameen, not being satisfied that the award was properly obtained, dismissed the application and refused to execute the award. That decision, therefore, decided nothing as to the position and rights of the parties now before the Court.

The appellant states that Mussamuts Onda Koonwar and Burmajotee Koonwar, widows of Srimunth Singh, applied to the Judge for a certificate, under Act XXVII. of 1860, to realize debts due to the estate; that the appellant, Chintamun, the step-brother of the deceased, alleging that the family was joint, opposed the grant of a certificate to the widows, on the ground that they were entitled only to maintenance. This, however, is not quite a correct statement of the case as brought before the Court. The ladies state, in their petition, that they are widows of Srimunth Singh; that they were guardians of his son Nundo Gopal and managed his estate; that he died when he was five years old, and that they are his legal heirs; and ask the Court for a certificate to realize the amount of a decree in which they were plaintiffs, as guardians of the said Nundo Gopal.

It appears to us that the first thing to be proved is that Nundo Gopal had a separate estate, and was not in joint possession with Chintamun The fact of the decree being in the names of the ladies does not, by itself, prove separate possession. If the ladies are unable to prove this point, the case must be given against them. We remand the case to the Judge for disposal with reference to the above remarks.

The 12th July 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Mesne-profits.**

Case No. 125 of 1866.

*Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Jessore, dated the 28th December 1865.*

Huronath Roy and others (Judgment-debtors), *Appellants,*

*versus*

Rajah Indoo Bhoosun Deb Roy (Decree-holder), *Respondent.*

*Baboo Sreenath Doss* for Appellants.

*Baboo Unnoda Pershad Banerjee* for Respondent.

Under a decree which provided for possession with mesne-profits from 8th Bysack 1264, the plaintiff was held entitled to the rents of 1263 and whatever else was realized by the defendant after 8th Bysack 1264 during the period of his wrongful possession.

The decree simply gave mesne-profits from a certain date anterior to the suit; but as it was silent as to the mesne-profits accruing subsequently—HELD that this Court could not, under Section 11, Act XXIII. of 1861, give mesne-profits not expressly provided for by the decree; and that the proper course for the decree-holder was to apply to the Court which made the decree, to amend its order regarding mesne-profits.

THE decree provides for possession with mesne-profits from 8th Bysack 1264. The suit was to recover possession with mesne-profits from the date of dispossession to date of suit. The Principal Sudder Ameen has, it is urged, included the rents of 1263, and also the rents for the period from the date of institution of suit to the date of plaintiff's regaining possession under the decree. On the first point, we find that the rents of 1263 were realized by defendant subsequent to the 8th Bysack 1264, during the period of his wrongful possession; and we think the plaintiff is clearly entitled to recover everything that defendant realized after that date. On the second point, we think, looking to the terms of Section 196, Act VIII. of 1859, that the decree is not specific enough in its terms to allow of our putting an interpretation upon it which it does not properly bear. The claim was for mesne-profits to date of suit. The decree simply gave mesne-profits from a certain date anterior to the suit, but is silent as to the mesne-profits accruing subsequently; nor do we think that the terms of Section

11, Act XXIII. of 1861, enable us to give mesne-profits when they are not expressly provided for by the decree. The proper course for the decree-holder is to apply to the Court making the decree to amend its order regarding mesne-profits. The order of the Lower Court will be amended accordingly, and the parties will pay their own costs.

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The 13th July 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

**Certificate—Enforcement of payment of debt to deceased.**

Case No. 276 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Jessore, dated the 14th March 1866.*

Tarinee Pershad Ghose (Judgment-debtor), *Appellant,*

*versus*

Gunga Dhur and others (Decree-holders), *Respondents.*

*Baboo Obhoy Churn Bose* for Appellant.

No one for Respondents.

No one claiming to be entitled to the effects of a deceased person can enforce the payment of a debt due to the deceased without the production of a certificate

THIS case must go back. Section 2, Act XXVII. of 1860, provides that no debtor of any deceased person shall be compelled in any Court to pay his debt to any person claiming to be entitled to the effects of any deceased person, except on production of a certificate. The plaintiff in the present case is endeavouring to enforce payment of the debt, as the heir of a person deceased. by proceedings in Court, *viz*, process of execution, without the production of a certificate which the defendant has a right to require in order to save himself from the risk and liability of paying the debt to the wrong person. We agree with the decision of the Madras Sudder Court on this subject, dated 17th May 1861, cited in Rama Pershad's Book, page 175. In the present case, there has been no proper investigation as to who was really the heir of the deceased, and the Judge has taken it for granted that the person seeking to enforce execution was the heir without sufficient enquiry.

The case must go back, and the appellant will get the costs of this appeal irrespective of the result.

The 13th July 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

**Limitation—Keeping alive decree.**

Case No. 261 of 1866.

*Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Midnapore, dated the 20th January 1866.*

Debnath Holder and others (Judgment-debtors), *Appellants,*

*versus*

Doya Moyee Dossee and others (Decree-holders), *Respondents.*

*Baboos Dwarkanath Sein* and *Nursing Chunder Mitter* for Appellants.

*Baboo Bhowanee Churn Dutt* for Respondents.

A distinct admission by a decree-holder's vakeel of his inability to carry on the case, for want of instructions from his client, is not a proceeding, within the meaning of Section 20, Act XIV. of 1859, to keep alive the decree.

WE think the appellant entitled to have the order of the Lower Court reversed. On the last occasion when execution was sought, the decree-holder Doya Moyee appeared in Court on the 31st of December 1861. Notice was issued to the debtors on the 25th of April 1862, and they appeared on the 11th June following. Nothing was done after that date, and, on the 11th of September, the vakeel of the decree-holder, being questioned, distinctly stated that he was unable to carry on the case, because, after repeated applications to his client, he had received no instructions.

We think that such a distinct admission of failure to carry on the case cannot be taken to be the proceeding contemplated by Section 20, Act XIV. of 1859. And, if this be so, then no such proceeding has been taken for more than three years antecedent to the present application, which was on the 9th September 1865. Had there been any adjudication of any point by the Court on the said 11th of September 1862, the case would have been different. But the last proceeding taken by the decree-holder could not be carried down to a period later than 11th June 1862, which is beyond three years.

We reverse the decision, and decree the appeal with costs.

The 13th July 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

**Costs—Pleaders' fees—Private arrangement between pleader and client.**

Case No. 219 of 1866.

*Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Dinagepore, dated the 4th January 1866.*

Umirtonath Jha and another (Decree-holders), *Appellants,*

*versus*

Roghoonath Pershad Roy (Judgment-debtor), *Respondent.*

*Babao Tarucknath Sein* for Appellants.

*Baboo Debendro Narain Bose* for Respondent.

A Court is bound to award, as costs to a defendant, his pleader's fees calculated according to the rules laid down in Section 25, Regulation XXVII. of 1814. The plaintiff cannot take advantage of any private arrangement between the defendant and his vakeel.

THIS is an appeal by the defendant who obtained a decree for costs. The costs, as calculated according to the rules laid down in Section 25 of Regulation XXVII. of 1814, would have been 850 rupees. It appears, however, that by a private arrangement between the defendant and his pleader, the defendant only paid 200 rupees to the pleader. The Principal Sudder Ameen, in allowing costs against the plaintiff, has awarded the defendant only this sum of 200 rupees. But Section 7, Act I. of 1846, is express, that, when costs are awarded to a party in any regular suit, original or appeal, decided on the merits, against another party, the amount to be paid on account of pleader's fees shall be calculated according to the rules contained in the Regulation above cited.

We are therefore of opinion that the Principal Sudder Ameen was bound to award costs to the defendant upon the scale therein mentioned, and the plaintiff could not take any advantage of the private bargain between the defendant and his vakeel.

The appeal will be allowed with costs and interest.

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The 13th July 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

**Surety—Costs (of enforcing decree).**

Case No. 298 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Patna, dated the 17th January 1866.*

Thakoor Deen Tewaree (Decree-holder), *Appellant,*

*versus*

Boolakee Lal and others (Judgment-debtors), *Respondents.*

*Mr. C. Gregory* for Appellant.

No one for Respondents.

Where, if a decree, or half of the decree, had been enforced against a defendant, such defendant would be held liable for the costs of the enforcement, the defendant's surety is also liable for the costs of such enforcement.

THE decision of the Lower Court must be reversed. We think that, as the defendant agreed to pay "half the decreed amount," he did, in effect, agree to pay a debt, an incident of which was that it carried interest.

Section 204 of Act VIII. of 1859 provides that, "whenever a person has become "liable as security for the performance of "a decree, or any part thereof, the decree "may be executed against such person to "the extent to which he has rendered him-"self liable, in the same manner as a de-"cree may be enforced against a defend-"ant." Now, if the decree, or half of the decree, had been enforced against the defendant, the defendant against whom the decree would be so enforced would be held liable for the costs of the enforcement. That being so, we think that the surety is also liable for the costs of such enforcement, and accordingly decree this appeal with costs and interest.

E.

The 13th July 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

**Appeal—Execution of decree—Limitation.**

Case No. 294 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Backergunge, dated the 20th January 1866, affirming an order passed by the Moonsiff of Madaree-pore, dated the 21st January 1865.*

Kebul Kishen Sein and others (Deeree-holders), *Appellants,*

*versus*

Obhoya Churn Doss *alias* Titoo Ram Doss and others (Judgment-debtors), *Respondents.*

*Baboo Pedree Lal Roy* for Appellants.

*Baboo Romanath Bose* for Respondents.

An appeal lies to the Judge from an order of a Lower Court deciding that execution of a decree is barred by limitation.

THE decision of the Judge refusing to hear the appeal is wrong. Section 257 of Act VIII. refers to the mere regularity or irregularity of the sale-proceedings. But the Moonsiff went beyond this point, and decided that execution was barred by limitation. An appeal lay to the Judge on this point, and we remand the case to him for a decision accordingly.

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The 16th July 1866.

*Present:*

The Hon'ble L. S. Jackson and G. Campbell, *Judges.*

**Ex-parte decree—Section 119, Code of Civil Procedure.**

Case No. 162 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Mymensingh, dated the 21st December 1865, affirming an order passed by the Sudder Ameen of that District, dated the 26th August 1865.*

Koroona Moyee Dossee, *Appellant,*

*versus*

Nubo Kishore Sein, *Respondent.*

*Baboo Bama Churn Banerjee* for Appellant.

No one for Respondent.

When a party applies, under Section 119, Code of Civil Procedure, to have an *ex-parte* decree set aside on the allegation that the decree was obtained upon a petition of confession of judgment put in by a person fraudulently employed to personate him, the Court is bound to enquire into the truth of the allegation, and, if it be established, the decree may be set aside.

IT seems that a decree was passed against the petitioner, and execution taken out thereupon. The petitioner came before the Court of first instance, and alleged that he had not had an opportunity of defending the case. It appeared that the decree had been passed upon a petition of confession of judgment. But petitioner alleged that that confession of judgment had not been filed by him, or under his instructions, or with his consent, but that some person had been employed to personate him, and that the confession of judgment had been fraudulently put in.

The Court of first instance stated that this was not an *ex-parte* case, and that the petitioner could not be entitled to a new trial under Section 119, Code of Civil Procedure. The Court observed that a decree had been passed upon a confession of judgment; that the confession of judgment had been filed in the regular way by a vakeel; that the responsibility of putting in such document rested on the head of the vakeel; and that it was not necessary for the Court to enquire into the matter. He therefore refused the application to set aside the judgment.

On appeal before him, the Zillah Judge was of opinion that the judgment of the Court below was correct. He stated that the judgment was not *ex parte*, and that, consequently, it could not be set aside under Section 119. Whether the defence was fraudulent or not, was ground for appeal—not for revival and re-hearing by the original Court.

It seems to us that this petitioner brought his case before the Court which passed the decree, simply on the ground that this decree had been passed in his absence; and he proposed to show, to the satisfaction of the

Court, that the summons had not been duly served, and that, consequently, he was prevented from appearing. If that was the case, the fact that some one else had fraudulently appeared and personated the defendant could be no ground for sustaining the judgment, for it would be literally true that defendant had not been served with summons, and that consequently, the trial, as far as regarded him, was really *ex parte*. To say that the responsibility of filing documents rests with the vakeel, is no ground for denying to petitioner the relief which he asked for. It may be that petitioner might have proceeded in a different manner. He might, perhaps, have sued to set aside the decree obtained on the ground of fraud. However that may be, there seems to be no reason for denying to him the remedy which he claims under Section 119. We therefore think that the decision of the Judge and of the Lower Court ought to be set aside, and the Sudder Ameen directed to enquire into the truth of the allegation made by the petitioner; and, if he should substantiate the fact of fraudulent personation, the *ex-parte* judgment will be set aside, and the case will be tried *de novo* in the presence of the defendant.

The appellant is entitled to costs in this Court and also in the Lower Appellate Court.

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The 16th July 1866.

*Present :*

The Hon'ble L. S. Jackson and G. Campbell, *Judges.*

**Limitation—Execution of decree—Legal disability.**

Case No. 101 of 1866.

*Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Nuddea, dated the 27th January 1866.*

Chunder Coomar Roy and others (Judgment-debtors), *Appellants,*

*versus*

Ranee Shurut Soonduree Debia (Decree-holder), *Respondent.*

*Baboo Bungshee Dhur Sein* for Appellants.

*Baboo Gopal Lal Mitter* for Respondent.

Act XIV. of 1859 contains no provision by which the execution of a decree is barred by limitation on account of minority or other legal disability.

A mere application for execution of a decree is not a proceeding which keeps alive the decree.*

*Jackson, J.*—The decision of the Principal Sudder Ameen ought, in my opinion, to be reversed. The husband of the present decree-holder appears to have been for several years a minor. That circumstance is not one which prevents the execution from being barred by limitation. Act XIV. of 1859 contains no provision to that effect.

Then we are told that this decree was sought to be executed in 1862. On reference to the record, it appears that merely a petition was presented to the Court applying for execution. That petition was ordered to be registered, and subsequently the further order was recorded on the back of it, that, inasmuch as the petitioner did not deposit the *tulubana* for peons, the case was to be struck off the file.

The respondent's vakeel urges that a reference has been made to a Full Bench on the point as to whether the filing of a petition in cases of execution is a proceeding which keeps alive the decree.

It seems to me that a petition of that sort can, taking the most favorable view, only be considered a proceeding to keep alive a decree where notice of the application is given to the opposite party, as it is then a notice to him that the decree-holder intends to enforce his decree. But where no such notice is given, and where a petition is merely lodged in the Court, it seems to me that that petition can have no force whatever in keeping the decree alive.

The order of the Principal Sudder Ameen must, I think, be reversed with costs.

*Campbell, J.*—I concur. The word "limitation" in Act XIV. of 1859 seems to be used only as regards the limitation of the period within which suits can be instituted, not as regards the periods within which execution can be had. In all the earlier Sections, the word "limitation" is used, and the Sections which give an extension of time on account of minority or other legal disability immediately follow.

* This ruling is in accordance with a recent Full Bench decision (in Miscellaneous Appeal No. 778 of 1865) in which it was held that the proceeding contemplated in Section 20, Act XIV. of 1859, is either a *bond-fide* application made for execution under Section 207, Code of Civil Procedure, or a *bond-fide* act done either by the Court or by the party in furtherance of such application.

The Sections relating to execution are subsequent Sections, and the word "limitation" is not used in those Sections.

I think, therefore, it is clear that the period prescribed with regard to execution of decrees is absolute, and not a limitation subject to certain exceptions and extension.

As regards the nature of a proceeding to enforce a judgment or to keep the same in force, it seems to me that those words refer to some coercive process issued against a defendant, and not to a petition presented to Court not followed by any active process.

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The 16th July 1866.

*Present :*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Limitation—Execution of decree appealed from.**

Case No. 281 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of West Burdwan, dated the 1st February 1866, reversing an order passed by the Moonsiff of that District, dated the 26th June 1865.*

Huree Bungsho Banerjee and others (Decree-holders), *Appellants,*

*versus*

Ramessur Banerjee (Judgment-debtor), *Respondent.*

*Baboos Kishen Succa Mookerjee* and *Nil Madhub Sein* for Appellants.

*Baboo Bungshee Dhur Sein* for Respondent.

The three years' limitation prescribed by Section 20, Act XIV. of 1859, counts from the date of the final decree of the Appellate Court, in a case in which the judgment-debtor has appealed against the original decree.

THE appellant in this case, on the 1st of May 1865, applied for execution of a decree obtained by him on the 20th August 1861, which decree, having been appealed against, was confirmed by the late Sudder Court on the 5th of May 1862. The Lower Court refused the application for execution on the ground that it was barred by Section 20 of Act XIV. of 1859, inasmuch as it was made more than three years after the 20th August 1861, which was the date of the original decree. In appeal, it is contended that the three years run, not from the date of the original decree, but from the date of the order of the Sudder Court of the 5th of May 1862 dismissing the appeal. It is urged that, although a decree-holder may be bound to execute within three years a decree which is not under appeal and is final, he ought not to be compelled to execute a decree which has been appealed from, and which may possibly be reversed, until the appeal is decided; and the case of Singh and others *versus* Lalla Kalee Churn, 3 Weekly Reporter, page 21 (Miscellaneous Appeals), is relied upon as supporting this view.

It appears to us that the case referred to is in point. We think that the three years are to be calculated from the date on which the decree become final, and the relative positions of the parties, decree-holders and judgment-debtors, were definitively settled.

The order of the Lower Court is set aside with costs, and the application for execution must be granted.

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The 16th July 1866.

*Present:*

The Hon'ble L. S. Jackson and G. Campbell, *Judges.*

**Limitation—Keeping alive decree.**

Case No. 200 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Shahabad, dated the 19th December 1865, affirming an order passed by the Principal Sudder Ameen of that District, dated the 22nd August 1865.*

Lalla Bishen Dyal Singh and others (Decree-holders), *Appellants,*

*versus*

Ram Sunkur Tewaree (Judgment-debtor), *Respondent.*

*Baboo Bhowanee Churn Dutt* for Appellants.

*Baboo Kalee Mohun Doss* for Respondent.

The petitioners applied for the substitution of their names as heirs of a deceased decree-holder, but failed to satisfy the Judge that they were the heirs of the original decree-holder.—HELD that such an infructuous application was not a process to enforce or keep in force a decree within the meaning of Section 20, Act XIV. of 1859.

WE think that the Judge is perfectly right in this case.

b

The petitioners seek to execute an old decree of 1851. The question is whether they have come within three years of the last process issued in execution. It appears that, on the 26th April 1862, petitioners, as heirs of the deceased decree-holder, applied to have their names substituted for the original decree-holder; but, failing to satisfy the Judge that they were the heirs of the original decree-holder, that application was altogether infructuous, and no process whatever was issued, because no decree-holder was before the Court at whose instance a process could issue.

We think it quite clear that this infructuous application for a substitution of the names of the petitioners as heirs of the decree-holder is not a process to enforce the decree or to keep the same in force within the meaning of Section 20, Act XIV. of 1859. Therefore, by that Section, the petitioners are barred, as the Judge has rightly held.

The appeal is dismissed with costs.

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The 16th July 1866.

*Present:*

The Hon'ble L. S. Jackson and G. Campbell, *Judges.*

**Parol Evidence—Mesne-profits.**

Case No. 178 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Midnapore, dated the 16th December 1865.*

Ram Kishen Chuckerbutty (Judgment-debtor), *Appellant,*

*versus*

Rajah Gunga Narain Shaha (Decree-holder), *Respondent.*

*Baboo Mohendro Lal Shome* for Appellant.

No one for Respondent.

There is no provision of law which forbids a Court to accept parol testimony in support of wasilat without the support of *dakhilas.*

THERE appears to be no valid ground of appeal against this judgment. The Judge records (and we must accept it as conclusive) that the petitioner before him insisted only upon one ground of objection, and that was that the payment of a considerable sum is reported by the Ameen to be due as wasilat, in support of which no dakhilas have been produced. We are not informed how it happened that the dakhilas were not produced on this occasion. But there is no provision of law which forbids a Court to accept oral testimony in support of the amount of wasilat without the support of dakhilas.

In addition to this, it appears to us that every presumption must be taken against the petitioner in this case, as, when an Ameen was deputed to enquire into the amount of wasilat, it was his business to have produced his collection-papers, and in that way to have satisfied the Court what he had received from the land in dispute. Therefore we cannot, by way of appeal, interfere with the order of the Judge.

Then it is said that there are certain sums which the Judge ought to have allowed, and in respect of which application was made after the date of his judgment, such as the allowance of Surunjamee expenses and a deduction on account of Government revenue which the petitioner had paid. There is a clear distinction between the case of a party who is by his own wrongful act in possession of another's property, and of a person who is placed in possession of such property by the order of a competent Court. It seems, therefore, to be only reasonable that a deduction should be made of such charges as the petitioner has necessarily incurred on account of the property. No doubt, on application to the Judge, he will review his judgment, and, if there appear clear ground for making such deduction, it will be allowed.

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The 16th July 1866.

*Present:*

The Hon'ble L. S. Jackson and G. Campbell *Judges.*

**Limitation—Sections 20 and 21, Act XIV. of 1859.**

Case No. 150 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Backergunge, dated the 9th December 1865, affirming an order passed by the Sudder Ameen of that District, dated the 29th July 1865.*

Huro Nath Bose (Decree-holder), *Appellant,*

*versus*

Muddun Mohun Chuckerbutty (Judgment-debtor), *Respondent.*

*Baboo Bungsee Dhur Sein* for Appellant.

*Baboo Motee Lal Mookerjee* for Respondent.

Section 21, Act XIV. of 1859, was passed to give an extension of time to decree-holders whose decrees would have been barred under the new law; but it in no way affects decree-holders who come within the ordinary time allowed by the new law for the execution of decrees.

Where a decree-holder comes to execute his decree within 3 years from the date when a previous proceeding has been taken to enforce his decree, he is entitled under Section 20 to have a second process in execution, notwithstanding he may not have come within 3 years from the passing of Act XIV. of 1859.

In this case, we think that the Judge has wholly misapprehended the law. Section 21, Act XIV. of 1859, was passed in order to give an extension of time to decree-holders whose decrees would have been barred under the new law. But it in no way affects decree-holders who come within the ordinary time allowed by the new law (Act XIV. of 1859) for the execution of decrees. A man who comes to execute his decree within three years from the date when a previous proceeding has been taken to enforce such judgment or decree, is entitled to have a second process in execution, notwithstanding he may not have come within three years from the passing of Act XIV. of 1859.

In this case, it is perfectly clear upon the record that not only were coercive processes issued within three years from the date of the present application, but that the defendant was actually in custody on the 16th June 1863. The present application for execution in 1865 was therefore clearly within time, the matter being governed by Section 20, and not by Section 21, Act XIV. of 1859.

The order of the Court below is reversed, and the case is remitted in order that the Judge may proceed with execution.

Costs of this appeal to be borne by respondent.

The 16th July 1866.

*Present:*

The Hon'ble L. S. Jackson and G. Campbell, *Judges.*

**Jurisdiction—Execution of joint decree as a several decree.**

Case No. 181 of 1866.

*Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Sylhet, dated the 6th January 1866.*

Mussamut Omutool Khair (Decree-holder), *Appellant,*

*versus*

Mussamut Somayee Bibee (Judgment-debtor), *Respondent.*

*Baboo Greesh Chunder Ghose* for Appellant.

*Mr. J. S. Rochfort* and *Baboo Mohendro Lal Shome* for Respondent.

Where several defendants submit to a joint decree it is not competent to the Court in execution to treat the decree as a several decree against the different defendants in respect of their proportionate shares however equitable such an order may be.

A DECREE for a certain sum of money was passed against the defendants, the decree being in its form joint, and not several. In execution, the Principal Sudder Ameen, considering, apparently, that the nature of the suit was such that the decree ought to have been a several decree against the defendants in respect of their proportionate shares, refused to execute the whole decree against the present respondent, holding her liable only for her own share. It may be that this order is altogether equitable. But we think we are bound to maintain the strict law. In the end, looseness of practice will cause greater inconvenience than the inconvenience to the individual resulting from an observance of the law.

The defendants having, it may be through negligence, submitted to a joint decree, are jointly liable for the sum so decreed against them. It is not in the power of a Court in execution to go beyond the terms of the decree, and to execute the decree in a manner other than that which the decree itself provides.

We must therefore reverse the decree of the Court below, and remand the case in order that execution may issue as for a joint decree. Any party injured by that process must resort to a further suit for contribution against the other parties who, being liable, may not have paid their proportion. We hope, however, that the parties will settle the matter among themselves in order to avoid further litigation.

The appellant must have the costs of this appeal.

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The 16th July 1866.

*Present :*

The Hon'ble L. S. Jackson and G. Campbell, *Judges.*

**Limitation—Act XI. of 1861 (Meaning of).**

Case No. 90 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Mymensingh, dated the 24th November 1865, reversing an order passed by the Principal Sudder Ameen of that District, dated the 29th April 1865.*

Gopal Kishen Potedar (Judgment-debtor), *Appellant,*

*versus*

Ranee Shurut Soonduree Debea (Decree-holder), *Respondent.*

*Baboos Woomesh Chunder Banerjee* and *Gopeenath Banerjee* for Appellant.

*Baboos Gopal Lal Mitter* and *Debendro Narain Bose* for Respondent.

Act XI. of 1861 only declares that certain Sections of Act XIV. of 1859 should not take effect or have any operation before 1st January 1862, but did not defer the operation of the Act in respect of every case which might thereafter come before the Courts.

*Jackson, J. (Campbell, J., concurring).*—It appears to me that the order of the Judge should be set aside. He clearly mistook the meaning of Act XI. of 1861. It only declares that certain Sections of Act XIV. of 1859 should not take effect or have any operation before the 1st January 1862, but did not defer the operation of the Act in respect of every case which might thereafter come before the Courts. The decree, therefore, could not properly be executed, and the order of the Judge must be set aside with costs.

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The 17th July 1866.

*Present :*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Family Property (Enforcement of private award regarding).**

Cases Nos. 289 and 290 of 1866.

*Miscellaneous Appeals from an order passed by the Judge of Patna, dated the 31st January 1866, affirming an order passed by the Principal Sudder Ameen of that District, dated the 29th April 1865.*

Baboo Koylashputty Narain Singh and others, *Appellants,*

*versus*

Baboo Beer Narain Singh, *Respondent.*

*Baboos Onookool Chunder Mookerjee* and *Kishen Succa Mookerjee* for Appellants.

*Baboos Dwarkanath Mitter* and *Chunder Madhub Ghose* for Respondent.

Where a private award regarding family property provided for a summary mode of enforcing the penalty prescribed for a breach of the terms of the agreement, and both parties tried to take advantage of it when application was made to the Court below for enforcement of the penalty—HELD that the objection, that the penalty should be enforced by regular suit, could not be entertained in special appeal.

UNDER a private award made on the 22nd August 1862, an arrangement was made regarding the property of Dirgpat Singh to the following effect: that Beer Narain was to hold and manage the entire family property. and, after payment of certain charges, was to divide the profits in the proportion of 9½ annas to Koylashputty, and to retain for himself and his brother Basdeo Narain and others, 6½ annas. It was further agreed that, if either party acted contrary to the terms of the award, a deduction should be made of a certain portion of the profits from the share of the offending proprietor, which should be made over to the other party. Application to enforce this award was made to the Court on 12th February 1863. Notice was served, and on 19th March all parties interested gave their consent, and in their petitions agreed further that the penalties proposed for a breach of the terms of the agreement should be enforced by summary process in execution of decree. On 19th June 1863, Beer Narain applied to the Principal Sudder Ameen for enforcement of the penalty against Koylashputty, on the ground that he had failed to give possession as arranged by the award. A petition on the part of Koylashputty, complaining of acts and omissions on the part of Beer Narain, was also put in. On 12th July 1864, the Principal Sudder Ameen held that, as the agreement made in the award had not been carried out by Koylashputty, the Court was bound to enforce the conditions of the award and to impose the penalty provided for a breach of the agreement, and directed that Beer Narain should be put into possession of a moiety of the estate, which was done. That this was the meaning and effect of the order of the 12th July 1864 is apparent from a subsequent proceeding of the Principal Sudder Ameen of 29th April 1865, in which he explains what he intended and what he had done. With regard to the petition of Koylashputty, the Principal Sudder Ameen would not attend to it, apparently on the ground that he was not in a position to bring a complaint, as he had failed to comply with the terms of the award. From the order passed by the Principal Sudder Ameen on 12th July 1864, no appeal was preferred, but on the 19th September following, Koylashputty again presented a petition complaining of the acts and omissions of Beer Narain which, it was alleged, rendered him liable to the penalty prescribed in the award. The Principal Sudder Ameen rejected this petition, which was brought under the provisions of Section 230, Act VIII. of 1859—a Section altogether inapplicable to the petitioner's case. The Judge has rejected the appeal, looking at the petition, apparently, as an attempt to revive the case of Beer Narain disposed of on 12th July 1864, with which he could not interfere, as the period of appeal has elapsed.

Before us, the appellant's pleader urges that the penalty should have been enforced by regular suit when a breach of the agreement occurred, and that the acts now complained of, being subsequent to the decision of July 1864, should be enquired into. On the first point, we find that the parties agreed among themselves to a summary mode of enforcing the penalty; that, when application was made to the Court for enforcement of the penalty, both parties tried to take advantage of it; and that no objection is expressed on this score till the Judge, in his decision now before us, expressed a doubt as to whether summary process could be taken out. This point, therefore, cannot now be urged with success; and on the second point it is urged by the pleader for respondent, and not denied by the appellant, petitioner, that the present petition contains merely a re-statement of the charges made in the petition put in by Koylashputty before the decision passed on 12th July 1864. We see, further, that the application to the Court has been made altogether in a wrong form, for the petitioner was not in a position to bring a claim under Section 230, Act VIII. of 1859. As we see no sufficient ground for giving the petitioner the relief he asks for, we dismiss the appeal with costs.

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The 17th July 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Limitation—Keeping alive decree.**

Case No. 323 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Gya, dated the 15th February 1866, affirming an order passed by the Sudder Ameen of that District, dated the 22nd July 1865.*

Mussamut Fuzeelutoonissa (Judgment-debtor), *Appellant,*

*versus*

Chuttur Dharee Singh (Decree-holder), *Respondent.*

*Baboo Romanath Bose* for Appellant.

No one for Respondent.

**An attempt at settlement of accounts in Court is sufficient to keep a decree alive.**

BOTH the Lower Courts state that, in May 1864, the parties attempted to settle their accounts in Court, for so we gather from the wording of the Sudder Ameen's order. We think this attempt at settlement was quite sufficient to keep the decree alive. The appeal is dismissed.

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The 20th July 1866.

*Present:*

The Hon'ble L. S. Jackson, *Judge.*

**Appeal (Re-admission of)—Evidence—Verified plaint.**

*Petition praying for the restoration of an appeal which had been dismissed owing to no notice having been served on the respondent, and urging that neither petitioner nor his Mooktear in the Zillah Court knew of the appeal having been filed, and that the notice was returned unserved long before the time fixed for the attendance of the respondent.*

Mr. F. R. Miselbach, *Petitioner.*

*Baboo Khetter Mohun Mookerjee* for Petitioner.

**A petition for the re-admission of an appeal must be accompanied by evidence in support of the allegations on which the petition is founded.**

**A verified petition is not evidence.**

THE petitioner applies to have his appeal re-admitted. He does so upon the strength of a petition which he alleges has been verified by the petitioner. I have always intimated that, in applications of this kind before making any order such as the petitioner asks for, the Court would require evidence to the facts alleged. The petitioner's vakeel contends that a verified petition ought to satisfy the Court. I am of opinion that it ought not. The Court requires evidence. A verified petition is not evidence any more than a verified plaint is evidence. A verified plaint is subject to this condition, that, by Section 24 of Act VIII. of 1859, a person making, in a verified plaint or such other declaration as is mentioned in that Section, any statement which is false, which he knows or believes to be false, or does not know or believe to be true, is liable to punishment according to the provisions of the law for fabricating false evidence. That Section, however, does not include verified petitions of this nature. Therefore the sanction which attaches to verified plaints by reason of the party being subject to punishment if they contain statements which are wilfully false does not apply in the present case. The petition, therefore, not being supported by anything in the shape of evidence in support of the allegation made in it, I must decline to re-admit the appeal.

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*Miscellaneous*

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*The 20th July 1866.*

*Present:*

*The Hon'ble G. Loch and A. G. Macpherson, Judges.*

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Against such remand an appeal was preferred to Her Majesty in Council.

The Zillah Court, however, proceeded with the case, and eventually dismissed the whole suit, and the defendant applied to execute the decree for his costs.

HELD that, in such circumstance, the High Court was not competent under Section 4, Regulation XVI. of 1797 (the last-mentioned decree not having been appealed to it), to suspend execution of decree or to direct the taking of security.

THIS rule was obtained by Baboo Poorno Chunder Mookerjee, whose client was plaintiff in a suit for resumption of lakeraj land. That suit having been partially decreed in favor of the plaintiff, an appeal was made to this Court, and on the appeal the Court, being of opinion that the *onus* of proof had been laid upon the wrong party, reversed the decree and remanded the suit to the Lower Court for re-trial, without making, as it appears, any order as to costs. The Court below on the new trial has dismissed the suit of the plaintiff, charging him with the entire costs of the proceedings, including, it seems, the costs of the appeal to this Court. In the meantime, the plaintiff, dissatisfied with the order of remand, has appealed against that judgment to Her Majesty in Council. The Court below, notwithstanding, on the application of the defendant, has proceeded to execute its decree for costs. On being informed, however, that an appeal to England had been preferred, it appears that the Court below, presumably under Section 36, Act XXIII. of 1861, which may or may not apply to the case (on that we give no very decided opinion), has required the defendant to give security to the extent of the sum sought to be levied from the plaintiff. The plaintiff's, petitioner's, application now is that the Court should disallow this proceeding, but accept security from the plaintiff and direct the stay of execution. The petitioner's vakeel contends that this Court has authority to make such an order under Section 4, Regulation XVI. of 1797. That Section says that, in case of an appeal to Her Majesty in Council, the Court of Sudder Dewanny Adawlut, *i.e.*, this Court, may order the judgment passed *by them* to be carried into execution, taking sufficient security, or suspend execution of *their* judgment during the appeal which is the appeal to England. That refers evidently and exclusively to judgments passed by the late Sudder Court or this Court. It cannot refer to a judgment passed by the Zillah Court. It is alleged, in support of the rule, that, amongst other things, the Zillah Court has executed the decree for costs of the appeal in this Court, and that, consequently, the proceedings may be looked upon to that extent as executing the decree of this Court. But we think that manifestly the proceedings cannot be looked upon in any such light. This Court made no order in respect of costs. It seems extremely doubtful whether in such case the Zillah Court would have authority to award against either party costs of appeal to this Court. But, if the decree of the Zillah Court was wrong in this particular, it was open to the plaintiff to appeal against it in regular course. He has not done that; and he cannot be permitted on this occasion to raise a question as to the propriety of that decree. It seems to us, therefore, that this Court has no jurisdiction to make the order prayed, and that the rule must be discharged with costs.

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The 24th July 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Attachment and Sale—Irregularities.**

Case No. 214 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Sylhet, dated the 30th December 1865, affirming an order passed by the Moonsiff of Nubeegunge, dated the 2nd August 1865.*

Nilmonee Shaha (one of the Judgment-debtors), *Appellant,*

*versus*

Ram Churn Deb (Decree-holder) and Raj Chunder Nag (Auction-purchaser), *Respondents.*

*Baboo Asootosh Dhur* for Appellant.

*Baboo Sreenath Doss* for Respondents.

Where irregularities were alleged in the mode of enforcing attachment and making proclamation of sale, the Judge was required to go fully into the case, and determine whether the debtor had sustained substantial injury.

The 20th July 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Execution of decree—Limitation—Liability of Surety.**

Case No. 324 of 1866.

*Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Behar, dated the 20th February 1866.*

Hurkhoo Singh (Objector), *Appellant,*

*versus*

Baboo Ram Kishen and others (Decree-holders), *Respondents.*

*Baboos Kishen Succa Mookerjee* and *Tarucknath Sein* for Appellant.

*Mr. R. T. Allan* and *Baboo Dwarkanath Mitter* for Respondents.

In execution of decree the debtors arranged to pay the debt by instalments, and the petitioner entered into a surety-bond by which he agreed, on failure of the debtors to pay the debt or any one of the instalments, to be liable for the debt or to have execution at once taken out against him.—HELD that the surety's was a separate liability; that proceedings against one or other of the joint debtors which would keep the decree alive against all of them would not affect him; and that, if he could be proceeded against in execution of the original decree, execution should have been taken against him from the date when his liability commenced, and that the decree should have been kept alive as against him by proceedings irrespective of those taken against the judgment-debtors.

Two questions arise in this case: *1st,* That execution cannot issue at all against the petitioner; and, *2nd,* that, if it could, it is barred by limitation. It appears that, in execution of a decree, the debtors, so far back as 1845, entered into an arrangement with the decree-holder, promising to pay the debt by instalments in the course of four years. The petitioner became surety for the debtors, and entered into a bond by which he agreed that, on failure of the debtors to pay the debt, or on failure to pay any one instalment, he would be liable for the debt, and that execution might at once be taken out against him. The decree-holder, it is alleged, took no steps against the surety till 1858, when he applied for execution against him; but it is not shewn us that he proceeded further. From that time to the present, he has been satisfied with bringing the property of his debtors to sale, and, having exhausted their means, now seeks to realize the balance from the surety, alleging that the surety is, by his own act, jointly liable with the judgment-debtors, and that, as he (the decree-holder) has kept his decree alive against the latter, he is entitled to proceed against the former.

It appears to us that the Lower Court is in error in considering the petitioner to be in the same position as the debtors for whose debt he made himself liable. He is not jointly and severally liable with them for the payment of the debt, but only liable on their failure to pay it. His liability commenced from the time when the debtors failed to pay according to the terms of the kistbundee, but no steps were taken against him till 1856. He then filed a petition, alleging that he could not be proceeded against summarily, and this petition was rejected, and no appeal was preferred. No attempt, however, appears to have been then made to proceed further against him. In 1858, another petition was preferred for execution, but with similar results. Now, though it may be said that, by not preferring an appeal from the order of 1856 declaring him liable to be proceeded against in execution, he has acquiesced in that order, and cannot again plead non-liability, yet that circumstance does not, we think, put him on the same footing as the original debtors. He is not jointly and severally liable with them, though he has made himself responsible for their debt. Proceedings against one or other of the joint-debtors, which would keep the decree alive against all of them, will not affect him. His is a separate responsibility, and admitting, for argument's sake, that he can be proceeded against in execution of the original decree, which appears very doubtful, we think that execution should have been taken against him from the date when his liability commenced, and that the decree should have been kept alive as against him by proceedings irrespective of those taken against the judgment-debtors. The summary decision quoted by Mr. Allan is so imperfectly reported that it does not serve to guide us, and the allegation made by him that the surety's liability commenced from the time that the resources of the debtor were exhausted is not the case, for the liability commenced from the period mentioned in the bond, *viz.,* when the debtors failed to pay the instalments due on their kistbundee. As no proceedings have been taken out against the petitioner since 1858, we think that execution is barred as against him; and we, therefore, reverse the order of the Lower Court with costs.

The 10th July 1866.

*Present:*

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

**Appeal to Privy Council—Power of High Court to stay execution of Lower Court's decree—Costs.**

*Petition of Onooroop Chunder Mookerjee.*

The Zillah Court decreed a suit in part for plaintiff. On appeal, the High Court reversed the judgment, and remanded the case—making no order as to the costs of the appeal.

Against such remand an appeal was preferred to Her Majesty in Council.

The Zillah Court, however, proceeded with the case, and eventually dismissed the whole suit, and the defendant applied to execute the decree for his costs.

HELD that, in such circumstance, the High Court was not competent under Section 4, Regulation XVI. of 1797 (the last-mentioned decree not having been appealed to it), to suspend execution of decree or to direct the taking of security.

THIS rule was obtained by Baboo Poorno Chunder Mookerjee, whose client was plaintiff in a suit for resumption of lakeraj land. That suit having been partially decreed in favor of the plaintiff, an appeal was made to this Court, and on the appeal the Court, being of opinion that the *onus* of proof had been laid upon the wrong party, reversed the decree and remanded the suit to the Lower Court for re-trial, without making, as it appears, any order as to costs. The Court below on the new trial has dismissed the suit of the plaintiff, charging him with the entire costs of the proceedings, including, it seems, the costs of the appeal to this Court. In the meantime, the plaintiff, dissatisfied with the order of remand, has appealed against that judgment to Her Majesty in Council. The Court below, notwithstanding, on the application of the defendant, has proceeded to execute its decree for costs. On being informed, however, that an appeal to England had been preferred, it appears that the Court below, presumably under Section 36, Act XXIII. of 1861, which may or may not apply to the case (on that we give no very decided opinion), has required the defendant to give security to the extent of the sum sought to be levied from the plaintiff. The plaintiff's, petitioner's, application now is that the Court should disallow this proceeding, but accept security from the plaintiff and direct the stay of execution. The petitioner's vakeel contends that this Court has authority to make such an order under Section 4, Regulation XVI. of 1797. That Section says that, in case of an appeal to Her Majesty in Council, the Court of Sudder Dewanny Adawlut, *i.e.*, this Court, may order the judgment passed *by them* to be carried into execution, taking sufficient security, or suspend execution of *their* judgment during the appeal which is the appeal to England. That refers evidently and exclusively to judgments passed by the late Sudder Court or this Court. It cannot refer to a judgment passed by the Zillah Court. It is alleged, in support of the rule, that, amongst other things, the Zillah Court has executed the decree for costs of the appeal in this Court, and that, consequently, the proceedings may be looked upon to that extent as executing the decree of this Court. But we think that manifestly the proceedings cannot be looked upon in any such light. This Court made no order in respect of costs. It seems extremely doubtful whether in such case the Zillah Court would have authority to award against either party costs of appeal to this Court. But, if the decree of the Zillah Court was wrong in this particular, it was open to the plaintiff to appeal against it in regular course. He has not done that; and he cannot be permitted on this occasion to raise a question as to the propriety of that decree. It seems to us, therefore, that this Court has no jurisdiction to make the order prayed, and that the rule must be discharged with costs.

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The 24th July 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Attachment and Sale—Irregularities.**

Case No. 214 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Sylhet, dated the 30th December 1865, affirming an order passed by the Moonsiff of Nubeegunge, dated the 2nd August 1865.*

Nilmonee Shaha (one of the Judgment-debtors), *Appellant,*

*versus*

Ram Churn Deb (Decree-holder) and Raj Chunder Nag (Auction-purchaser), *Respondents.*

*Baboo Asootosh Dhur* for Appellant.

*Baboo Sreenath Doss* for Respondents.

Where irregularities were alleged in the mode of enforcing attachment and making proclamation of sale, the Judge was required to go fully into the case, and determine whether the debtor had sustained substantial injury.

The 20th July 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Execution of decree—Limitation—Liability of Surety.**

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*Baboos Kishen Succa Mookerjee* and *Tarucknath Sein* for Appellant.

*Mr. R. T. Allan* and *Baboo Dwarkanath Mitter* for Respondents.

In execution of decree the debtors arranged to pay the debt by instalments, and the petitioner entered into a surety-bond by which he agreed, on failure of the debtors to pay the debt or any one of the instalments, to be liable for the debt or to have execution at once taken out against him.—HELD that the surety's was a separate liability; that proceedings against one or other of the joint debtors which would keep the decree alive against all of them would not affect him; and that, if he could be proceeded against in execution of the original decree, execution should have been taken against him from the date when his liability commenced, and that the decree should have been kept alive as against him by proceedings irrespective of those taken against the judgment-debtors.

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It appears to us that the Lower Court is in error in considering the petitioner to be in the same position as the debtors for whose debt he made himself liable. He is not jointly and severally liable with them for the payment of the debt, but only liable on their failure to pay it. His liability commenced from the time when the debtors failed to pay according to the terms of the kistbundee, but no steps were taken against him till 1856. He then filed a petition, alleging that he could not be proceeded against summarily, and this petition was rejected, and no appeal was preferred. No attempt, however, appears to have been then made to proceed further against him. In 1858, another petition was preferred for execution, but with similar results. Now, though it may be said that, by not preferring an appeal from the order of 1856 declaring him liable to be proceeded against in execution, he has acquiesced in that order, and cannot again plead non-liability, yet that circumstance does not, we think, put him on the same footing as the original debtors. He is not jointly and severally liable with them, though he has made himself responsible for their debt. Proceedings against one or other of the joint-debtors, which would keep the decree alive against all of them, will not affect him. His is a separate responsibility, and admitting, for argument's sake, that he can be proceeded against in execution of the original decree, which appears very doubtful, we think that execution should have been taken against him from the date when his liability commenced, and that the decree should have been kept alive as against him by proceedings irrespective of those taken against the judgment-debtors. The summary decision quoted by Mr. Allan is so imperfectly reported that it does not serve to guide us, and the allegation made by him that the surety's liability commenced from the time that the resources of the debtor were exhausted is not the case, for the liability commenced from the period mentioned in the bond, *viz.,* when the debtors failed to pay the instalments due on their kistbundee. As no proceedings have been taken out against the petitioner since 1858, we think that execution is barred as against him; and we, therefore, reverse the order of the Lower Court with costs.

The 10th July 1866.

*Present:*

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

**Appeal to Privy Council—Power of High Court to stay execution of Lower Court's decree—Costs.**

*Petition of Onoeroop Chunder Mookerjee.*

The Zillah Court decreed a suit in part for plaintiff. On appeal, the High Court reversed the judgment, and remanded the case—making no order as to the costs of the appeal.

Against such remand an appeal was preferred to Her Majesty in Council.

The Zillah Court, however, proceeded with the case, and eventually dismissed the whole suit, and the defendant applied to execute the decree for his costs.

HELD that, in such circumstance, the High Court was not competent under Section 4, Regulation XVI. of 1797 (the last-mentioned decree not having been appealed to it), to suspend execution of decree or to direct the taking of security.

THIS rule was obtained by Baboo Poorno Chunder Mookerjee, whose client was plaintiff in a suit for resumption of lakeraj land. That suit having been partially decreed in favor of the plaintiff, an appeal was made to this Court, and on the appeal the Court, being of opinion that the *onus* of proof had been laid upon the wrong party, reversed the decree and remanded the suit to the Lower Court for re-trial, without making, as it appears, any order as to costs. The Court below on the new trial has dismissed the suit of the plaintiff, charging him with the entire costs of the proceedings, including, it seems, the costs of the appeal to this Court. In the meantime, the plaintiff, dissatisfied with the order of remand, has appealed against that judgment to Her Majesty in Council. The Court below, notwithstanding, on the application of the defendant, has proceeded to execute its decree for costs. On being informed, however, that an appeal to England had been preferred, it appears that the Court below, presumably under Section 36, Act XXIII. of 1861, which may or may not apply to the case (on that we give no very decided opinion), has required the defendant to give security to the extent of the sum sought to be levied from the plaintiff. The plaintiff's, petitioner's, application now is that the Court should disallow this proceeding, but accept security from the plaintiff and direct the stay of execution. The petitioner's vakeel contends that this Court has authority to make such an order under Section 4, Regulation XVI. of 1797. That Section says that, in case of an appeal to Her Majesty in Council, the Court of Sudder Dewanny Adawlut, *i.e.*, this Court, may order the judgment passed *by them* to be carried into execution, taking sufficient security, or suspend execution of *their* judgment during the appeal which is the appeal to England. That refers evidently and exclusively to judgments passed by the late Sudder Court or this Court. It cannot refer to a judgment passed by the Zillah Court. It is alleged, in support of the rule, that, amongst other things, the Zillah Court has executed the decree for costs of the appeal in this Court, and that, consequently, the proceedings may be looked upon to that extent as executing the decree of this Court. But we think that manifestly the proceedings cannot be looked upon in any such light. This Court made no order in respect of costs. It seems extremely doubtful whether in such case the Zillah Court would have authority to award against either party costs of appeal to this Court. But, if the decree of the Zillah Court was wrong in this particular, it was open to the plaintiff to appeal against it in regular course. He has not done that; and he cannot be permitted on this occasion to raise a question as to the propriety of that decree. It seems to us, therefore, that this Court has no jurisdiction to make the order prayed, and that the rule must be discharged with costs.

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The 24th July 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Attachment and Sale—Irregularities.**

Case No. 214 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Sylhet, dated the 30th December 1865, affirming an order passed by the Moonsiff of Nubeegunge, dated the 2nd August 1865.*

Nilmonee Shaha (one of the Judgment-debtors), *Appellant,*

*versus*

Ram Churn Deb (Decree-holder) and Raj Chunder Nag (Auction-purchaser), *Respondents.*

*Baboo Asootosh Dhur* for Appellant.

*Baboo Sreenath Doss* for Respondents.

Where irregularities were alleged in the mode of enforcing attachment and making proclamation of sale, the Judge was required to go fully into the case, and determine whether the debtor had sustained substantial injury.

WE think the Judge must go more fully into this case, and determine whether the debtor has sustained substantial injury from irregularity in the sale-proceedings. The Judge admits that there were some irregularities, but he does not specify what these were. The petitioner complains of two classes of irregularities, *first*, in regard to attachment, that it was not conducted according to the provisions of Section 239 of the Code of Civil Procedure, the order for attachment not having been read out on the spot, nor affixed on the office of the Collector; and, *secondly*, in regard to the sale-proclamation, that, though the law requires proclamation of sale of landed property paying revenue to Government to be made in five distinct places, this mode of making proclamation was not duly observed. Now, it is obvious that a debtor may be seriously injured if the attachment and proclamation of sale be not duly made, for bidders will not be in attendance. The property is said to be worth Rupees 5,000. It may or may not be worth so much, but, if it be anything like that value, which the Judge should ascertain, if proclamation was not duly made, the inference to be drawn from the low price bid is that substantial injury has been done to the debtor owing to the paucity of bidders arising from irregularity in the mode of enforcing attachment and making proclamation. We remand the case to the Judge. Should he find sufficient grounds for setting aside the sale, he will take up the question of limitation now urged before us, and, giving the decree-holder opportunity to show that he has kept his decree alive, determine whether further execution is or is not barred by limitation.

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The 26th July 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Section 246 of Act VIII. of 1859—Claim to attached property (by Mortgagee)—Appeal.**

Case No. 669 of 1865.

*Miscellaneous Appeal from an order passed by the Judge of Tirhoot, dated the 27th July 1865.*

Shaikh Bukshee and another (Objectors), *Appellants,*

*versus*

Bungsheedhur and others (Decree-holders and Judgment-debtors), *Respondents.*

*Mr. R. E. Twidale* for Appellants.

*Moonshee Ameer Ali Khan Bahadoor* for Respondents.

Where a claim under Section 246 of Act VIII. of 1859 is dismissed, there is no appeal from the order of dismissal.

THIS case was brought under Section 246 of Act VIII. of 1859. The Judge has found that the property belongs to, and is in possession of, the judgment-debtor, and that the claim put forward by the petitioner is fraudulent. From this order there is no appeal, but the petitioner may bring a suit to establish his right, at any time within a year from the date of the order passed by the Judge. The petitioner urges, however, that, having held a mortgage which he foreclosed, he is in the shoes of the debtor and now the actual proprietor, and, as such, entitled to appeal; but, even if this be true, it does not make him a party to the suit so as to give him a right to appeal under Section 11 of Act XXIII. of 1861. We reject the application with costs.

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The 26th July 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Sale in Execution—Objections to—Irregularity.**

Case No. 222 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Backergunge, dated the 6th January 1866, affirming an order passed by the Principal Sudder Ameen of that District, dated the 9th May 1865.*

Nil Komul Chuckerbutty and others (Decree-holders), *Appellants,*

*versus*

Shama Soonduree and others (Judgment-debtors), *Respondents.*

*Baboo Romesh Chunder Mitter* for Appellants.

*Baboo Kalee Mohun Doss* for Respondents.

**Objections by the judgment-debtor to a sale in execution of decree being made absolute can be raised and disposed of only under Sections 256 and 257 of the Code of Civil Procedure, under which a sale can be set aside on the ground of material irregularity in publishing or conducting it.**

In this case, execution issued, and, after the usual process had been gone through, certain property of the appellants was actually put up for sale and sold. Until after the sale, no objection of any sort was taken by the appellant to the regularity or propriety of the proceedings. But some time after the sale (though before it was confirmed), the appellant appeared, and contended that the sale was illegal and void, because the decree was one on which, under Section 20 of Act XIV. of 1859, execution ought not to have been issued; and because also the judgment-creditor had taken a kisteebundee in lieu of his decree, and, therefore, should not have been allowed to take out further execution. The Lower Court has entertained these objections, and has set aside the sale on the ground that execution ought not to have issued; and the purchaser has declared his readiness to give up all claims on receiving back the purchase-money which he has deposited in Court.

The sale having once taken place, it appears to us that objections to its being made absolute can be tried only under Sections 256 and 257 of Act VIII. of 1859, especially in the case of a judgment-debtor who lies by as the appellant has done. Under these Sections, applications can be made to set aside sales only on the ground of material irregularity in publishing or conducting the sale. Here no such material irregularity is shown to exist; and, therefore, if the appellant has any remedy, it is not under those Sections.

The order of the Lower Court is reversed with costs, and the sale will stand good.

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The 26th July 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Certificate under Act XL. of 1858.**

Case No. 249 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Rajshahye, dated the 16th March 1866.*

Pauch Cowree Mundul and others, *Appellants,*

*versus*

Bhugobutty Dossia, *Respondent.*

*Baboo Romesh Chunder Mitter* for Appellants.

*Baboos Unnoda Pershad Banerjee* and *Onookool Chunder Mookerjee* for Respondent.

**Where a minor claimed an estate as adopted son—Held that a certificate appointing a guardian under Act XL. of 1858 would not, until his adoption was proved, entitle the minor or his guardian to interfere with the possession of the estate by the deceased's widow who denied the adoption and claimed the estate as heiress.**

This is an appeal from the order of the Judge of Rajshahye dismissing an application for a certificate as guardian under Act XL. of 1858. The real question at issue is whether the minor is or is not the adopted son of the respondent Bhugobutty. This issue cannot be properly tried on this application. But, if the appellant be really the nearest male relative to the minor, and, as such, entitled to act as his guardian, we see no reason why a certificate under Act XL. of 1858 should not be granted him. Such certificate would enable him to bring a suit to establish the adoption of the minor, while, until the adoption is finally proved, the certificate will not enable the appellant to interfere with Bhugobutty, or her possession of her husband's estate. We remand the case to the Judge that he may try it again with reference to the above remarks.

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The 1st August 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Execution—Jurisdiction.**

Case No. 326 of 1866.

*Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Tirhoot, dated the 26th February 1866.*

Rajah Bhoop Singh Bahadoor (Judgment-debtor), *Appellant,*

*versus*

Sunkur Dutt Jha (Decree-holder), *Respondent.*

*Mr. C. Gregory, Moonshee Ameer Ali,* and *Baboo Onookool Chunder Mookerjee* for Appellant.

*Mr. R. E. Twidale* and *Baboo Mohesh Chunder Chowdhry* for Respondent.

When a case is transferred by the Court which passed the original decree to another Court in order that the decree may be executed, and the proceedings on the application for execution have been struck off the file for default, the proper Court to apply to for a fresh issue of execution is the Court which passed the original decree, and not the Court to which the case was transferred to be executed.

THIS decree, passed by the Judge of Tirhoot, was made over by him for execution to the Principal Sudder Ameen of that District. On the application of the decree-holder, the Principal Sudder Ameen sent a certificate to the Principal Sudder Ameen of Patna to execute the decree against certain property in that district. The case was, however, struck off for default on 6th July 1861, and the jurisdiction deputed to the Principal Sudder Ameens of Tirhoot and Patna ceased. The decree-holder made a fresh application for execution to the Principal Sudder Ameen of Tirhoot, as if that officer had still jurisdiction in the matter, and the case was admitted and orders for execution were passed. We think, however, that the appellant is correct in his contention that, the execution-case having been struck off the file, the jurisdiction under which the Principal Sudder Ameen had acted ceased, and that the proper Court to apply to for the fresh issue of the execution was that of the Judge who had passed the decree. As the respondent is unable to show us that the Principal Sudder Ameen, in proceeding with the case as he has now done, was acting under authority from the Judge, we think that an appeal does lie to this Court; and, holding that the Principal Sudder Ameen has acted without jurisdiction, we reverse his order and decree the appeal with costs.

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The 1st August 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Execution—Representatives.**

Cases Nos. 356 and 357 of 1866.

*Miscellaneous Appeals from an order passed by the Judge of Shahabad, dated the 21st April 1866, affirming an order passed by the Principal Sudder Ameen of that District, dated the 24th February 1866.*

Sheo Narain Singh (one of the Judgment-debtors), *Appellant,*

*versus*

Ram Purtab Chowdhry and others (Decree-holders), *Respondents.*

*Baboo Mohesh Chunder Chowdhry* for Appellant.

No one for Respondents.

A decree against the representatives of a deceased person can only be executed against the property of the deceased come to their hands, so long as they have rightly administered the estate.

BY the decree of the High Court, the petitioners were made liable as representatives of the deceased. Execution is sought to be taken out against them personally, and the Principal Sudder Ameen held that the decree as passed by the first Court was intended to be executed; and this order has been confirmed by the Judge. The decree under the judgment of the High Court can only be executed under the provisions of Section 203 of Act VIII. of 1859. If the debtors are in possession of the property belonging to the deceased, that property is liable to sale; and the decree-holder must give some proof that the property he seeks to sell is property of that kind. The debtors cannot be made personally responsible, unless it be proved that property belonging to the deceased came into their hands, and that they misapplied it. We reverse the orders of the Lower Courts, and direct them to proceed according to the law as above laid down in Section 203.

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The 2nd August 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Execution—Limitation.**

Case No. 311 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Beerbhoom, dated the 16th February 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 22nd July 1865.*

Junardun Doss Mitter and others (Judgment-debtors), *Appellants,*

*versus*

Rajah Rooknee Bullub Bahadoor (Decree-holder), *Respondent.*

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*Mr. R. T. Allan* and *Baboos Otool Chunder Mookerjee* and *Sham Lal Mitter* for Appellants.

*Baboo Obhoy Churn Bose* for Respondent.

**An unnecessary and unsuccessful suit is not a proceeding to enforce a decree within the meaning of Section 20, Act XIV. of 1859.**

In this case, there is no doubt that the decree-holder is out of time, and cannot now take out execution unless he is entitled to exclude from the three years' rule contained in Section 20 of Act XIV. of 1859, the time during which a certain suit was pending between himself and Messrs. Colvin, Cowie, and Co. Having got a decree against his debtor, the decree-holder applied for execution in 1859, which application was eventually struck off for default. Messrs. Colvin, Cowie, and Co. had about that time sold lands of the judgment-debtor which had been previously mortgaged to them. It is unnecessary to enter into details as to their position, further than to say that the decree-holder thought himself entitled to attach certain monies in Court which Messrs. Colvin, Cowie, and Co. claimed as the proceeds of their mortgage. To establish his right to attach this fund, the decree-holder brought a civil suit against Messrs. Colvin, Cowie and Co., making the judgment-debtor also a defendant. This suit was unsuccessful both in the Court of original jurisdiction and in the Appellate Court, by which it was finally dismissed in October 1863. In March 1865, a fresh application for execution was made. The decree-holder urged that, though more than three years had elapsed since his former application was struck off, still he was in time, as his unsuccessful suit was a proceeding to enforce his decree within the meaning of Section 20 of Act XIV. of 1859. The Lower Court considered that the right to execute the decree was not barred.

We think the order of the Lower Court is wrong, and we reverse it with costs. Two decisions of this Court reported in 2 Weekly Reporter 3 (Miscellaneous) and 6 Weekly Reporter 15 (Miscellaneous) have been referred to in support of the order of the Lower Court. But they do not apply to the present case, because the suits which were then deemed to be proceedings within the meaning of Section 20, were suits in which the decree-holder was successful, and which were properly, if not necessarily, brought by him to enable him to realize his debts by removing obstructions from his path. Here the litigation, was wholly unnecessary and fruitless; no obstacle was (and never, we must presume, could be) removed by it. Such a suit we do not think comes within the meaning of Section 20, Act XIV. of 1859.

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The 2nd August 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Execution—Limitation.**

Case No. 305 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of East Burdwan, dated the 8th February 1866, reversing an order passed by the Sudder Ameen of that District, dated the 7th November 1865.*

Kishen Mohun Jush (one of the Judgment-debtors), *Appellant,*

*versus*

Chunder Kant Chuckerbutty (Decree-holder), *Respondent.*

*Baboo Umbica Churn Banerjee* for Appellant.

No one for Respondent.

**The act of taking out the proceeds of a previous sale in execution of a decree is not a proceeding which keeps alive the decree within the meaning of Section 20, Act XIV. of 1859.**

The money that was paid to the decree-holder in June 1862 was a sum in deposit, the proceeds of a previous sale in execution of this decree. The act of taking out this money, which really belonged to the decree-holder, cannot, we think, be considered a proceeding such as is contemplated in Section 20, Act XIV. of 1859. Under this view of the case, we reverse the order of the Judge.

The 2nd August 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Case No. 179 of 1866.

**Resistance of process—Landed proprietors.**

*Miscellaneous Appeal from an order passed by the Judge of Tirhoot, dated the 16th December 1865.*

Shaikh Kodrutoollah and others (Defendants), *Appellants,*

*versus*

Roghoobur Dutt Chowdhry (Plaintiff) and Government and others (Objectors), *Respondents.*

*Mr. R. E. Twidale* for Appellants.

*Baboo Kishen Kishore Ghose* for Government Respondent.

Section 25, Regulation IV, 1793, is applicable to landed proprietors.

THOUGH the evidence against the petitioners is not very strong, the Judge has considered it worthy of credit, and the pleader for the appellants has not shewn us that the Judge was in error in coming to the conclusion which he has done, and the defendants, appellants, have no evidence sufficient to refute that produced in support of the charge.

An objection is taken that the law under which the Judge has acted, *viz.*, Section 25, Regulation IV. of 1793, is not applicable to the defendants who are landed proprietors; but Section 3, Regulation IX. of 1799, extended the provisions of that Section to all classes, and neither of the laws above quoted have been rescinded by Act X. of 1861.

We dismiss the appeal. Government, who have been unnecessarily made a respondent, will obtain costs.

The 3rd August 1866.

*Present:*

The Hon'ble L. S. Jackson, *Judge.*

**Appeal to Privy Council (after time)—Jurisdiction (of High Court).**

*Application for admission of an Appeal to the Privy Council from a decision passed by the High Court on the 29th January 1866, in Regular Appeal No. 372 of 1865.*

Mahomed Mudsur (Plaintiff), *Appellant,*

*versus*

Ram Lal Roy and others (Defendants), *Respondents.*

*Baboo Otool Chunder Mookerjee* for Appellant.

Where a petition of appeal to the Privy Council was returned because not accompanied with the sum certified or a sum probably sufficient to meet the expense of translating and transcribing the proceedings in the case, and the application was renewed after the time for appeal had expired—HELD that this Court had no further jurisdiction in the matter.

Baboo Otool Chundur Mookerjee applies to the Court to receive his application for leave to appeal to Her Majesty in Council against a decree of this Court made on the 29th January last. The six months allowed by law for preferring that appeal expired on the 29th of last month. The law (Act II. of 1844), and the rules of practice, dated the 7th December 1858, require that a party appealing to Her Majesty in Council should not only file his petition of appeal, but also deposit, within the six months, security in cash or Company's paper (or a security bond) for Rupees 4,000 to meet the probable costs of appeal, and also deposit either the sum certified or a sum probably sufficient to meet the expenses of translating and transcribing the proceedings in the case. It appears that the petitioner presented this petition of appeal on the 28th of last month, being a Saturday, together with a security bond and with a tender of Rupees 100 to meet the expense of translating and transcribing the transcript. That sum was not either the sum certified, nor a sum probably sufficient to meet these expenses. The Deputy Registrar, therefore, returned the petition of appeal on the fol-

lowing Court day, being Monday, the 30th. This proceeding of the Deputy Registrar was quite in accordance with the law and with rule. It is now too late to receive the appeal, the six months having expired, and the Court having no further jurisdiction to deal with it; and the party, if he desires to appeal to England, must apply to the Judicial Committee of the Privy Council.

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The 6th August 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Jurisdiction—Execution of decree (transfer of).**

Case No. 351 of 1866.

*Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Sylhet, dated the 9th March 1866.*

Rajeeb Ram Doss and others (Judgment-debtors), *Appellants,*

*versus*

Mahomed Haseem (Decree-holder), *Respondent.*

*Baboo Mohinee Mohun Roy* for Appellants.

*Mr. C. Gregory* and *Baboo Unnoda Pershad Banerjee* for Respondent.

A Zillah Judge must execute his own decrees, and has no power to direct the Principal Sudder Ameen to take up and dispose of an application for execution.

THE first decree in this suit was passed by the Judge of Sylhet. There was an appeal to this Court, after the disposal of which an application for execution was made to the Judge, who, instead of dealing with it himself, transferred the application to the Court of the Principal Sudder Ameen for disposal. The Principal Sudder Ameen has attempted to execute the decree, and the present appeal is from his proceedings.

We think that the whole of the proceedings taken in the Principal Sudder Ameen's Court are nugatory, that Court having no jurisdiction to deal with the case. The Judge had no power to transfer the execution of his own decree to the Principal Sudder Ameen's Court or to any other Court. The words of Section 362 of Act VIII. of 1859 are clear and distinct upon that point, and leave no discretion to the Court—"Application for execution "of the decree of an Appellate Court shall "be made to the Court which passed the "first decree in the suit, *and shall be exe-* "*cuted by that Court* in the manner and "according to the rules hereinbefore con-"tained for the execution of original de-"cree."

Under these circumstances, we set aside the whole of the proceedings before the Principal Sudder Ameen, and remand the case to the Judge by whom the decree must now be executed.

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The 6th August 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Act VIII. of 1859, Section 119—Ex-parte decree.**

Case No. 76 of 1866.

*Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Mymensingh, dated the 5th February 1866.*

Shib Chunder Bhadooree and others (Defendants), *Appellants,*

*versus*

Luckhee Debia Chowdhrain (Plaintiff), *Respondent.*

*Baboo Kishen Dyal Roy* for Appellants.

*Baboo Juggodanund Mookerjee* for Respondent.

The 30 days "after any process for enforcing the judgment has been executed" within which a defendant may apply under Section 119, Code of Civil Procedure, for an order to set aside an *ex-parte* decree, mean 30 days after the execution of any process against the person or property of the defendant.

THIS was an application, under Section 119 of Act VIII. of 1859, to set aside an *ex-parte* decree on the ground that the applicant had not been served with the summons in the suit, and did not appear, because he did not know that any suit had been instituted. The Lower Court has refused this application as being made more than thirty days after process for enforcing judgment has been executed. We think that the words "process for enforcing the judgment has been executed" refer to process executed against the person or property of the judgment-debtor—process so executed as to make it certain that the debtor has got notice of the execution of the decree against him. In the present instance, the applicant, while admitting that certain lands have been attached, says that they are lands

in which he is in no way interested and of which he is not in possession; and he alleges that he did not know of these lands having been attached as his, and that he did not in any other way become aware of the *ex-parte* decree until within thirty days prior to his application. The Lower Court clearly ought to have enquired into, and decided upon the truth of these allegations, If true, the application ought to have been granted; if untrue, and notice of the decree more than thirty days before the application was brought home to the judgment-debtor, then it ought to have been refused.

The case is remanded to be re-tried with reference to the above remarks. The Court will take the case up at once out of its regular turn, and will dispose of it with the least possible delay.

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The 6th August 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Lunatic (Manager of estate of)—Hindoo widow.**

Case No. 204 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Rajshahye, dated the 3rd March 1866.*

Dinobundhoo Shaha, *Appellant,*

*versus*

Wooma Soonduree Dossia, Guardian of Hurish Chunder Shaha (Insane) *Respondent.*

*Mr. G. C. Paul* and *Baboo Mohinee Mohun Roy* for Appellant.

*Baboos Onookool Chunder Mookerjee* and *Sreenath Dass* for Respondent.

The appointment of a Hindoo widow as manager of the estate of a lunatic is always undesirable if any other suitable person can be found.

We think the Lower Court acted quite rightly in not appointing Dinobundhoo to manage the affairs of the lunatic, and also acted rightly in appointing the lunatic's sister to be guardian of his person.

But, in our opinion, the sister ought not to have been appointed manager of the estate. She is a Hindoo widow, and the appointment of such a person is always undesirable if any other suitable manager can be found. Moreover, she is by no means specially qualified for such a charge, judging from the remarks made upon her by the Moonsiff. Her appointment as manager is set aside, and the Judge must appoint either the public Curator or some other fit person to be manager of the estate.

The order of the Lower Court is modified accordingly. The appellant will bear his own costs of this appeal. The respondent is entitled to her costs out of the lunatic's estate.

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The 6th August 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Attachment of immoveable property—Irregularities.**

Case No. 358 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Hooghly, dated the 3rd May 1866, affirming an order passed by the Sudder Ameen of that District, dated the 9th March 1866.*

Mussamut Kooranee Bibee (Objector), *Appellant,*

*versus*

Bhoobun Mohinee Dossee (Decree-holder) and others (Judgment-debtors), *Respondents.*

*Baboo Romanath Bose* for Appellant.

*Baboo Tarucknath Dutt* for Respondents.

An attachment of immoveable property is not voidable merely because all the forms prescribed in Section 239, Code of Civil Procedure, have not been followed, when the irregularities complained of are immaterial, and not productive of any substantial injury to the person who objects to the proceedings.

In this appeal, we are asked to declare an attachment of immoveable property void, because the forms prescribed in Section 239 of Act VIII. of 1859 have not been gone through. The judgment-debtor is the appellant, and her objections are that the written order of attachment was not read aloud on the property, and that there is nothing on the record to show that the order was stuck up in the Court-house or in the Collectorate. She does not attempt to show that the order was in fact not stuck up both in the Court-house and in the Collector's

office; and she admits that a proclamation by beat of drum was made on the lands, so that she was herself made fully aware of the fact of the attachment.

We by no means concur with the Lower Court in presuming, or in considering, that there is any legal presumption that the Court which had to attach this property did attach it in the manner provided by Section 239. The proceedings have evidently been conducted in a most careless manner; and the Court has distinctly failed in its duty in not putting upon the record satisfactory evidence of the attachment having been duly made. Nevertheless, the irregularities complained of are, under all the circumstances of the case, in our opinion, immaterial, and not productive of any substantial injury or injustice to the appellant who alone now objects to the proceedings. We therefore should not be justified in interfering. How far the position of the judgment-creditor may be affected by what has been done or omitted may be a question with reference to the terms of Section 240. But upon the consideration of that question we need not enter until it shall arise, which on this application it does not.

In holding that the irregularities alleged are immaterial so far as this application is concerned, we must not in any degree be supposed to hold that any want of attention to the provisions of Section 249 may not prove fatal to a sale of this property, if any sale take place.

The appeal is dismissed with costs.

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The 6th August 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Minors—Act XL. of 1858, Section 7—Accounts.**

Case No. 231 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Shahabad, dated the 28th February 1866.*

Mussamut Soukolly Koonwar, *Appellant.*

*Baboo Kalee Kishen Sein* for Appellant.

An administrator holding a certificate under Section 7, Act XL. of 1858, is not bound to file in Court periodical accounts of monies realized and disbursed on account of the minor.

THE question raised in this appeal is whether an administrator holding a certificate under Section 7, Act XL. of 1858, is bound to submit periodically accounts of monies realized and disbursed on account of the minor. The Judge has held that every holder of a certificate is bound, when ordered by the Court, to file accounts, and that no one is exempt on the score of relationship from this obligation. It is contended before us that only public curators or administrators appointed by the Court under Section 10 of the Act are required to give in periodical accounts, but not holders of certificates under Section 7.

After carefully examining the Act, we come to the conclusion that the law does not require a party holding a certificate under Section 7 to produce accounts, unless sued for such under Section 19 of the Act by any relative or friend of the minor. Public curators or administrators appointed under Section 10 are required by the provisions of Section 16 to put in annual accounts, to the accuracy of which any relative or friend of the minor may take objections. But, where a party is appointed under Section 7 to administer to the estate, it appears to us that he is bound, as was the practice before the passing of the Act, to account only to the minor on his attaining majority, and to no one else; though, of course, he is liable to have the certificate withdrawn under Section 21, should any sufficient cause for its withdrawal be proved to the satisfaction of the Court which gave it. The order of the Judge is reversed.

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The 10th August 1866.

*Present:*

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

**Curator's Act, XIX. of 1841 (Effect and objects of)—Framing of issues—Client and pleader—Jurisdiction (of High Court).**

Case No. 309 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Gya, dated the 7th April 1866.*

Jusoda Koonwar, *Petitioner,*

*versus*

Baboo Gouree Byjnath Pershad, *Opposite Party.*

*Mr. R. V. Doyne* and *Baboos Kishen Kishore Ghose, Umoda Persad Banerjee,* and *Mohesh Chunder Chowdhry* for Petitioner.

*Mr. R. T. Allan* and *Baboos Dwarkanath Mitter, Onookool Chunder Mookerjee, Kishen Succa Mookerjee*, and *Tarucknath Sein* for Opposite Party.

Where a Judge, on hearing an application under Act XIX. of 1841 from the nephew of a deceased Hindoo, in which no case of force or fraud, nor of a likelihood of misappropriation, nor of an inability to proceed by regular suit, was submitted to the Judge, simply on the solemn declaration of the complainant, and without making the perliminary enquiry required by Section 3, issued his citation to the widow complained of—HELD that the defect in the Judge's procedure has been cured by the widow appearing and opposing the application on its merits.

The objects of Acts XIX. of 1841 and XXVII. of 1860 are so different, that two cases under those Acts respectively cannot be decided entirely upon issues common to both. In this case, although the widow was not bound by the mistaken consent of her pleader to abide by the issues of law erroneously framed by the Judge—HELD that the Judge's error in drawing the issues gave this Court no jurisdiction to interfere with an order as to which, by Section 18, Act XIX. of 1841, neither appeal nor revision was allowed.

*Jackson, J.*—THE facts of the case upon which the present application is founded are as follows:—

The person on whose behalf the application is made is the widow of the late Joy Kurun Lal, and the opposing party is Gouree Byjnath Pershad, his nephew.

Joy Kurun Lal died in December 1865, leaving his widow in possession of a very large real and personal estate, to the amount, it is said, of nearly a million sterling. He made no will, and the whole of this property is claimed by the nephew; and it is admitted that, according to the Benares Law which governs the family, the nephew is entitled, unless there was separation in estate at the time of Joy Kurun's death.

On the 19th February 1866, the nephew presented a petition in the Court of the Judge at Gya, under Act XIX. of 1841, praying that possession of the property might be delivered to him. He made a deposition in support of this petition, in which he merely denies the widow's title and asserts his own.

Upon this statement, the Judge directed the widow to come in and show cause against the application, which she accordingly did on the 2nd of February following.

A daughter of Joy Kurun Lal also presented a petition on the 9th of March in opposition to the nephew's claim for possession.

The nephew filed a statement replying to those of the widow and the daughter.

In the meantime, the widow had applied to the same Judge for a certificate to enable her to collect the debts due to the deceased under Act XXVII. of 1860. To this petition the daughter and nephew appeared separately as objectors. The nephew also filed a cross-petition for a certificate under the same Act. against which the widow and daughter appeared as objectors.

The above three petitions—one under Act XIX. of 1841, and two under Act XXVII. of 1860—being all before the Court at the same time by consent of the pleaders on both sides, the Judge determined to try at once, and upon the same issues, the different questions of law arising under those two Acts; and a certain state of facts being admitted, he proceeded to determine whether these circumstances amounted to a complete separation.

The issues are as follows:—

*1st.*—If it be proved by oral and documentary evidence on the part of the petitioner, Jusoda Koonwar (widow), that both Gouree Byjnath Pershad and Joy Kurun Lal, in the lifetime of the said Joy Kurun Lal, and for many years previous thereto, collected separately, and exclusively of each other, 8 annas of the immoveable property derived from Roy Pirthee Singh, also separately granted pottahs to ryots, and received kubooleuts from them, and also separately paid Government revenue in regard to their respective 8 annas share of the said estate, would such acts amount to legal separation between the said Joy Kurun Lal and Gouree Byjnath Pershad according to the Mitakshara?

*2nd.*—If the several acts specified in the first issue in law should be considered sufficient *per se* to constitute a legal separation between the parties aforesaid, would such separation be negatived by the express admission of Joy Kurun Lal in various suits and proceedings (the last being as late as July 1863) that he, the said Joy Kurun Lal, and Gouree Byjnath, were joint and undivided in estate; and also by the fact that several kubooleutnamahs and mookhtiarnamahs in the joint names of the said Gouree Byjnath and Joy Kurun Lal were granted by them as late as 1865 for suits instituted and defended in their joint names?

These issues are somewhat oddly drawn, but it is clear that the question, and the only question, submitted to the Court was, whether, at the death of Joy Kurun Lal, the family was joint or separate?

The several applications for a certificate under Act XXVII. of 1860 were considered first, and the Judge, having come to the conclusion, on the facts submitted to him, that the family was joint, on that ground refused

the application of the widow and daughter, and granted the certificate prayed for by the nephew.

On the same day, and upon the same grounds, possession of the moveable and immoveable property of the deceased under Act XIX. of 1841 was also granted to the nephew.

Subsequently, upon the application of Mr. Doyne on behalf of the widow, we granted a rule calling upon the nephew to show cause why the order of the Judge in the Act XIX. case should not be quashed, as having been made without jurisdiction.

The first objection taken is that the Judge did not make the preliminary enquiry necessary under Section 3 before summoning the widow. That Section enacts that the Judge shall, "in the first place, enquire, by the solemn declaration of the complainant, and by witnesses and documents at his discretion, whether there be strong grounds for believing that the party in possession has no lawful title, and that the applicant is really entitled, and is likely to be materially prejudiced if left to the ordinary remedy of a regular suit, and that the application is made *bonâ fide*." The 4th Section provides that, "in case the Judge shall be satisfied of the existence of such strong ground of belief, but not otherwise, he shall cite the party complained of."

The Judge in this case was satisfied by the solemn declaration of the complainant, and, without requiring any other witnesses or documents, issued his citation to the widow. She appeared by her vakeel, and contested the application on its merits. And here another point arises, namely, whether under Section 3 the applicant is bound to support his application in the first instance by documents, or witnesses, or both, or whether the Judge may issue a citation upon the applicant's own testimony.

It is further objected that, even if the parties were properly before the Court, still that the Judge has erred in the way in which he disposed of the application, and that he has so erred as to exceed his jurisdiction.

I proceed to deal with these objections in their order.

First as to matter which has to be proved before citation. Upon this part of the case, it is plain to me that the Judge has so entirely erred that, if the matter were before us on appeal, or if this Court had authority to set aside the order by reason of defect in law, we should have no hesitation in doing so.

The power of summary adjudication vested in the Zillah Judges by this Act affords an extraordinary remedy, and is intended to meet extraordinary cases.

The circumstances in which the Civil Courts are empowered to exercise this jurisdiction and the circumspection required from the Judges who exercise it, are set forth in the Preamble to the Act.

"Whereas," it begins, "much inconvenience has been experienced, where persons have died possessed of moveable and immoveable property, and the same has been taken upon pretended claims of right by gift or succession; . . . . . the delays of a regular suit and the inability of heirs when out of possession to prosecute their rights, affording strong temptations for the employment of force or fraud in order to obtain possession. And whereas from the above causes the circumstance of actual possession, when taken upon a succession, does not afford an indication of rightful title equal to that of a decision by a Judge after hearing all parties in a summary suit, though such summary suit may not be sufficient to prevent a party removed from possession thereby from instituting a regular suit . . . . . And whereas it will be very inconvenient to interfere with successions to estates by . . . . . summary suits, unless satisfactory grounds for such proceedings shall appear, and unless such proceedings shall be required by or on behalf of parties giving satisfactory proof that they are likely to be materially prejudiced if left to the ordinary remedy of a regular suit."

Now, these words very clearly indicate that the Act was passed in order to meet cases of wrongful possession or disturbance of possession under *pretended* claims of right, and to discountenance the employment of *force* and *fraud*. Also that the decision by the Judge was not to be of such a nature as to supersede the necessity of a regular suit; and, *thirdly*, that the applicant was to be left to his ordinary remedy by suit, unless he shewed that, if so left, he was likely to be materially prejudiced. And the provisions enacted correspond very closely with those recitals.

Section 3 provides that the Judge "shall, "in the first place, enquire . . . . . "whether there be strong reasons for believing that the party in possession has no "lawful title, and that the applicant is really "entitled, and is likely to be materially

"prejudiced if left to the ordinary remedy "of a regular suit, and that the application "is made *bonâ fide*."

The 4th Section goes on: " . . . in "case the Judge shall be satisfied of the exist-"ence of such strong ground of belief, but "not otherwise, he shall cite the party com-"plained of." So that before the Judge could lawfully issue the citation, he had to be satisfied upon the four points specified, and upon all of them the applicant was to show him strong ground of belief, and otherwise he was not to proceed.

A slight case would not be sufficient. The title and *bona fides* of the applicant must be *primâ facie* clear; it must also be manifest that the party complained of had no lawful title to possession, and that, if the applicant were referred to a regular suit, he would be a serious sufferer, as by the risk of waste or misappropriation, or by his inability to prosecute his rights when out of possession.

Now, what, in the present instance, was the case submitted to the Judge of Gya? Certainly neither force nor fraud—neither a likelihood of misappropriation, nor an inability to proceed by regular suit.

The case was simply one of two brothers living under the Mitakshara Law, possessed of equal moieties of property, moveable and immoveable, of immense extent, of whom one died leaving a widow and a daughter. It seems to have been admitted that the brothers had lived in separate houses, and had separately collected their shares of rent. But the surviving brother alleged that these circumstances did not constitute a separation in estate according to Hindoo Law, and that consequently he was entitled. And it was vaguely asserted that the widow in possession was likely to commit waste.

Now, here it was quite manifest that the widow was holding her deceased husband's estate under a state of facts which the Civil Courts might very possibly interpret as giving her a valid right to retain it. The applicant had already in his own right very extensive property equal, or nearly equal, to that which he was claiming, and nothing restrained him from bringing a regular suit; and the suit once instituted, he could have immediately obtained, on showing cause for it, an injunction under Section 92 of Act VIII. of 1859.

Beyond all doubt, therefore, this was a case in which the Judge, on hearing the petition, ought to have refused to act; and it must be remarked that, whatever the need for summary proceedings like the present which may have existed in 1841, things have greatly altered in the quarter of a century which has elapsed since the passing of the Act, and the considerations which led to its enactment are greatly less cogent under the Civil Procedure Code. Formerly, it was notorious that Civil suits were protracted, in one shape or another, frequently for a life-time, whereas now the average duration of suits is probably less than a year, and appeals to the highest court in the country are decided with equal expedition.

Upon all grounds, therefore, I think the Judge was wrong in citing the widow; but then it is contended that this defect has been cured by her appearance and opposing the application on its merits.

To this argument, I feel compelled, after much consideration, to assent. She certainly was competent to have demurred to the proceedings on the ground that the Judge did not appear to have been satisfied upon the points specified in the 3rd Section; but I cannot say that she might not, if she was so advised, accept the citation, waiving that objection, and submit to the Judge's determination of the right to possession. As she actually did take this course, I think it is now too late, after the determination, to say that she was improperly cited.

Whether, if the objection had been taken in time, and the Judge, overruling it, had proceeded to determine the right to possession, this Court could have set aside the order as made without jurisdiction, it is not necessary to decide in this case, and I express no opinion on the point.

As to the question whether an enquiry merely on the solemn declaration of the applicant himself was legally sufficient, it is also needless to express an opinion for the reasons already stated; but I may observe that the words of the Act are "by the solemn declaration of the complainant, and by witnesses and documents at his discretion," which words appear to leave the taking of further evidence at all, as well as the amount of such evidence, wholly within the discretion of the Judge so long as he came by strong reasons for believing the allegations which the applicant had to make.

I now come to the second main objection, which is that, even if the parties were properly before his Court, the Judge has so completely miscarried in his mode of dealing with the application as to have gone beyond his jurisdiction, and that, consequently, the order may and ought to be set aside upon this ground.

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Now, it must be said that it would be difficult to go further wrong in framing issues than the Judge has gone in the case before us. The Judge had to decide at the same time upon two questions between these parties—one being the present case, the other a contest for a certificate under Act XXVII. of 1860 enabling the party who obtained it to collect the debts due to the estate of the deceased.

Now, Act XX. of 1841 (repealed and re-enacted in an amended shape as Act XXVII. of 1860), though passed simultaneously with Act XIX. of the same year, had quite a different purpose in view, and contemplated an enquiry of a different kind.

In the one case, there was a party in possession who was not to be disturbed unless his possession was manifestly wrongful. In the other case, there was no consideration arising out of possession, and the Court, with several claimants before it, all standing upon equal ground, had to "determine the right to the certificate, and to grant the same accordingly."

To say that a case under the first and one under the second of those two Acts can be decided entirely upon issues common to both, implies, therefore, a misconception of the meaning of one or other of the Acts. In the present instance, it is the meaning of Act XIX. of 1841 that has been lost sight of.

But then it is said that, the appellant's pleader having given his consent to those issues, she is bound by his act, and may not contend that those issues were erroneous. This argument, however, in my opinion, assumes for pleaders in the Mofussil Courts of this country an authority which they do not possess, and with which it would not be safe to invest them, and which, moreover, as we shall show, is not contemplated by the law of procedure in India.

In England, no doubt, the law is that parties are bound, not merely by admissions, but by the view taken of their cases, and the mode of conducting them, by their Counsel at the trial.

In the Mofussil Courts, no doubt, particular acts done, within the conditions of the vakalutnamah, and admissions of fact by the pleader are binding on the client,* but we cannot hold that the client is bound by the mistaken consent of his pleader to abide by issues of law erroneously framed by the Judge, and not properly arising in the case.

* See cases cited in Macpherson's Civil Procedure, 4th Edition, page 209, notes *a* and *c*.

There is but a slight analogy between a barrister in English Courts of Justice and a Mofussil pleader.

The former is usually entrusted with the conduct of a cause (through an attorney) by reason of his learning and ability; he is responsible to the Court, and to the profession of which he is a member, for his professional conduct, and he has well-known privileges and immunities.

The vakeel is simply the representative of the suitor, possessed of his personal confidence, and in direct communication with him, but having neither in theory nor in fact the learning and the varied experience of the English barrister.

The pleader is presumably well acquainted with the facts of the case in which he is employed, and he is bound to an honest care for his client's interest; but, although, of late years, efforts have been made to ensure his having a rudimentary knowledge of the law, it is certain that those efforts have been only partially successful, and especially that no rule of practice can be laid down which is based on the presumed legal science of the Mofussil practitioner.

I say Mofussil practitioner, because these observations are not meant to apply to the Native Bar in the Appellate High Court, nor do I deny that there are honorable exceptions even in the interior; but any one who is at all acquainted with the Mofussil Courts is aware that, generally speaking, the possession of the commonest text-books by pleaders there is quite exceptional; it might be possible to find some who are not even possessed of the Act VIII. itself.

Regulation XI. of 1806, Section 12, Clause 2 (which appears to be still in force), directs the Zillah Judges to require the Native pleaders of their respective Courts to take copies of the translation of any Regulations which relate directly or indirectly to the administration of civil justice.

And Regulation XXVII. of 1814, Section 40 (repealed only last year by Act XX. of 1866), contained the following provision: "That the pleaders in the several Courts, as well as other persons, may have it in their power to render themselves acquainted with the Regulations enacted by the British Government, there shall be kept for public inspection, in the several Courts of Judicature, printed copies of all such Regulations, and of the translations in the native languages. . . . ." And "on receipt of the translations of the Regulations in the country languages," the Courts of Justice were to cause

them to be publicly read, and to require the Native pleaders to take copies, &c., &c.

And very mainly, no doubt, for this reason the Legislature has, in the Code of Civil Procedure, imposed upon the Courts themselves the responsibility of conducting suits in every stage emphatically so as to the framing of issues, which, under the present as well as the former procedure, is exclusively the business of the Court.

By Section 38, Act XXIII. of 1861, the procedure prescribed by Act VIII. of 1859 is to be followed, as far as it can be, in all Miscellaneous cases and proceedings, which after the passing of the Act may be instituted in any Court.

The mode in which issues are to be framed under that Act is to be found in the Sections 139-141 which clearly show that this is exclusively the function of the Court. Section 139 declares that "the Court may frame the issues from the allegations of fact which it collects from the oral examination of the parties or their pleaders, notwithstanding any difference," &c. This clearly shows that the pleader may bind his client by a statement of matter of fact, but nothing is said of issues or admissions of law.

The only cases in which the issues are not directly framed by the Court are those provided for by Sections 142 and 143. In those cases, issues may be tendered to the Court, under a solemn agreement between *the parties* in writing, by which they bind themselves to act according to the finding of the Court upon such issues; and the Court, if it be satisfied that *the parties* have so agreed, and that the question is *fit to be tried* (still retaining a control over the frame of the issue), may proceed to determine the same.

There was no agreement of the sort here, and the responsibility of the issue lay wholly on the Court.

There is a precedent* (Musst. Sabitra Manee, Appellant) in which this Court (Bayley and Campbell, *JJ.*) held on a statement recorded to the effect that "the vakeels of the several parties accept the following issues," that neither party was competent to object in special appeal that a material issue had not been tried in the Court below. That case is distinguishable from the present, as it would perhaps be competent for the vakeel to waive an issue (presumably of fact) in the same manner as he might make a binding admission of fact, though he could bind his client to consent that the Court should decide the case according to its finding upon issues which could lawfully arise in the case. We think the question to be determined in this case by the Judge was essentially the same as those in which he had to be *primâ facie* satisfied before issuing the citation; whereas he has raised the whole question which will arise between the parties in the civil suit which is expressly reserved.

* Marshall, page 519.

But then it remains to be said that the Judge had in this case jurisdiction over the subject-matter, and he had jurisdiction to frame the issues. whether rightly or wrongly; and we cannot say that an error in drawing them, however glaring, gives us jurisdiction to interfere with an order which is by law final, and as to which neither appeal nor revision is allowed.

We regret exceedingly our inability in this case to afford relief to the petitioner, who has so much reason to complain of the proceedings below, and we have thought it right to state at length the reasons which have influenced our judgment.

The very infrequency of such cases, and the want of appeal to a higher Court, render it the more necessary that we should take the opportunity of making an authoritative statement as to the effect and objects of this Act, otherwise it would have been consistent with our duty simply to say that we had no jurisdiction.

The rule must be discharged, but, under the circumstances, without costs.

We are now given to understand that the question between the same parties touching the right to a certificate under Act XXVII. of 1860 having come before another Bench of this Court in appeal, the order of the Court below has been set aside, and a fresh certificate granted to the widow. It thus appears that a cruel, and, for the present, irreparable, wrong has been done to this unfortunate lady, who has been, by the order before us, deprived (in the most sweeping manner) of property of which she was apparently in rightful possession.

The 18th Section of the Act declares these orders not open to appeal or *order for review*. Whether these words enable the Judge, of his own motion, to withdraw an order which he must now see was improperly made, we offer no opinion.

*Markby, J.*—I concur in the view taken by my brother Jackson as to the general construction of this Statute; but, for the reasons which he has so fully pointed out, it is impossible for us to say that the Zillah Court has acted without jurisdiction.

The 13th August 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Co-sharers—Possession—Joint decree.**

Case No. 368 of 1866.

*Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Moorshedabad, dated the 9th March 1866.*

Messrs. Jardine, Skinner, and Co. (Judgment-debtors), *Appellants,*

*versus*

Ranee Shama Soonduree Debia (Decree-holder), *Respondent.*

*Messrs. R. T. Allan* and *J. S. Rochfort* for Appellants.

*Baboo Sreenath Doss* for Respondent.

One who holds a decree for possession of a 2-annas share jointly with co-sharers to whom the remaining 14 annas belong is not entitled in execution to obtain exclusive possession of any specific portion of the lands covered by the decree.

THE order of the Lower Court is wrong, and must be reversed in so far as it allows execution under Section 223 of Act VIII. of 1859—Section 224 being the only Section applicable to this case.

The decree-holder (respondent) got a decree for possession of a two-annas share jointly with her co-sharers to whom the remaining fourteen annas belong. The appellants now before us represent those other share-holders; and, they being lawfully in possession of a fourteen-annas share, it is quite clear that there can be no execution under Section 223, and that the decree-holder is entitled to no more than possession of her share jointly with those to whom the other shares belong. The decree-holder is entitled to realize a two-annas share of the rent from all ryots on the land, and, if any of the lands are in the *nij* occupation of the appellants, she is entitled from them to what would represent a fair two-annas share of the rents of such lands. But she is not entitled to exclusive khas possession of any portion of the lands covered by her decree. If she wants exclusive possession, probably she will have to bring a suit for partition before she can attain her object.

The order of the Lower Court is amended accordingly, and any proceedings improperly taken are set aside. The respondent must pay the costs of his appeal.

The 13th August 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Limitation—Execution—Joint decree.**

Case No. 367 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 28th April 1866, affirming an order passed by the Principal Sudder Ameen of that District, dated the 6th February 1866.*

Johiroonissa Khatoon (Judgment-debtor), *Appellant,*

*versus*

Ameeroonissa Khatoon (Decree-holder), *Respondent.*

*Baboo Mohinee Mohun Roy* for Appellant.

*Baboo Chunder Madhub Ghose* for Respondent.

Where a decree is a joint one, the right of one decree-holder to execute is kept alive by proceedings duly taken to put the decree in execution by his co-decree-holder.

WE agree with the Judge that, as the decree was a joint one, the right of Abdool Kureem to execute has been kept alive by the proceedings taken in execution by his co-decree-holder. We reject this appeal with costs.

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The 13th August 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Verification of plaint—Section 28, Act VIII. of 1859.**

Case No. 372 of 1866.

*Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Shahabad, dated the 19th March 1866.*

Maharajah Mohessur Buksh Singh Bahadoor (Plaintiff), *Appellant,*

*versus*

Sheo Narain Singh and others (Defendants), *Respondents.*

*Baboos Dwarkanath Mitter* and *Mohesh Chunder Chowdhry* for Appellant.

No one for Respondents.

When an application is made to a Court to permit a plaint to be subscribed and verified on behalf of the plaintiff by a person other than the plaintiff, the Court must exercise the power vested in it by Section 28 of

Act VIII. of 1859, and must decide whether or not the plaintiff, by reason of absence or other good cause, is unable to subscribe and verify the plaint himself.

WE think the Principal Sudder Ameen should look at the words of Section 28 of Act VIII. of 1859, and determine whether the statement made by the petitioner discloses a "good cause" sufficient to enable the Court to permit verification to be made by another person on his behalf. Neither the decision quoted by the Principal Sudder Ameen, nor the circular of the Judge, in any way precludes the Principal Sudder Ameen from using his discretion in each case as it comes before him. The order of the Principal Sudder Ameen is reversed, and the case is remanded to him to determine whether the allegations made by the petitioner are true; and, if so, whether they constitute a "good cause" within the meaning of Section 28.

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The 18th August 1866.

*Present:*

The Hon'ble G. Campbell and A. G. Macpherson, *Judges.*

**Limitation—Execution.**

Case No. 384 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of West Burdwan, dated the 17th March 1866.*

Maharajah Dheráj Mahatab Chund Bahadoor (Decree-holder), *Appellant,*

*versus*

Dino Moyeee Debia, mother and guardian of Kartick Chunder Banerjee, minor (Judgment-debtor), *Respondent.*

*Baboo Chunder Madhub Ghose* for Appellant.

No one for Respondent.

The mere striking off of an application for execution is not a proceeding within the meaning of Section 20, Act XIV. of 1859.

THIS appeal is dismissed, it having been recently decided by a Full Bench that the mere striking off of an application for execution is *not* a proceeding within the meaning of Section 20 of Act XIV. of 1859.

The 18th August 1866.

*Present:*

The Hon'ble G. Campbell and A. G. Macpherson, *Judges.*

**Limitation—Execution—Appeal of one defendant.**

Case No. 380 of 1866.

*Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Sarun, dated the 10th March 1866.*

Chedoo Lal (Purchaser of decree), *Appellant,*

*versus*

Nund Coomar Lal and others (Judgment-debtors), *Respondents.*

*Baboo Obhoy Churn Bose* for Appellant.

*Mr. R. E. Twidale* and *Baboo Mohendro Lal Shome* for Respondents.

Where one of two defendants appeals against a decree, if the decree was joint and several, and the appeal imperilled the whole decree, the time for execution will count from the date of the decision in appeal.

A DECREE was passed against two defendants. One appealed. Execution has been taken out against the other, more than three years after the date of the original decree, but less than three years after that of the decision in appeal. We think that, if the decree was joint and several against the defendants without distinction, the decree was put in peril by the appeal of one, and the execution will be within time. If the decree was not of such a nature that the appeal of one necessarily imperilled the whole decree, it is not within time. We cannot decide on the point without seeing the original decree. The appellant has most carelessly omitted to file it; and the Lower Court has not dealt with the matter as it should have done. On the condition that appellant bears the costs of this hearing and of the remand, we remand the case in order that, after reference to the original decree, the case may be decided in accordance with the above remarks.

The 18th August 1866.

*Present:*

The Hon'ble G. Campbell and A. G. Macpherson, *Judges.*

**Registration—Section 15, Act XVI. of 1864.**

Case No. 389 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Hooghly, dated the 6th March 1866, affirming an order passed by the Principal Sudder Ameen of that District, dated the 8th December 1865.*

Gooroo Doss Dutt (Plaintiff), *Appellant,*

*versus*

Dwarkanath Manna (Defendant), *Respondent.*

*Baboo Anund Chunder Ghosal* for Appellant.

No one for Respondent.

Section 15, Act XVI. of 1864, applies only to cases in which the Registrar has improperly refused to register an instrument.

THIS is a suit under Section 15 of Act XVI. of 1864 to establish a right to have a certain instrument registered.

We think the Lower Court has properly held that that Section does not apply to the present case. The Registrar was clearly right in refusing to register when the parties would not attend and did not consent to the registration. In our opinion, Section 15 applies only to cases in which the Registrar has refused, when under the circumstances he ought not to have refused, to register.

The appellant now seeks to convert the matter into a regular suit; but we decline to entertain such a proposition at this stage of the proceedings. We express no opinion as to what the effect of a regular suit under Act VIII. of 1859 might have been, or may still be, should such a suit be brought.

The appeal is dismissed.

The 20th August 1866.

*Present:*

The Hon'ble G. Campbell and A. G. Macpherson, *Judges.*

**Execution—Representative—Claims to attached property.**

Case No. 395 of 1866.

*Miscellaneous Appeal from an order passed by the Second Principal Sudder Ameen of Hooghly, dated the 28th February 1866.*

Maharajah Dheraj Mahatab Chund Bahadoor (Decree-holder), *Appellant,*

*versus*

Mussamut Pearee Dossee and others (Judgment-debtors), *Respondents.*

*Baboo Chunder Madhub Ghose* for Appellant.

*Baboos Mohendro Lal Shome* and *Taruck-nath Sein* for Respondents.

If execution has once been duly issued against a person as representative of one who is deceased, this person cannot dispute his representative character on the occasion of any subsequent issue of execution against him as representative.

Section 11, Act XXIII. of 1866, does not alter or modify the effect of Section 246, Act VIII. of 1859, so as to give an appeal from orders passed under the latter Section.

Where property is seized as belonging to *A* as representative of *B*, deceased, and *A* claims the property as his own, and denies that it ever belonged to *B* or *B's* estate, *A's* claim is properly dealt with under Section 246 of Act VIII. of 1859.

THE appellant is in the right as regards the first point, namely, that it was not open to the respondent to contest, in the present proceedings, the fact of his being the heir or representative of the original judgment-debtor, and, as such, liable to have execution issued against him. We find that execution has, on a previous occasion, been issued against him in the same representative character; that he then disputed (on other grounds) the right of the appellant to issue

the execution; and that the right was established, the order for execution being confirmed by this Court on appeal. His liability as representative can therefore be no longer disputed, especially with reference to the terms of Section 216 of Act VIII. of 1859, which provides that, "when execution against the representative of an original party to a suit is applied for, no notice of the application need be given to that representative, if, upon a previous application for execution against the same person, the Court shall have ordered execution to issue against him." The Lower Court, consequently, was, in our opinion, wrong in entering into any question as to the respondent's liability as heir; and the order of the Lower Court is reversed so far as it holds that the respondent is not liable to have execution issued against him as representative.

This, however, is the only part of the order of the Lower Court which is open to appeal. So far as the order declares that the property against which it was sought to execute the decree is not property belonging to the respondent in his representative character, and, as such, is not liable to attachment, the order is one made in a proceeding under Section 246, and is not subject to appeal. It is contended that, as the question is one arising between parties to the suit in the execution of a decree, there is an appeal under Section 11 of Act XXIII. of 1861. But that Section in no way interferes with Section 246 of Act VIII. of 1859, which seems to us to lay down the course to be followed whenever property is claimed as not being liable to be taken in execution of the decree under which it has been attached. It is true that the respondent has been made a party to the suit; but that is only in his representative character. He is no party to the suit in his own right; and it is in his own right, and not in his representative capacity, that he came in and claimed the property attached. The property having been attached as belonging to the estate of the original judgment-debtor, and being claimed by the respondent as his own private property which never belonged to the estate, the respondent claimed as any third party, an entire stranger to the suit, might have claimed, and the claim was properly and necessarily disposed of under Section 246. The matter, therefore, cannot be the subject of appeal to us; and this appeal, so far as it relates to it, must be dismissed. Each party will bear his own costs of the appeal.

The 20th August 1866.

*Present:*

The Hon'ble G. Campbell and A. G. Macpherson, *Judges.*

**Appeal to Privy Council—Security.**

Case No. 365 of 1866.

*Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Bhagulpore, dated the 5th May 1866.*

Mussamut Molka (Judgment-debtor), *Appellant,*

*versus*

Mussamut Sumput Koonwaree (Decree-holder), *Respondent.*

*Mr. R. E. Twidale* for Appellant.

*Baboo Ashootosh Dhur* for Respondent.

In the case of an appeal to the Privy Council, security to the extent of the whole sum decreed need not always be taken from the decree-holder. When security is taken for less than the full amount decreed, the decree-holder should be restrained from issuing process of execution with a view to realizing any sum in excess of the amount for which security is given.

UNDER Section 4 of Regulation XVI., 1797, the Court must take sufficient security from the decree-holder for the due performance of such order or decree as the Privy Council may make. We do not think it essential that, before any execution (for however small an amount) issues, security to the extent of the whole sum decreed should, in every instance, be given. We think that, in the present case, it will suffice if security is taken to the extent of the value of the property seized, and the costs, &c., of the appeal to the Privy Council and any other costs which the Privy Council may order the decree-holder to pay. But, if security is taken for less than the full amount decreed, an order must be made restraining the decree-holder from issuing any process of execution whereby property exceeding in the whole the value for which security is given shall be attached and sold; and restraining the decree-holder from issuing any process against the person with a view to realizing any sum in excess of that for which security shall be given.

This case is remanded to the Lower Court with reference to the above remarks.

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The 20th August 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Limitation—Execution.**

Case No. 301 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Hooghly, dated the 28th February 1866, reversing an order passed by the Moonsiff of Ghattal, dated the 4th January 1866.*

Luckhee Narain Chuckerbutty (Decree-holder), *Appellant,*

*versus*

Ram Chand Sircar (Judgment-debtor), *Respondent.*

*Baboo Nil Madhub Sein* for Appellant.

No one for Respondent.

**An application for execution of a decree, followed by the issue of notice, if made *bonâ fide* (*i.e.*, with a real intention and desire on the part of the decree-holder to execute his decree), is a proceeding, within the meaning of Section 20, Act XIV. of 1859, to keep alive the decree.**

The Lower Court states as a fact that no proceeding was taken between December 1861 and the application out of which this appeal arises, which application was made in 1865; and the Court accordingly decrees that, under Section 20 of Act XIV. of 1859, execution can no longer be issued.

But it appears that the facts cannot be as stated: because, in a petition filed by the respondent on the 31st August 1865, it is admitted that an application for execution was made, and a notice under it was issued in October 1864. Such an application and notice, if made and issued *bonâ fide* (that is to say, with a real intention and desire on the part of the decree-holder to execute his decree), would, according to a decision lately passed by a Full Bench of Judges of this Court, constitute a proceeding, within the meaning of Section 20 of Act XIV. of 1859, which would prevent the decree-holder's right from being barred.

We remand the case that the Judge may enquire into the nature and *bona fides* of these alleged proceedings in 1864, and may decide the question under Section 20 accordingly.

The 20th August 1866.

*Present:*

The Hon'ble G .Loch and A. G. Macpherson, *Judges.*

**Limitation—Execution.**

Cases Nos. 415 and 416 of 1866.

*Miscellaneous Appeals from an order passed by the Principal Sudder Ameen of East Burdwan, dated the 29th March 1866.*

Maharajah Dheraj Mohatab Chund Bahadoor (Decree-holder), *Appellant,*

*versus*

Baboo Buloram Singh and others (Judgment-debtors), *Respondents.*

*Baboo Chunder Madhub Ghose* for Appellant.

*Baboos Debendro Narain Bose* and *Ashootosh Dhur* for Respondents.

**The period of limitation for executing a decree counts from the date on which any *bonâ-fide* act is done by the decree-holder or by the Court in furtherance of the execution of the decree. The striking off of a case is not an act in furtherance of execution.**

It has been held by a Full Bench that the date on which an execution-case is struck off the file, does not give the decree-holder a fresh starting point from which to calculate the period of limitation. The date from which the time for executing a decree is calculated commences from the date on which any act is done by the decree-holder in good faith, or by the Court in furtherance of the execution of the decree; but the striking off a case is not an act in furtherance of execution. We dismiss the appeals.

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The 20th August 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Limitation—Execution—Sale—Pleading.**

Case No. 340 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Backergunge, dated the 24th February 1866, reversing an order passed by the Sudder Ameen of that District, dated the 25th November 1865.*

Tarinee Churn Gangooly (Decree-holder), *Appellant,*

*versus*

Tiluck Chunder Ghose (Judgment-debtor), *Respondent.*

*Baboo Kallee Mohun Doss* for Appellant.

*Baboo Woomesh Chunder Banerjee* for Respondent.

**The striking off of an execution-case gives the decree-holder no fresh starting point from which to count limitation.**

**A decree-holder ought to urge before the Lower Court, or make it a distinct ground of special appeal, that it is too late to take objection to the execution after the property has been sold.**

THE question before the Judge was whether the decree-holder was in time from the date on which the previous execution-proceedings were struck off the file, and he held, in opposition to the view taken by the Principal Sudder Ameen, that the period could not count from the date when the case was removed from the file. By a recent decision of a Full Bench, it has been held that the striking off of a case is not an act in furtherance of execution; and a decree-holder consequently cannot get a fresh start from that date. The order of the Judge, therefore, is perfectly correct.

Another objection is now taken that the property has been sold, and that it is now too late to take objection to the execution. We do not find that this objection is taken in the special appeal, and it does not appear to have been raised before the Judge. But it is said that the petitioner was respondent before the Judge, and was not in a position to take it; that the Principal Sudder Ameen had decided the point, and the Judge should have disposed of it; and that, in the special appeal, reference is made to the decision of the Principal Sudder Ameen. We see no sufficient reason why the petitioner, though in the position of a respondent before the Judge, was unable down below to take the objection he now makes in this Court; for, when the Judge decided the first point in favor of the appellant, he might at the time have raised the present contention; and, if he wished this Court to listen to it, he should have made it a distinct ground of appeal in his petition of special appeal. We reject the appeal with costs.

The 20th August 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Maintenance—Execution of decree.**

Case No. 369 of 1866.

*Miscellaneous Appeal from an order passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 3rd May 1866.*

Kasheeshuree Debia (Judgment-debtor), *Appellant,*

*versus*

Greesh Chunder Lahoree (Decree-holder), *Respondent.*

*Baboo Mohinee Mohun Roy* for Appellant.

*Baboo Romesh Chunder Mitter* for Respondent.

**Arrears of maintenance are liable to attachment in execution of a decree, although the right to future maintenance is not so liable.**

ARREARS of maintenance already accrued due are liable to be attached in execution of a decree, although the right to future maintenance is not so liable. (Bipro Protap Sahee *versus* Deonarain Roy, 3 Weekly Reporter 16, Miscellaneous Rulings.)

We therefore dismiss the appeal with costs, as the order of the Lower Court is merely that the 1,600 rupees of arrears of maintenance due to the appellant shall be set off against the decree which the latter has obtained.

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The 21st August 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Joint decree—Separate Execution.**

Case No. 423 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Jessore, dated the 28th March 1866, affirming an order passed by the Principal Sudder Ameen of that District, dated the 16th June 1865.*

Prannath Mitter and others (Judgment-debtors), *Appellants,*

*versus*

Mothooranath Chuckerbutty (Decree-holder), *Respondent.*

*Baboo Doorga Dass Dutt* for Appellants.

*Baboo Nil Monee Sein* for Respondent.

Joint decree-holders are not entitled to apply separately for execution of the decree limited to what they consider their respective interests in it.

In this suit, there were two plaintiffs who sued jointly and obtained a joint decree. The decree being joint, neither of the decree-holders was entitled to take out execution only for what he considered to be his own share of the property, the subject of the decree. No execution ought to have been granted save of the decree as a whole. There being two decree-holders, the Court, if it saw sufficient cause, might, under Section 207 of Act VIII. of 1859, have allowed one decree-holder to apply for execution of the whole decree, making such order as the Court deemed necessary for protecting the interests of the other decree-holder. But that is a very different thing from allowing the decree-holders separately to apply for execution of the decree limited to what they consider to be their respective interests in it. Such a course is wholly unwarranted.

The present appeal relates only to the costs. The execution which has been issued is irregular, and the appellant was not liable for the costs. We, therefore, reverse so much of the Lower Court's proceedings as relates to the costs of execution; and we order that the respondent do pay the costs of this appeal.

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The 24th August 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, L. S. Jackson, G. Campbell, and A. G. Macpherson, *Judges*.

**Stamp Duty (Refund of)—Remand.**

*Application on behalf of Doorga Dass Dutt, Appellant, in Special Appeal No. 2110 of 1865, decided on 26th January 1866.*

*Baboo Mohendro Lall Seal* for Applicant.

HELD by the majority of the Court that, when a suit is remanded in part, the appellant is entitl d to only a proportionate refund of stamp-duty.

*Note by the Deputy Registrar.*—I HAVE an application from Baboo Mohendro Lall Seal, the Vakeel of the appellant in the above special appeal, for the refund of the value of stamp on which the petition of appeal is engrossed.

This Court affirmed the decree of the Lower Court as to a part of the claim involved in the appeal, and set it aside by an order of remand as to the rest.

The practice of this Court in such cases used to be to allow *no* refund, until the Loazima Bench directed (Sevestre, 8 Vol. VIII., page 343-4) the refund of the full value of stamp whenever the decree of the Lower Court is set aside or *partly set aside* so as to require a remand to that Court for a second or further decision.

I should, however, like the point involved to be considered in connection with the established principle as to costs in appeals partly decreed and partly disallowed.

According to it, an appellant is entitled only *to so much* of the value of the stamp against so much of the decree *as is not injurious to him;* and, if that principle holds good as to appeals partly decreed and partly disallowed, it would, I presume, hold equally good as to appeals partly affirming the order of the Lower Court as against the appellant and partly setting it aside in his favor, by an order of remand; or, in other words, the appellant in the remand case would be entitled to a refund only *to the extent to which the decree is not injurious to him*, that is to say, to the extent of the remand order setting aside the Lower Court's order *and to no more;* otherwise the Stamp Law fixing a tax on litigation would in all such cases be altogether evaded as to the portion of the claim finally disposed of.

The law quoted in the order of the Loazima Bench above adverted to seems to lay down a *general* principle, leaving it to the discretion of the Court to apply it to particular cases which it does not fully cover; and it appears to me, the law, as it stands, contemplates and covers cases in which the decree of the Lower Court is *entirely* set aside by an order of remand for a second or further decision as to the *whole* matter in dispute, and does not contemplate and cover cases in which the order of the Lower Court is *only partly* set aside by an order of remand for a second or further decision as to a *portion* only of the matter in dispute.

As, therefore, there are grounds for doubting whether a full refund should be made in cases of the sort under notice, I beg to refer the point for the consideration and orders of the Loazima Bench.

*N. B.*—In the case now referred, I almost omitted to mention, the pleader has applied for a refund of the *portion* only of the value of the stamp covered by the value of that

portion of the property in dispute as to which the order of the Lower Court is set aside by the order of remand. But, under the order of the Loazima Court adverted to, I must give a certificate for the refund of the *entire* value notwithstanding.

*The case was then referred to a Full Bench by Mr. Justice L. S. Jackson, under the following order :—*

*Referring order.*—It appears to me that the petitioner, if he is entitled to any refund in this case, is entitled only to a refund to the extent of the part of the suit to which the remand order refers.

The *suit* has not been remanded, but only a part of the suit.

There is a decision to the contrary effect of Mr. Justice E. Jackson reported at VIII. Sevestre, page 343 ; and I, therefore, think it proper to refer the point for the decision of a Full Bench.

*Judgments of the Full Bench.*

*Macpherson, J.*—In this case, the question is whether or not, the suit having been remanded for re-trial by the Lower Court upon a certain part of the case, while as to the other part it was finally decided by the Appellate Court, the petitioner (who was the appellant) is entitled to a refund of the whole or any portion of the stamp-duty paid by him upon the petition of appeal. The case was, in the Court by which it was originally tried, to a certain extent admitted by the defendant, that is to say, the defendant admitted that, as to a certain portion of the plaintiff's claim, judgment must go against him. Nevertheless, he chose to include, in his appeal to this Court, both the portion of the case in which he admitted the plaintiff's right, and that in which he denied it; and in appealing, he paid stamp-duty upon the whole value of the original suit. In this Court, he made the same admission as he made in the Lower Court, and only contested the decision as to the other part of the case. As regards so much of the plaintiff's claim as he had not admitted to be valid, the appellant succeeded in getting an order of remand; but, as regards the rest of the suit, the appeal was dismissed, and the judgment of the Lower Court was affirmed.

The appellant now applies, under Note F, Article 11, Schedule B, Act X. of 1862, for a certificate authorizing him to receive back the full amount of the stamp-duty paid on the petition of appeal. The question is whether, in this particular case, the order passed being something more than a mere order of remand—being an order which to a certain extent affirmed the decree of the Lower Court while to a certain extent it remanded the case—there should be a refund of the full stamp-duty, or of any stamp-duty at all.

For the appellant, it is contended that the words of the Section are express, and that inasmuch as there has been a remand, there ought to be a refund of the full amount. But it appears to me that that is not the proper construction to put upon the Note F; and that the word "full" is used in the Note merely as in contrast to certain provisions of Act VIII. of 1859 by which parties may become entitled to a refund of a portion only of the stamp-duty paid by them.

In my opinion, Note F, so far as it authorizes a refund of the full stamp, applies to cases in which there is only an order of remand ; and an appellant is not entitled to a refund of the full amount when the decree of the Lower Court is affirmed to a certain extent, although there may be a remand as to some of the points involved in the suit. I think the appellant is entitled to a refund to duty only in respect of so much of the case as is remanded. He is not entitled to a refund of the full amount, but, putting a liberal interpretation on Note F, he may be allowed a refund proportionate to the value of that part of the case which is remanded.

I would order a refund of duty proportionate to the value of so much of the suit as has been remanded.

*Campbell, J.*, said that he entertained some doubts on the subject.

*Jackson, J.*—In respect to the claim advanced by the appellant (petitioner), it appears to me that there are three decisions to which the Court might come—either that he is entitled to a refund of the full amount of stamp-duty, or that he is entitled to no refund, or that he is entitled to an amount proportionate to the value of that part of the claim in respect of which. on his appeal a remand has taken place.

It will be well to consider. in the first place, the principal upon which refund of stamp-duty on remand proceeds. It appears to me manifestly to proceed on the principle that, when an order of remand is general, and the first decision passed has become ineffectual, so that a new decision must be passed in the Court below which will probably give rise to a fresh appeal, it will be unjust to oblige the appellant to pay the full amount of stamp-duty twice over.

That being so, can the petitioner in this case be entitled to a refund of the full amount of stamp-duty? Manifestly, I think, he cannot. He preferred an appeal to this Court in which he impugned the whole decision of the Court below, and he advanced *seriatim* several grounds of objection which assailed that decision in its entirety.

As to the portion of the appeal in which the appellant was unsuccessful, as he submitted it to the Court and obtained a final judgment, he cannot be entitled to a refund of the stamp-duty. Then can we say that he is entitled to no refund? It appears to me that this would not be just either. The defendant advanced a plea in bar of the entire case which, though it was not found to be tenable as to the whole, was yet found valid as to a part of the case; and, as it became necessary to remand the suit on that part of the case, it would not be just to require stamp-duty twice over as to that part of the case, and it would be inequitable to say that he should get no refund at all.

There remains the third alternative, that is to say, proportionate refund. This course, it appears to me, can be reconciled with the Act in this manner: The plaintiff sued for the entire of a particular claim. The defendant set up a plea as to the whole of that claim. Upon enquiry, it was found that that plea, not being good as to the whole claim, was good as to a part of it. In that way the subject-matter of the suit became, as it were, split into two portions. As to one, the Court was debarred from coming to a decision, because limitation or other similar cause prevented a decision. As to the other part, the plea of limitation, or whatever the plea was, not being valid, it became necessary to remand the case. It seems to me that that portion of the case might be very easily separated from the other, and that the full stamp-duty, calculated on the remanded portion of the suit, may be allowed to the petitioner.

I therefore think that, in this case, it would be fair and equitable to say that the petitioner is entitled to a proportionate refund of stamp-duty.

*Loch, J.*—It appears to me that the words in Note F, Article 11., Schedule B of Act X. of 1862, bear a very limited construction. After the passing of Act VIII. of 1859, appeals were made to this Court from orders passed under Sections 29 to 36, and the question was raised, on what stamp those appeals were to be preferred—whether on full stamp, or on the stamp prescribed for Miscellaneous petitions. The Court then ruled that they were to be on the full stamp, and that they were to be looked upon as regular appeals. After that, the new Stamp Law, Act XXXVI. of 1860, was passed, in which, to prevent hardship to suitors, this provision was introduced:—

"If an appeal or plaint, which shall have been rejected by the Lower Court on any of the grounds mentioned in Act VIII. of 1859, shall be ordered to be received," then the appellant should get back the full amount of stamp-duty.

It went on further to say, "or if a suit shall be remanded in appeal for a second decision by the Lower Court," the appellant was equally entitled to get back the *full* amount of stamp-duty. This provision is almost the same, except as to a few words, as Note F in Act X. of 1862.

It appears to me that the word "remanded" must be confined to remands made under Section 351, Act VIII. of 1859, where the first Court has decided the case upon some preliminary point, and has excluded evidence of fact, so that the Appellate Court, being unable to come to any judgment on the merits, finds it necessary to remand. If the present case comes within that rule, the appellant, in my opinion, is entitled to a refund of the *full* stamp-duty paid upon his petition of appeal. If it does not, he is not entitled to any refund.

It appears to me that this case does not fall under that rule, and, therefore, I think that the appellant is not entitled to any refund of stamp-duty.

*Peacock, C.J.*—It appears to me that the appellant is entitled to a refund of the stamp-duty paid upon his petition of appeal in proportion to the value of that part of the claim which has been remanded for further trial.

It appears to me to have been the object of the Legislature that, where there has been no final decision given in appeal, and the stamp-duty paid on the petition of appeal has consequently become ineffectual, the party should be entitled to a refund of the stamp-duty.

We are pressed with the words "the full amount of stamp-duty paid on the petition of appeal." But, if the words of the Section are to be read literally, that the appellant is to be entitled to the full amount of stamp-duty, it can only be in a case in which the suit is remanded, and not where the suit is remanded in part. I apprehend it was the meaning of the Legislature that, where a suit was

altogether remanded, the party should be entitled to a refund of the full amount; but that, where a suit was remanded only as to a particular part of the claim, the party should be entitled to a refund of the full amount of stamp-duty on the value of that part of the suit to which the remand should relate.

The words "full amount" appear to me to have been used with reference to certain other Acts in which parties were entitled to a refund of a certain portion of the stamp-duty, as in some cases of one-half only. For example, Section 98 of the Code of Civil Procedure enacted: "If a suit shall be adjusted by mutual agreement or compromise, or if the defendant satisfy the plaintiff in respect to the matter of the suit, such agreement, compromise, or satisfaction shall be recorded, and the suit shall be disposed of in accordance therewith. On the application of the plaintiff reciting the substance of such agreement, compromise, or satisfaction, the Court, if satisfied that such agreement, compromise, or satisfaction has been actually entered into or made, shall grant a certificate to the plaintiff authorizing him to receive back from the Collector the full amount of stamp-duty paid on the plaint if the application shall have been presented before the settlement of issues, or half the amount if presented at any time after the settlement of issues, and before any witness has been examined."

That Act was in force at the time when Act X. of 1862 was passed, and it appears to me that the words "full amount" were used in contradistinction to the "one-half" or other portion less than the full amount to which a party was in other cases entitled. It is not unreasonable to suppose that, when the Legislature authorized a return of the full amount of stamp-duty paid upon appeal when the whole case should be remanded, they intended that the appellant should be entitled to the return of a proportionate amount of stamp-duty when a suit should be remanded only as to part.

I now come to consider whether a suit can be remanded in part.

Suppose a suit should be brought for 10,000 beegahs of land, and the defendant should deny the petitioner's title, and also plead limitation as to the whole 10,000 beegahs. Suppose the Court below should hold that limitation was a bar to the whole claim, and determine the case without trying the issue as to title. Now, if plaintiff should appeal on the ground that limitation did not apply to any part of his claim, and the Appellate Court should hold that, except as to 100 beegahs, limitation did bar the suit, it would be necessary that the issue as to title should be determined with reference to the 100 beegahs to which limitation did not apply; but, the Lower Court having dismissed the case upon a preliminary point of limitation, it would be necessary to remand the case according to the provisions of Section 351, Act VIII. of 1859, to be re-tried upon the merits as to the 100 beegahs. It would be clearly unnecessary to remand the case for a trial as to the title to the 9,900 beegahs to which limitation applied; and, as to that part of the case, the decision of the Lower Court would be affirmed. In that case it would be very unreasonable, when the suit was remanded only as to the 100 beegahs, that the appellant should be entitled to a refund of the whole stamp-duty paid upon his petition of appeal which related to the 9,900 beeghas, as well as to the 100.

It appears to me that, in determining whether a suit has been remanded or not we cannot enter into the question of degree and hold that a suit has been substantially remanded if it has been remanded as to a great part of the demand, but not remanded as to the remainder. If we were to attempt to do so, we should be involved in great difficulties. Suppose a suit were remanded as to one-half or three-fourths of the demand, could we say that the suit had been remanded? I think not. We must, in my opinion, hold either that the plaintiff is entitled to a return of proportionate part of the stamp-duty where the suit has been remanded as to part of the claim, or that he is not entitled to a return of any part of the stamp-duty unless the suit is entirely remanded. I think that it is a reasonable construction to hold that, when a suit is remanded in part, the appellant is entitled to a return of a proportionate part of the stamp-duty.

The appellant is, therefore, entitled to a refund of the full stamp-duty in proportion to the value of that part of the case which has been remanded, and he is not entitled to a refund as to that portion of the case which has been finally determined by the Court of appeal.

The judgment of the majority of the Court is, that the appellant is entitled to a refund of stamp-duty in proportion to the value of that part of the claim only which has been remanded; and the Registrar will grant a certificate accordingly.

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The 24th August 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, L. S. Jackson, and A. G. Macpherson, *Judges*.

**Limitation—Execution of decrees of Privy Council.**

Cases Nos. 569 and 570 of 1865.

*Miscellaneous Appeals from decisions passed by Baboo Koylas Chunder Deb Bahadoor, Principal Sudder Ameen of the Twenty-four Pergunnahs, dated the 16th January 1865.*

Annadmoyee Dossee and another (Decree-holders), *Appellants*,

*versus*

Poorno Chunder Rai and others (Judgment-debtors), *Respondents*.

*Mr. R. T. Allan* and *Baboo Kishen Kishore Ghose* for Appellants.

*Baboos Dwarkanath Mitter* and *Oopendur Chunder Bose* for Respondents.

The right to enforce decrees of Her Majesty in Council is not affected by any Law of Limitation.

*These cases were referred to a Full Bench by Kemp and L. S. Jackson, JJ., under the following orders:—*

*Kemp, J.*—THE decree-holders in these two cases applied to the Principal Sudder Ameen of the 24-Pergunnahs for permission to execute the decree of Her Majesty's Privy Council in the matter of costs. The Principal Sudder Ameen, holding that the application was made after more than three years from the date of the decree, rejected it, applying the provisions of Section 20, Act XIV. of 1859.

In appeal, it is contended that the Principal Sudder Ameen was wrong in applying the above Section, inasmuch as the Privy Council is a Court established by Royal Charter, and that Section 19 of the aforesaid Act applies.

We are of opinion that the decision of the Principal Sudder Ameen is wrong. Section 20 of Act XIV. of 1859 applies to processes of execution issued from Courts not established by Royal Charter in this country.

The Privy Council is a Court not established by Royal Charter, but it is a Court not of this country. We have been referred by the pleader of the respondents to a decision of this Court, dated the 29th November 1865, published in Volume IV. of the Weekly Reporter, in which it was held that the decree of the Privy Council must be considered as the decree of the Court originally passing the same when execution of such decree is sued out. Act XXV. of 1852 is quoted. The pleader for the respondent contends that, in this view of the law, the decree of the Privy Council which the appellants seek to execute becomes the decree of the Court originally passing the same; and, as such Court is one established in this country, and not by Royal Charter, the provisions of Section 19 of Act XIV. of 1859 apply, and the application is beyond time.

We cannot concur in the view taken by the learned Judges who passed the decision referred to. The Act quoted enacts "that every decree or order of Her Majesty in Council shall be enforced and executed by the Court which made the first decree or order appealed from, in the manner and according to the rules and laws applicable to the enforcement of original decrees or orders made by such last-mentioned Court." That is to say, that the procedure in the course of the execution of the decree of the Privy Council is to be regulated by the rules and laws applicable to the enforcement of the decrees of the Courts of this country—not that the decree of the Privy Council becomes that of the Court of first instance.

Having found that Section 20 of Act XIV. does not apply to this application, and that Section 19 of the same Act is also inapplicable, inasmuch as the Court of the Privy Council is not a Court established by Royal Charter, we would apply the provisions of Clause 16, Section 1, Act XIV. of 1859, which enacts that, in all suits for which no other limitation is expressly provided for by that Act, the period of six years from the time the cause of action arose is allowed. In this case, the decree of the Privy Council is dated the 30th November 1861; the application to enforce it is dated the 10th December 1864, and is therefore in time. We would reverse the decision of the Principal Sudder Ameen in both cases, and decree the appeal with costs.

As this decision is opposed to that of a Divisional Bench of this Court, we refer the question to a Full Bench.

*Jackson, J.*—I quite concur in referring this question to a Full Bench. I do not indeed think that Section 1, Clause 16, will apply, as that and the other Clauses of Section 1 refer to suits, and not to proceedings in execution.

The case appears to me a *casus omissus*, which is no concern of the Courts. We have only to consider whether the provision relied on by the judgment-debtor bars the decree-holder. I think it does not. The words "Courts established by Royal Charter" (Section 19) denote (as the learned Judges say in the judgment from which we dissent) Courts in this country established by Royal Charter; and therefore, *à fortiori*, the words in Section 20, "Courts not established by Royal Charter," mean Courts in this country not so established; and, as the Judicial Committee of the Privy Council, or rather the Court of Her Majesty herself in Council, is not a Court of either description, the decrees of that Court will not come within the terms of either Section, unless the decree, when executed in the Court of first instance, become, by virtue of Act XXV. of 1852, a decree of the Court of first instance.

This I cannot think it does. It is to be executed there, and to be executed in like manner as a decree of the local Court; but it is, for all that, still a decree of Her Majesty in Council, and not of any local Court. To this I may add that it would be in the last degree unjust to limit parties who have appealed to England, or have got a decree in their favor in a distant *forum*, to the same period of time that is allowed for executing the decree of Courts in this country. Considerable delay occurs in the preparation and transmission of decrees from England, and it is quite within the bounds of possibility that a successful party might not receive his decree before the period allowed for executing it had expired.

*Judgments of the Full Bench.*

*Peacock, C.J. (Trevor and Jackson, JJ., concurring).*—I am of opinion that a decree of Her Majesty in Council is neither a decree of the Court established by Royal Charter, nor a decree of a Court not established by Royal Charter within the meaning of Section 20, Act XIV. of 1859, and consequently that Act XIV. of 1859 does not apply to it.

It is contended that, even if the decrees of Her Majesty in Council are not decrees of a Court not established by Royal Charter within the meaning of the latter Section, they cannot be executed after the period limited by that Section for the execution of decrees of the Mofussil Courts; and in support of that contention, Section 1 of Act XXV. of 1852 is relied upon.

That Section enacts that "every decree "or order in appeal of Her Majesty in Coun-"cil, or by any Court of Sudder Dewanny "Adawlut, or of any Zillah or City Judge, "which shall be made after the passing of "this Act, shall be enforced or executed by "the Court which made the first decree or "order appealed from, in the manner and "according to the rules and laws applicable "in the execution and enforcement of ori-"ginal decrees or orders made by such last-"mentioned Court."

It is urged that the words "according to "the rules and laws applicable to the enforce-"ment of original decrees of such last-men-"tioned Court" extend to the decrees of Her Majesty in Council all Laws, including the Law of Limitation, which are applicable to decrees of the Court which made the first decree. But I am of opinion that that is not the proper construction of those words. The object of the Act was merely to provide that decrees of Her Majesty in Council and decrees of the Sudder Court, which were formerly executed by that Court, as well as decrees made on appeal by the City or Zillah Judges, should for the future be executed by the Court which passed the first decree according to the procedure of such Court and the rules and laws regulating such procedure. It was never intended to extend to such decrees any Law of Limitation.

It would be a very strained construction of the words, "according to the laws applicable to the execution and enforcement of original decrees," to hold that they included a Law of Limitation which prohibits the enforcement of decrees after a certain period.

As regards decrees of the Sudder and Zillah Courts, it was wholly unnecessary to provide any limitation, for the same limitation which applied to the decrees first passed applied to the decrees passed in appeal by the Sudder and Zillah Courts. As regards decrees passed in appeal by Her Majesty in Council, it appears to me that it was beyond the power of the Legislature to limit the period for their execution, as such an enactment would have been an interference with Her Majesty's prerogative.

The 2 and 3 Wm. IV., c. 85, s. 43, expressly provided that the Governor-General in Council should not have power to make any law which should in any way affect any prerogative of the Crown.

Further, it was enacted by the 3 and 4 Wm. IV., c. 41, s. 21, that "the order or decree of His Majesty in Council, on an appeal from the order, sentence, or decree of any Court of Justice in the East Indies, shall be carried into effect in such manner and subject to such limitations and conditions as His Majesty in Council shall, on the recommendation of the said Judicial Committee, direct; and it shall be lawful for His Majesty in Council on such recommendation by order to direct that such Court of Justice shall carry the same into effect accordingly, and thereupon such Court of Justice shall have the same powers of carrying into effect and enforcing such order or decree as are possessed by or are hereby given to His Majesty in Council."

It was evidently to prevent any interference with these latter words that Section 4 of Act XXV. of 1852 was introduced, so that, upon appeals from the decrees of the Sudder Court, that Court might itself carry the same into effect if ordered so to do by Her Majesty in Council.

If the Legislature, when making a distinction between Courts established by Royal Charter and Courts not established by Royal Charter by Act XIV. of 1859, had considered that, by virtue of Act XXV. of 1852, Section 20 of the new Law of Limitation would be in effect applicable to decrees of Her Majesty in Council in appeal from the Sudder Court, it is very unlikely that they would have so framed the Act as to allow a much shorter period for enforcing such decrees of Her Majesty in Council than for enforcing decrees of the Supreme Court. This, however, would be the case if Section 20 is held to apply to decrees of Her Majesty in Council.

I am further of opinion that decrees of Her Majesty in Council are not affected by Clause 16, Section 1, Act XIV. of 1859, which enacts that, in all suits for which no other limitation is expressly provided by that Act, the period of six years should be applied. The enforcement of a decree by execution is clearly not the institution of a suit within the meaning of that Section.

For the above reasons, I think that the right to enforce decrees of Her Majesty in Council is not affected by any Law of Limitation. Should any inconvenience arise from this decision, it may be obviated by Her Majesty in Council upon the recommendation of the Judicial Committee under the provisions of Section 21, Act 3 and 4 Wm. IV., c. 41, to which I have already alluded.

The order of the Principal Sudder Ameen is reversed with costs, with liberty to the decree-holder to proceed with the execution.

*Loch, J.*—It appears to me that the words used in Section 1, Act XXV. of 1852, are sufficiently comprehensive to admit of the construction that I have put upon them elsewhere, *viz.*, that they enable the Courts to apply the Law of Limitation to decrees in execution. Previous to the enactment of Act XIV. of 1859, there was no Statute of Limitation in respect to the execution of decrees. The Courts were guided by rules laid down by the late Sudder Court in certain constructions of law. By those constructions it was ruled that the Law of Limitation applicable to suits, *viz.*, 12 years, was applicable to the execution of decrees; and that a decree-holder could not, except upon good and sufficient cause shown, execute his decree after the lapse of that period. When, therefore, the Act directs that certain decrees made in appeal are to be enforced and executed by the Court which made the first decree or order appealed from, in the manner and according to the rules and laws applicable to the execution and enforcement of original decrees or orders made by such last-mentioned Court, it appears to me that all rules then in force must be taken into consideration, and that, if execution were barred by limitation, the rule of the Court which prohibited execution under such circumstances would have to be applied.

Whether the Legislature in this country had the power to limit the period for the execution of decrees of Her Majesty in Council, is another question. But I believe that I am not wrong in stating that, under the former practice, the rule applicable to other decrees was considered applicable to them. Looking, however, to the wording of the Act 3 and 4 Will. IV., c. 41, s. 21, quoted by the Chief Justice, I think that the Legislature in this country had not authority to pass any law limiting the period during which decrees of Her Majesty in Council should be executed; and I therefore concur in the judgment of the Court that the provisions of Section 1, Act XXV. of 1852, cannot be applied to this case.

*Macpherson, J.*—I concur in the conclusion arrived at by the Court; because I think, for the reasons which have been

given, that whatever may be the construction of the words used in Section 1 of Act XXV. of 1852, it was not in the power of the Indian Legislature to limit the time for the execution of decrees of the Privy Council.

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The 24th August 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, L. S. Jackson, G. Campbell, and A. G. Macpherson, *Judges*.

**Cross-decrees—Section 209 of Act VIII. of 1859.**

Case No. 277 of 1866.

*Miscellaneous Appeal from an order passed by Baboo Peary Mohun Banerjee, Principal Sudder Ameen of Rajshahye, dated the 10th February 1866.*

Greesh Chunder Lahoory (Judgment-debtor), *Appellant*,

*versus*

Fakeer Chand Khan (Decree-holder), *Respondent*.

*Baboos Otool Chunder Mookerjee* and *Romesh Chunder Mitter* for Appellant.

*Baboo Mohinee Mohun Roy* for Respondent.

Cross-decrees in the same Court may be set off one against the other, whether they are originally decrees of the same Court, or are decrees sent to the same Court to be executed. But decrees of different Courts cannot be set off one against the other unless when they are both in the same Court for the purpose of being executed.

*This case was referred to a Full Bench by Loch and Macpherson, JJ., under the following order:—*

*Referring order.*—THE circumstances of this case are as follow: Greesh Chunder Lahoory obtained a decree against Kasheeshuree Dabee in the Judge's Court. She subsequently obtained a decree against him before the Principal Sudder Ameen, and sold it to one Fakeer Chand, who proceeded to execute it. When Fakeer Chand attempted execution, Greesh Chunder applied to the Judge to have the amount of his decree set off against that obtained by Kasheeshuree. The Judge directed the Principal Sudder Ameen to do so if there was no objection, but in reply that officer stated that the decree obtained by Kasheeshuree no longer remained in her name, but had been assigned by her to Fakeer Chand on 4th Srabun 1272, and therefore a set-off could not be made.

An appeal is preferred on the ground that the transfer to Fakeer Chand was made merely with the object of evading the set-off; that, though Fakeer Chand has purchased, he is in the place of Kasheeshuree and liable, as she would be, to have the one decree set off against the other. On the other hand, a judgment of a Divisional Bench of 9th February 1866, Sheikh Razeeooddeen, Appellant (reported in page 22, Miscellaneous Rulings, Volume 5 of Weekly Reporter), is brought to our notice, which rules that, where such an assignment has been made, it cannot be questioned except on the ground of fraud, and that, when the assignment is in good faith, the decree so assigned cannot be used as a set-off to the detriment of the assignee. Now, looking to the wording of Section 208, we find that a decree transferred by assignment "may "be executed in the same manner as if the "application were made by the original "decree-holder." These words intimate, we think, that the law looks upon the assignee as standing in the exact position as the original decree-holder, and liable, in regard to the decree assigned to him, to all the liabilities which rest upon the decree-holder. Were it otherwise, fraudulent assignments could be made without difficulty, and it would be almost impossible to give even *primâ facie* proof of fraud. It may be that attachment of the less decree might be made by the holder of the larger: but it appears to us that an assignee takes it (the decree) subject to all the liabilities and equities of his vendor which attach to it. Differing, therefore, from the opinion expressed by the Divisional Bench in their judgment of 9th February 1866, we submit the following point for the determination of a Full Bench: In the event of there being cross-decrees, and one of these decrees being transferred by the decree-holder to a third party in a *bond-fide* sale without any special notice to the purchaser of the existence of the cross-decree, whether the purchaser does not take it with all the liabilities and equities of the vendor which attach to it?

*Judgment of Full Bench.*—It appears that these two decrees were not decrees of the same Court. The one was a decree of the Principal Sudder Ameen, and the other was a

decree of the Judge. If one of them had not been assigned, the question would be, could the amount of the decree in the Judge's Court be deducted from that in the Principal Sudder Ameen's Court under the provisions of Section 209 of the Code of Civil Procedure? The words are: "If there be cross-decrees "between the same parties for the payment "of money, execution shall be taken out by "that party only who shall have obtained a "decree for the larger sum," &c. In this portion of the Section it is not expressly stated whether the Section refers to cross-decrees of the same Court, or cross-decrees between the same parties in whatever Courts they may be. But the words of the first paragraph are explained by the second paragraph of the same Section, which says: "The "above rules shall apply to decrees sent to "a Court for execution, as well as to decrees "in the same Court." That shows that the meaning of the whole Section was that, if there be cross-decrees in the same Court between the same parties, they shall be set off one against the other, and that the same rule shall apply to decrees sent to a Court for execution.

In this case, the decree of the Judge's Court was not sent to the Principal Sudder Ameen for execution. The two decrees are therefore not the decrees of the same Court: nor is the decree of the Judge's Court a decree sent to the Principal Sudder Ameen's Court for execution. The case does not fall within the provisions of Section 209. It is therefore unnecessary for us to determine whether the assignment made any difference or not. If we were to determine that point, our decision would be a mere *obiter dictum*. If there had been no assignment of the decree in the Principal Sudder Ameen's Court, that decree might have been attached in execution of the decree of the Judge's Court. If the assignment was fraudulent, it would not affect the right to attach it. If the decree attempted to be set off had been obtained in another Zillah, and could not be enforced within the jurisdiction of that Court, it might have been sent for execution to the Court of the Judge of Rajshahye; and the decree of the Principal Sudder Ameen might, in like manner, have been attached in execution if it had not been assigned or had been assigned for a fraudulent purpose. This decision renders it unnecessary for us to send back the case to the Division Bench which referred it.

The appeal is therefore dismissed with costs.

The 24th August 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Cross-decree—Purchaser of decree.**

Case No. 252 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Mymensingh, dated the 6th January 1866, affirming an order passed by the Principal Sudder Ameen of that District, dated the 1st July 1865.*

Nundo Coomar Bukshee and another (Decree-holders), *Appellants,*

*versus*

Koonjo Kishore Roy (Judgment-debtor), *Respondent.*

*Baboo Luleet Chunder Sein* for Appellants.

*Baboo Greesh Chunder Ghose* for Respondent.

The purchaser of a decree against which a cross-decree may be set off takes his decree subject to the set-off.

THIS appeal is dismissed with costs.

Two persons, Koonjo Kishore and Shib Ram, had cross-decrees against each other, the one decree being liable to be set off against the other under Section 209 of Act VIII. of 1859. The appellants, having got a decree against Shib Ram, attached and sold his interest in the decree which he held against Koonjo Kishore. The latter claimed the right of set-off given him by Section 209; but the appellants contend that, as the decree against Koonjo Kishore has been sold, he has lost his right of set-off, and must pay in full all that is due under that decree.

It is perfectly clear that the purchase of a decree under such circumstances cannot stand, as regards the judgment-debtor, in a better position than the person whose rights he has purchased. The purchaser takes his decree subject to all the equities and liabilities which attach to it; and in this case he brought a decree liable to the provisions of Section 209 of Act VIII. of 1859.

The 24th August 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Limitation—Execution.**

Case No. 346 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 22nd November 1865, reversing an order passed by the Moonsiff of Bohor, dated the 5th September 1865.*

Treelochun Chatterjee (Decree-holder), *Appellant,*

*versus*

Radha Monee Dossee and others (Judgment-debtors), *Respondents.*

*Baboo Sreenath Banerjee* for Appellant.

*Baboo Nubo Kishen Mookerjee* for Respondents.

An application for execution and an order to deposit tullubana, followed by the deposit of the tullubana and service of notice, are sufficient to keep the decree alive.

THE decree of which execution is sought bears date in August 1861. The first application for execution was made on the 24th July 1864 (being just within three years from the date of the decree). On the 26th July 1864, an order to deposit tullubana was passed; on the 4th of August the tullubana was deposited; and on the 5th August, notice appears from the Nazir's return to have been served.

These are sufficient proceedings, within the meaning of Section 20 of Act XIV. of 1859, to keep the decree alive. We reverse the order of the Lower Court with costs; and execution must issue as prayed.

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The 28th August 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Appeal—Sale-proceeds in execution of decree.**

Cases Nos. 336 to 339 of 1866.

*Miscellaneous Appeals from an order passed by the Judge of Sarun, dated the 26th February 1866, reversing an order passed by the Principal Sudder Ameen of that District, dated the 9th May 1865.*

Choonee Lal (Decree-holder), *Appellant,*

*versus*

Pultoo Bhukut and others (Judgment-debtors), *Respondents.*

*Mr. R. T. Allan* for Appellant.

*Mr. J. S. Rochfort* and *Baboo Taruckuath Sein* for Respondents.

There is no appeal from an order as to the application and distribution of the proceeds of property sold in execution under a decree of a rival decree-holder.

*Loch, J.*—IN this case, we find that Choonee Lal brought an action against the debtor on 5th September 1864, and attached his property on the same date, and got a decree on 22nd November 1864.

Hudwaree Lal obtained a decree in the Civil Court of Zillah Ghazeepore against the same debtor on 29th September 1864. The decree was sent to the Sarun Court for execution, and attachment of the debtor's property was made under it on the 18th November 1864, two days before Choonee Lal obtained his decree.

The attached property was sold in execution of the decree held by Choonee Lal, who had alleged before the Principal Sudder Ameen that the decree sent for execution from Ghazeepore had been fraudulently obtained; and under the provisions of Section 272, Act VIII. of 1859, he was directed to apply to the Ghazeepore Court for an order for the payment to him of the proceeds of sale. We are not shewn that he complied with that order, but the Principal Sudder Ameen proceeded to distribute the sale-proceeds, and directed them to be paid over in liquidation of the debt due to Choonee Lal.

An appeal was preferred to the Judge, who, for reasons assigned by him, reversed the order of the Principal Sudder Ameen; and a special appeal is made to this Court, on the ground that the Judge has acted without jurisdiction in admitting an appeal as the order appealed from was passed in execution of a decree, and related to the disposal of the sale-proceeds; and that, as the appellant was not one of the parties to the suit, but a party holding a decree against the same judgment-debtor, he could not, under the ruling of the Full Bench since followed in repeated instances by the Divisional Benches of this Court, be allowed to appeal.

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I think this case is covered by the Full Bench decision of the 1st June 1863, reported at page 116, Special Number of the Weekly Reporter, which laid down that there was no appeal from an order as to the application and distribution of the proceeds of property sold in execution under a decree of a rival decree-holder. Rightly or wrongly, the Principal Sudder Ameen has passed an order giving the sale-proceeds to Choonee Lal, and, under the decision quoted, that order was final, and not open to appeal. We therefore reverse the order of the Judge with costs.

*Macpherson, J.*—I agree in thinking that in this case there was no appeal to the Judge, and that his order should be set aside with costs.

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The 30th August 1866.

*Present :*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Joint Family Property—Purchaser of share in execution of decree.**

Case No. 121 of 1866.

*Miscellaneous Appeal from an order passed by the Additional Judge of Hooghly, dated the 27th November 1865, affirming an order passed by the Sudder Ameen of that District, dated the 26th July 1865.*

Oodoy Chunder Mullick and others (Judgment-debtors), *Appellants,*

*versus*

Pitambur Pyne (Decree-holder), *Respondent.*

*Baboos Onookool Chunder Mookerjee, Upprokash Chunder Mookerjee,* and *Luckhee Churn Bose* for Appellants.

*Baboo Kishen Succa Mookerjee* for Respondent.

In a suit for possession by the auction-purchaser of a judgment-debtor's share in a family residence, possession was ordered to be given to him so as not to annoy or insult the inmates of the house; and as the plaintiff could not use the family staircase without exposing the ladies of the family to annoyance, and was obliged to build a separate staircase, he was held entitled to compensation to the value of his share in the family staircase.

It appears that one Pitambur Pyne, having obtained a decree against Pitambur Mullick, sold the judgment-debtor's share in his family residence, and purchased it himself. The auction-purchaser was obliged to bring a suit for possession, and was successful on 25th November 1862, the decree directing that he be put in possession in a manner so as not to annoy or insult the inmates of the house. The house belonged to seven brothers, and possession of some of the outer buildings was given. There was, however, only one staircase by which the top of the house could be reached, and this was used by the females of the family; and in respect to it, it was ordered on 5th August 1864 that, if there were no outer staircase, and the present one was connected with the female apartments, the decree-holder was at liberty to build a stair at his own expense in any part of the building which had been assigned to him, taking care, however, to put up purdahs on the top of the house so as not to overlook the females. The Ameen who was deputed to carry out his order reported that the value of the family staircase was Rupees 1,186; and on 26th July 1865, the Principal Sudder Ameen directed Oodoy Chunder Mullick and others who objected to the Ameen's proceedings to pay into Court one-third of this sum in two days, otherwise the decree-holder was at liberty to sue them for the amount. The parties, who are brothers of the judgment-debtor, appealed from this order to the Judge who rejected the appeal for reasons given in his judgment, and a special appeal has been preferred, in which it is urged that they cannot be made liable to the decree-holder for the value of the staircase; that its value has been greatly over-estimated by the Ameen; that, if the decree-holder is entitled to a share in it under his purchase and decree, they are willing to be put to the inconvenience of having a stranger making use of a staircase which is used by the females of the family, but they are not bound to pay the value of a third share to him; and further that, under the arrangement made on 5th August 1864, the decree-holder is not entitled to any share in the family staircase.

On the other hand, it is urged that the decree-holder is entitled to all that he purchased; that the order of 5th August 1864, which was passed for the convenience of the members of the family, and under which he was obliged at his own expense to build a separate staircase in order to reach the top of his part of the house, did not deprive him of his right to a share in the family staircase, or its equivalent in money if the inmates of the house were unwilling to allow him to make use of it.

We do not understand upon what principle the Principal Sudder Ameen has held

the appellants liable to pay a third of the value of the staircase to the decree-holder who is purchaser only of a seventh share in the house. Under the decree, possession was to be given so as not to insult or annoy the inmates of the family; but it is clear that, if the decree-holder were allowed to make use of the staircase, much annoyance would result to the females of the house, as there is no other staircase by which they can get to the top of the house, and the chance of meeting strangers might prevent their making use of it at all. The decree-holder, however, is entitled to his share of the staircase or its equivalent, and, as he has been obliged to build a separate stair, and cannot make use of the family stair because of the annoyance to which the ladies of the family might be exposed, we think he is entitled to compensation to the extent of the value of his share in the staircase, which, as stated to us, is a seventh. With this modification, we affirm the order of the Lower Courts. Costs will be in proportion.

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The 30th August 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Joint decree—Limitation—Execution.**

Cases Nos. 292 and 354 of 1866.

*Miscellaneous Appeals from an order passed by the Judge of Patna, dated the 6th February 1866, reversing an order passed by the Principal Sudder Ameen of that District, dated the 9th September 1865.*

Maharanee Indurjeet Koonwur (one of the Decree-holders), *Appellant,*

*versus*

Mazum Ali Khan and another (Judgment-debtors), *Respondents.*

*Moonshee Ameer Ali* and *Baboo Romanath Bose* for Appellant,

*Messrs. R. E. Twidale* and *C. Gregory* and *Baboo Kishen Succa Mookerjee* for Respondents.

In the case of a joint decree any arrangement made by the decree-holders as to their relative shares in the amount of the decree would not alter its character, and *bonâ-fide* proceedings taken by one of the number to execute the decree would keep alive the rights of all the decree-holders.

In the absence of any order in the decree awarding particular sums to each of the decree-holders, one decree-holder cannot be allowed to take out execution of such portion of the decree as he may consider due to himself.

Six persons brought a suit for possession and mesne-profits, and obtained a joint-decree with costs. Possession was given, and execution to recover mesne-profits and costs has been taken out on different occasions. The petitioner in Case No. 292, Maharanee Indurjeet Koonwur, as representative of her late husband the Rajah Heet Narain Singh, applied for execution to recover her share of costs, and, on 27th February 1862, was required by the Principal Sudder Ameen to give proof of her being the heir of Heet Narain. Though she obtained a certificate under Act XXVII. of 1860 on 27th March 1862, she did not comply with the orders of the Court, and the case was struck off the file on 2nd August 1862. Her present application was put in on 26th January 1865, when she filed the certificate,

The petitioners in Case No. 354 are joint decree-holders with Indurjeet Koonwar. A petition by one of their number to take out execution for his own share of the decree was filed on 14th May 1861, when a notice by order of the Court was served on the other decree-holders and the debtors, and the case was struck off on 27th December 1861, as the applicant had failed to prove what was the extent of his share. On 6th March 1862, he put in a fresh application, and on 24th idem filed certain documents to prove the extent of his share. On the 9th April 1863, the Principal Sudder Ameen struck off the case, as he did not think it advisable to allow one out of several joint decree-holders to execute the decree. On 9th April 1864, the petitioner, having joined other two of the decree-holders with him, again applied for execution, stating what were their respective shares; and on 29th November 1864, another of the decree-holders filed a petition for execution, admitting, at the same time, the correctness of the statements as to the amount of shares made in the others' petition.

The Judge in appeal has reversed the order of the Principal Sudder Ameen, holding that the Ranee Indurjeet Koonwar is out of time, and that further execution on her part is barred by limitation. He has also disposed of the other application in appeal by a reference to his decision in the Ranee's case.

It is clear that, if the Ranee were the sole decree-holder, she would be out of time; but it is urged that her right to execute the decree has been kept alive by the acts of other joint decree-holders; and on the part of the other parties, the appellants in Case

No. 354, it is urged that the Judge has entirely overlooked their case, that it cannot be disposed of on the same grounds as the Ranee's petition; and it is contended that the proceedings taken by the petitioners on the 24th March 1862 were quite sufficient to keep the decree alive. It is contended on the other hand that, when joint decree-holders have among themselves made a partition of the amount decreed, they can no longer be looked upon as joint, but must be treated as separate, decree-holders, and that the acts done by any one of them in furtherance of the joint decree cannot keep alive the right to execute in the others who have not taken steps in time. Further, that the word "proceeding" used in Section 20, Act XIV. of 1859, means some process as used in Act VIII. of 1859, such as warrant, attachment of property, proclamation of sale whereby the debtor is made aware that steps are being taken against him; that, consequently, the mere filing of evidence is not a "proceeding" within the meaning of the Section.

By a recent ruling of a Full Bench, it has been held that any thing done by a decree-holder *bonâ fide*, or by the Court at the instance of a decree-holder, in furtherance of the execution of a decree, is a "proceeding" within the meaning of the Act; that, consequently, the service of a notice would be evidence of the *bona fides* of an application for execution. The proceedings taken by the appellants in Case No. 354 in 1862 appear, in the absence of any proof to the contrary, to have been in good faith and sufficient to keep the decree in force; and we think the Judge was wrong in dismissing this case with reference to his order passed in Ranee Indurjeet Koonwar's petition, which order was not applicable to these petitioners.

As the decree was a joint decree, any arrangement made by the decree-holders as to their relative shares in the amount of the decree would not alter its character, and efforts made by one of the number to execute the decree would keep alive the rights of all the decree-holders. But we think that, in the absence of any order in the decree awarding particular sums to each of the decree-holders, it would be contrary to law to allow one of the decree-holders to take out execution of such portion of the decree as he considered due to himself. Section 207 of Act X. of 1859 allows execution to be taken out by one or more of several decree-holders, if the Court see sufficient cause for allowing them to do so; but it must be execution of the whole decree—the Court, at the time of granting permission, making such order as is necessary for the protection of the rights of the other decree-holders. The application hitherto made by the decree-holders to take out execution for their own shares is irregular; but, as it appears to have been the practice of the Court to allow this to be done, we think they may be permitted in this case to have the benefit of those proceedings which were taken by them *bonâ fide*. We reverse the orders of the Judge in both these cases, and direct that the cases be remitted to the first Court to issue execution with reference and in conformity to the above remarks.

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The 31st August 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, L. S. Jackson, G. Campbell, and A. G. Macpherson, *Judges*.

**Section 35, Act XXIII. of 1861—Jurisdiction—Powers of High Court (as a Court of Revision).**

*Petition under Section 35, Act XXIII. of 1861.*

Subjaun Ostagar, *Petitioner*,

*versus*

Promothonath Ghose and others, *Opposite Party*.

*Baboo Obhoy Churn Bose* for Petitioner.

No one for Opposite Party.

HELD by the majority of the Court (Jackson, J., dissenting) that, under Section 35, Act XXIII. of 1861, the High Court has power to interfere, either in a case in which a Subordinate Court exercises an appellate jurisdiction which it has no power to exercise, or in a case in which the Subordinate Court, in the exercise of a jurisdiction which it has, exceeds its jurisdiction; that, where a Court exceeds its jurisdiction, the High Court may set aside that part of the order which is in excess of jurisdiction; that, where the decision of the Subordinate Court is made on appeal in a case in which it has no appellate jurisdiction, the proper order is to set aside the decision altogether; and that, where an appeal is heard by a Subordinate Court which has no jurisdiction to hear it when it ought to be heard by another Subordinate Court which has jurisdiction to hear it, the High Court may set aside the decision of the Court which had no jurisdiction, and may, if they think it right, refer the case to the Court which had jurisdiction, even if it be too late to prefer a fresh appeal to that Court.

*This case was referred to a Full Bench by Loch and Macpherson, JJ., under the following order:—*

*Referring order.*—IN this case, three decree-holders took out execution of their re-

spective decrees, and attached the property of the debtor on various dates. The sale was made, but, before the sale-proceeds were distributed, it was found that the decree held by the decree-holder, who had made the first attachment in order of time, was collusive, and he was declared incapable of partaking in the proceeds of sale; and the Moonsiff then distributed the proceeds rateably between the other two. An appeal was preferred to the Judge, who held that of the two other decree-holders, the one who attached first was entitled to recover the whole of his debt from the sale-proceeds, the balance, if any, being paid to the other. From this order an appeal has been preferred to this Court; but we think that no appeal lies, for this is a dispute between rival decree-holders regarding the distribution of sale-proceeds, and it has been ruled by a Full Bench that no appeal will lie in such a case. But the petitioner urges that, if there is no appeal to this Court, there was equally no appeal to the Judge; that he has acted without jurisdiction in accepting and passing orders in the appeal; that Section 35, Act XXIII. of 1861, gives this Court power to send for the record in such cases, and, if the Judge has acted without jurisdiction, to pass such order as may seem right.

We think it advisable, considering how frequently Section 35, Act XXIII. of 1861, is appealed to by petitioners as giving this Court powers of interference with orders passed below, to lay this case before a Full Bench, for an authoritative ruling as to the meaning of the above Section. Two interpretations have been put on the words in the earlier part of the Section, which we quote: "The Sudder Court may call for the record of any case decided on appeal by any Subordinate Court, in which no further appeal shall lie to the Sudder Court, if such Subordinate Court shall appear, in hearing the appeal, to have exercised a jurisdiction not vested in it by law." According to one interpretation, the meaning of these words is, that, if the Judge admits an appeal from the order of a Lower Court where no appeal is allowed by law, and passes an order thereon, the High Court has, under the provisions of this Section, authority to call for the record, and pass any order that may appear to be right, whether such order be for the setting aside or confirming the order of the Judge, or for correcting any error made by the first Court. According to the other interpretation, the meaning is that the High Court can interfere only in cases in which an appeal is allowed to the Judge, but in which no special appeal is permitted by law, such as suits referred to in Section 27, Act XXIII. of 1861. If, in disposing of such appeals, the Judge has exercised a jurisdiction not vested in him by law, this Court may interfere to correct his error.

If the latter be the correct interpretation of the law, then this Court cannot interfere in the present case, though it is obvious that the Judge, in admitting the appeal and reversing the order of the first Court, has acted without jurisdiction, inasmuch as the law does not allow of an appeal in such cases; and a decision of a Full Bench, followed in repeated instances by the Divisional Benches of this Court, has ruled that there is no appeal by one of several decree-holders from an order passed in execution regarding the distribution of sale-proceeds. Here it is obvious that the Judge has acted illegally; and this Court is powerless to put him to rights. The present case is only one of many which have come before the Court, and sometimes the Court, considering the former of the two interpretations to be correct, has interpreted and corrected the error of the Lower Court.

Another question arises as to the scope of the latter words of Section 35, Act XXIII. of 1861, which are as follows: "The Sudder Court may set aside the decision passed on appeal in such case by the Subordinate Court, *or may pass such other order in the case as to such Sudder Court may seem right.*" Do the words which are italicised in the passage of law quoted enable this Court, whenever it has jurisdiction to act at all, to interfere with the order passed by the first Court, should it be erroneous, as well as with the order passed in appeal; or are the words "pass such other order *in the case*" restricted to correcting the error made by the Judge on appeal?

*Judgments of the Full Bench.*

*Peacock, C.J. (Loch and Macpherson, JJ., concurring).*—The facts of this case, as set forth in the Minute of the referring Judges, are as follows:—

"In this case, three decree-holders took "out execution of their respective decrees, "and attached the property of the debtor on "various dates. The sale was made, but, "before the sale-proceeds were distributed, "it was found that the decree held by the "decree-holder, who had made the first at-"tachment in order of time, was collusive

"and he was declared incapable of partak-
"ing in the proceeds of sale; and the Moon-
"siff then distributed the proceeds rateably
"between the other two. An appeal was
"preferred to the Judge who held that of
"the two other decree-holders, the one who
"attached first was entitled to receive the
"whole of the debt from the sale-proceeds,
"the balance, if any, being paid to the
"other."

It appears to the Court that the decision of the Moonsiff was final, and that no appeal legally lay to the Judge.

The first question referred to us is whether, under Section 35, Act XXIII. of 1861, this Court has the power to interfere with the order of the Judge. On referring the case for the decision of a Full Bench, the Court, speaking of the words of Section 35, say: "According to one interpretation,
"the meaning of these words is that, if the
"Judge admits an appeal from the order of
"the Lower Court where no appeal is
"allowed by law, and passes an order there-
"on, the High Court has, under the provi-
"sions of this Section, authority to call for the
"record, and pass any order that may appear
"to be right, whether such order be for
"setting aside or confirming the order of the
"Judge, or for correcting any error made by
"the first Court. According to the other in-
"terpretation, the meaning is that the High
"Court can interfere only in cases in which an
"appeal is allowed to the Judge, but in
"which no special appeal is permitted by
"law, such as suits referred to in Section 27,
"Act XXIII. of 1861. If, in disposing of such
"appeals, the Judge have exercised a juris-
"diction not vested in him by law, this Court
"may interfere to correct his error."

It appears to me that, under the Section referred to (which is not very clearly worded), this Court has power to interfere, either in a case in which the Judge exercises an appellate jurisdiction which he has no power to exercise, or in a case in which, in the exercise of a jurisdiction which he has, he exceeds his jurisdiction. The words of the first portion of Section 35 are: "The Sudder
"Court may call for the record of any case
"decided on appeal by any Subordinate
"Court in which no further appeal shall lie
"to the Sudder Court, if such Subordinate
"Court shall appear, in hearing the appeal,
"to have exercised a jurisdiction not vested
"in it by law."

The first word that causes ambiguity is the word "further." It is considered by some that, by the words "in which no further appeal shall lie to the Sudder Court," the Legislature intended cases in which an appeal would lie to the Subordinate Court without a further appeal to the Sudder Court. It is contended, in support of this view, that the word "further" is not applicable to a case in which no appeal lies either to the Subordinate Court which exercises it or to the Sudder Court; but the first part of the Section must be read in conjunction with the subsequent words: "If such Subordinate Court
"shall appear, *in hearing the appeal*, to have
"exercised a jurisdiction not vested in it by
"law." The words are not "if, in deciding
"the appeal, the Court shall appear to have
"exceeded its jurisdiction," but "if, in hear-
"ing the appeal, it shall appear to have exer-
"cised a jurisdiction not vested in it by law."

If a Judge should hear an appeal in a case in which he has no appellate jurisdiction, he would appear to have exercised a power not vested in him by law; and yet, if no appeal lay to the Sudder Court, no further appeal than that which the Subordinate Court in fact heard would lie to the Sudder Court.

The thing to be looked to for the purpose of seeing whether the case falls within the Section is rather the hearing than the decision. If the hearing was an exercise of a jurisdiction not vested by law, the decision consequent upon such hearing may be set aside, without reference to the decision itself. The Section provides for setting aside the whole decision, not merely of any part of it which may be found to be in excess of jurisdiction. Looking at the whole Section and reading the words "in which no *further* appeal shall lie to the Sudder Court" together with the words "if such Subordinate
"Court shall appear, *in hearing the appeal*,
"to have exercised a jurisdiction not vested in
"it by law," and the subsequent words of the Section, I think the true construction is that the Sudder Court may call for the record in a case in which a Subordinate Court exercises an appellate jurisdiction where it has none, or in a case in which it exceeds its jurisdiction where it has. I think that the words, "in which no further appeal shall lie to the Sudder Court," means any case in which there is no appeal to the Sudder Court, or, in other words, no appeal in which the decision in the appeal heard *de facto* can be set aside. Where there is an appeal to the Sudder Court, any part of a decision which is beyond jurisdiction can be set right on appeal. But, if there be no appeal, then the Sudder Court is authorized to call for the record, and set aside whatever the Subordi-

nate Court has done in excess of its jurisdiction.

There are very few cases beyond those in Section 27, in which an appeal is given to a Subordinate Court without a special appeal to the Sudder. But there may be many cases in which appellate jurisdiction may, through error, be exercised without jurisdiction in which there is no further appeal to the Sudder, because there is no appeal given by law either to the Subordinate Court or to the Sudder Court. Such cases were, I think, clearly intended to be included.

As to the second question, the learned Judges who have referred this case say: "Another question arises as to the scope of the "latter words of Section 35, Act XXIII., "1861, which are as follows:—

"'The Sudder Court may set aside the de-"'cision passed in appeal in such case by "'the Subordinate Court, *or may pass such* "'*other order in the case as to such Sudder* "'*Court may seem right.*' Do the words "which are italicised in the passage of the "law that is quoted enable this Court, when-"ever it has jurisdiction to act at all, to in-"terfere with the order passed by the first "Court, should it be erroneous, as well as "with the order passed in appeal; or are the "words 'pass such other order in the case' "restricted to correcting the error made by "the Judge on appeal?"

In Cases Miscellaneous Appeals Nos. 129 and 130 of 1866, which were referred to a Full Bench, and were decided at this sitting, the Court considered that it would not be right to pass an order interfering with a decision which the Legislature intended to be final. In this case, the order of the Moonsiff was intended by the Legislature to be final; and therefore, so far from thinking that it would be right, I think it would be wrong for this Court, simply because the Judge did erroneously exercise a jurisdiction which did not belong to him, to enter into the question whether a decision intended by the Legislature to be final was right or wrong. The words of the Act here are again important: "The Sudder Court may "set aside the decision passed on appeal in "such case by the Subordinate Court, *or* "may pass such other order in the case as to "such Sudder Court may seem right."

It is not that the Sudder Court may set aside the decision of the Subordinate Court, *and* pass such other order in the case as it may think right, but that the Sudder Court may set aside the decision, *or* pass such other order as to it may seem right.

It appears to me that, where a Court exceeds its jurisdiction, this Court may set aside that part of the order which is in excess of jurisdiction; and that, where the decision of the Subordinate Court is made on appeal in a case in which it has no appellate jurisdiction, the proper order is to set aside the decision altogether. If an appeal be heard by a Subordinate Court which has no jurisdiction to hear it, when it ought to be heard by another Subordinate Court which has jurisdiction to hear it, the Court may set aside the decision of the Court which had no jurisdiction, and may, if they think it right, refer the case to the Court which had jurisdiction, even if it be too late to prefer a fresh appeal to that Court.

*Jackson, J.*—I regret to be obliged to differ from the judgment of the majority of the Court in this matter. It appears to me that the wording of Section 35, Act XXIII. of 1861, does not permit the Court to interfere in cases where the Lower Appellate Court has heard an appeal which it had no jurisdiction to entertain. I admit that this construction is of very much less convenience than that which has been adopted by the Chief Justice and my learned brothers. At the same time, I feel bound by the express words of the Section itself. If we look at Section 35 and the Sections which it follows, and look to the nature of Act XXIII., and refer to the Acts which it supersedes, I think the meaning is clear enough.

Act XXIII. of 1861 was an Act for amending Act VIII. of 1859 (for simplifying the procedure of the Courts of Civil Judicature not established by Royal Charter) and for consolidating the Acts previously passed for the amendment of the said Act. It appears to have gone over the whole ground which had previously been traversed by the amending Acts, to have thrown the whole of those Acts into one, and to introduce new matter which had been found necessary for the further amendment of the law of Procedure.

One of the Acts which was repealed by Act XXIII. was Act XLIII. of 1860. This enactment following Act XLII. (which was the Small Cause Courts Act for the Mofussil) gave a certain finality to the decisions passed in regular appeal in cases of the Small Cause Court class tried, not in the Courts of Small Causes proper, but in the ordinary Civil Courts; and it provided the mode of stating a case and obtaining the opinion of the Sudder Court upon such case.

Sections 27 to 34 of Act XXIII. of 1861 exactly replace Sections 1 to 8 of Act XLIII. of 1860. Then immediately following those Sections 27 to 34, comes Section 35. I think, from the location of Section 35 immediately after those Sections of the Act and before Section 36, which relates to a subject wholly different, it is quite clear that that Section was connected with the subject treated of in Sections 27 to 34. These, like Act XLIII., first provided that no appeal shall lie in cases of the nature described. They next provided the means of reference to the Sudder Court where a case should be stated, and then, as if to provide against a failure of justice in cases where special appeal was taken away, and in which the Lower Appellate Court did not think fit to submit a case to the High Court for opinion, it was provided that "the Sudder Court "may call for the record of any case decided "on appeal by any Subordinate Court in "which no further appeal shall lie to the "Sudder Court, if such Subordinate Court "shall appear in hearing the appeal to have "exercised a jurisdiction not vested in it "by law." That seems to me to provide for cases in which special appeal is barred, and in which a case might not have been stated by the Lower Appellate Court.

I cannot get over the words "in which no further appeal shall lie in the Sudder Court." Those words indicate clearly to me the case of one appeal being allowed, and a second or special or further appeal not being allowed. Nothing has been suggested, as far as I have heard, to account for the use of those words otherwise than as I have suggested.

Then the expression "in hearing the appeal" appears to me also to admit a construction quite consistent with the view I have taken.

It seems to me that, if by these words a going beyond the proper jurisdiction of the Court in entertaining the appeal had been alluded to, the words "in hearing the appeal" would not have been used, but "in admitting the appeal." It appears to me that the word "hearing" is meant in the sense of "determining," and that the Section means that, when a Subordinate Court hearing an appeal lawfully before it, in determining that appeal, grants some relief or makes some direction beyond its lawful competence to make, then the High Court may send for the proceedings, &c.

That appears to me to be the meaning of the Section; and then as to the concluding part of the Section, "and the Sudder Court "may set aside the decision passed on "appeal in such case by the Subordinate "Court, or may pass such other order in the "case as to such Sudder Court may seem "right," that seems to me to mean that this Court may either wholly reverse the judgment or pass such modified or other order as it may think fit, and as the Lower Appellate Court might have passed.

If this Section does include the case of appeals improperly heard by the Lower Appellate Court, surely all that the High Court could properly do would be to affirm or leave undisturbed the decision of the Court of first instance which by law was final. It would then be out of place to use such words, "pass such other order in the "case as to such Sudder Court may seem "right."

I am therefore compelled to disagree with the majority of the Court in this construction of Section 35 But, if it be held that cases of this kind are included in the Section, then I agree that all this Court can do under the Section is either in one case to pass the judgment which the Lower Appellate Court ought to have passed, or, in the other case, simply to restore the decision of the Court of first instance.

*Campbell, J.*—I am of the same opinion with the Chief Justice. The contention which has been urged on the part of one of the parties in this suit, and which is supported by my brother Jackson, is entirely new to me. I always supposed that Section 35, Act XXIII. of 1861, was a general provision introduced into the Code of Civil Procedure in order to rectify the injustice which might be done by the Lower Appellate Courts by exercising a jurisdiction not vested in them by law in cases in which no special appeal lay.

It appears that, when various amendments were made in Act VIII. of 1859, among others in 1860, a special Act was passed with a view to provide for a certain class of cases—money cases under 500 rupees—which were made final, and in which a special appeal was barred. That was the sole object for which Act XLIII. of 1860 was passed, and that Act, which was passed with that object, contains no provision whatever of the character of Section 35, Act XXIII. of 1861. I am therefore unable to see why that Section 35 has any special connection with the Sections which now stand as 27 to 34, Act XXIII. of 1861, and the origin of which has been traced by Mr. Justice Jackson. Section

35 has an origin quite independent from Sections 27 to 34. Section 35 was an entirely new provision, introduced, I think, into Act XXIII. for the purpose of providing for all cases in which jurisdiction had been improperly assumed where no special appeal lay.

I see no special connection between Section 27 and Section 35 such as to induce us to put a construction upon Section 35 different from that which we should put on it if read by itself. Read by itself, it would properly bear, it seems to me, the more liberal construction which has been put upon it.

The whole argument the other way seems to be based on the word "further." Now, that word "further," as it is placed, is, I think, not very material. It may be that it is used in a somewhat inexact sense, and also it may be said that, a *de facto* appeal having been preferred and heard, no further appeal lies, and Section 35 will be brought into play. The rest of the Section is plain enough. As respects the words "in hearing the appeal," it seems to me that these words would cover both cases in which there was no jurisdiction and those in which jurisdiction was exceeded.

If the words "in deciding" had been used, it would have limited the operation of the Section to the case in which an existing jurisdiction was exceeded. If the words "in admitting" were used, the Section would be limited to cases in which there was no jurisdiction whatever. But the words "in hearing" seem to me to apply to both classes of cases.

On the other point, I am of the same opinion with the Chief Justice. I think that the latter part of Section 35 can only be properly applied to questions affecting the jurisdiction, whether the order of the Court below be upheld, modified, or otherwise dealt with.

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The 31st August 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Section 254, Act VIII. of 1859—Payment of purchase-money at sale in execution—Appeal.**

Case No. 410 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Beerbhoom, dated the 24th March 1866, reversing an order passed by the Principal Sudder Ameen of that District, dated the 31st August 1865.*

Brinda Debee Dossee (Decree-holder), *Appellant,*

*versus*

Gopee Soonduree Dossia (Judgment-debtor), *Respondent.*

*Baboo Sreenath Doss* for Appellant.

*Baboo Luckhee Churn Bose* for Respondent.

Directions as to the payment of the purchase-money at sales in execution of decree, arising under Section 254, Act VIII. of 1859, are to be dealt with as provided by that Section, and do not fall under Sections 256 and 257.

No appeal lies to the Judge from an order passed by a Subordinate Court under Section 254.

A default under Section 254 is not an "irregularity in conducting the sale" under Section 256.

In this case, certain immoveable property was put up for sale in execution of a decree and knocked down to the petitioner. He brought the balance of the purchase-money to the Principal Sudder Ameen's Court on the fifteenth day after the sale as required by law, and was directed to deposit it in the Collector's treasury. On going to the Collector's Office he found the treasury closed, and was unable to pay in the money on that date, but did so either on the next or the day following, and obtained a receipt from the Collector which he produced in Court on the seventeenth day after the sale. Objections were taken to the sale-proceedings which were overruled by the Principal Sudder Ameen; and in regard to the alleged non-payment of the purchase-money in proper time, the Principal Sudder Ameen held that, as the money had been produced in Court on the fifteenth day after sale, and the purchaser had been directed by the Court to pay the money into the Collector's Office and had complied with that order as far as he was able, the objection taken was untenable. An appeal was preferred to the Judge on this point only, and the Judge held that, as the law, Section 254, Act VIII. of 1859, requires the purchase-money to be made good by the purchaser before sunset of the fifteenth day from the date of sale, and in default of payment within such period, the deposit shall be forfeited to Government and the property re-sold—and as the purchaser did not in this instance pay the money till the seventeenth day—the sale was void and must be set aside.

In appeal, it is urged that no appeal lay to the Judge from an order passed under Section 254, as the act complained of is not an irregularity in conducting the sale; and

further, that, if it be an irregularity within the meaning of the words used in Section 256, the Judge was wrong in reversing the sale, as the petitioner had not attempted to show that he had suffered any substantial injury by reason of such irregularity.

The irregularities referred to in Section 256 relate more particularly to the mode of attachment, to the issue of the proclamation of sale, and to the manner in which the sale itself is conducted. The words "conducting the sale" embrace all acts which the Court is required to perform down to the close of the sale which terminates when the lot is knocked down to the highest bidder. Objections to the sale on account of irregularity in publishing or conducting the sale must be made, as directed by Section 256, within thirty days from the date of sale. These words indicate that the irregularity complained of must be something done or omitted before the day of sale, and not anything which takes place after the sale. We think that the order of the Principal Sudder Ameen in directing that the purchase-money should be accepted after the fifteenth day from the date of sale is not an irregularity contemplated by Section 356, and of itself can form no ground of appeal to the Judge; and we think the Judge, in admitting and trying such an appeal, has acted without jurisdiction, and therefore we exercise the power vested in this Court by Section 35, Act XXIII. of 1861, and reverse the order of the Judge with costs. We, at the same time, take this opportunity of pointing out to the Judge that, even if the receipt of the purchase-money were an irregularity in conducting the sale, the sale should not have been set aside, except on proof that the applicant had suffered substantial injury by reason of such irregularity.

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The 31st August 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, L. S. Jackson, G. Campbell, and A. G. Macpherson, *Judges*.

**Appeal—Arbitration—Section 327 of Act VIII. of 1859.**

Case No. 353 of 1866.

*Miscellaneous Appeal from an order passed by Mr. E. G. Birch, Judge of Shahabad, dated the 18th February 1866, affirming an order passed by the Sudder Ameen of that District, dated the 5th February 1866.*

Baboo Chintamun Singh, *Appellant*,

*versus*

Roopa Kooer, *Respondent*.

*Baboo Anund Chunder Ghosal* for Appellant.

*Baboo Chunder Madhub Ghose* for Respondent.

An order rejecting an application to file an award under Section 327, Act VIII. of 1859, is not a decree, and is therefore not appealable.

*This case was referred to a Full Bench by Loch and Macpherson, JJ., under the following order:—*

*Referring order.*—In this case we have to decide whether there is any appeal from an order rejecting an application to file an award under Section 327 of Act VIII. of 1859, the Lower Appellate Court having held that there is not.

In appeal it is argued before us that, by Section 23 of Act XXIII. of 1861, an appeal, except when otherwise expressly provided, lies from all decrees of Courts of original jurisdiction, and that the order rejecting the application to file the award under Section 327 is a "decree," inasmuch as it is made on petition "numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants."

The only matter before the Court of original jurisdiction was the one point, whether the award should or should not be filed: there was no question as to what should be done, or what decree should be passed if it were received and filed. It appears to us that an order of the Court rejecting the application to file the award, although it is an order made in a proceeding numbered and registered as a suit, is not a "decree" properly so called. It is rather an "order passed in the course of a suit, and relating thereto *prior to decree*," and, such, as it falls within the terms of Section 363 of Act VIII. of 1859, and there is no appeal.

Supposing in this case the award had been filed, the Court would have had in a subsequent proceeding to pass judgment as provided in Section 325, and upon that judgment decree would follow to be carried out in the manner prescribed in the same Section. This confirms our opinion that the word "decree," as used in Section 23 of Act XXIII. of 1861, means something different from, and subsequent (in the course of proceeding) to, an order rejecting a mere application to the Court to receive and file an award.

As the view which we take appears to conflict with that taken by the Court in the case of Hulodhur Singhee *versus* Gunesh Santhal (6 Weekly Reporter 60) and other cases, we refer the question to a Full Bench for decision.

*Judgment of the Full Bench.*—It appears to the Court that an order rejecting an application to file an award under Section 327, Act VIII. of 1859, is not a decree; therefore, it is not appealable as a decree. It is simply an order rejecting an application to file an award. Then is it one of the orders in respect of which an appeal is provided by the Act? We can find no right given to appeal against an order refusing to file an award. We do find a right of appeal given in certain other cases and against certain orders, such as an order rejecting a plaint, but no appeal given with regard to orders rejecting an award.

Consequently, it appears to us that this order is not appealable. The appeal, therefore, will be dismissed with costs.

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The 31st August 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Sale in Execution—Notice.**

Case No. 672 of 1865.

*Miscellaneous Appeal from an order passed by the Judge of Nuddea, dated the 3rd August 1865.*

Shoshee Mookhee Burmonya, *Appellant,*

*versus*

Dwarkanath Biswas, *Respondent.*

*Baboo Kishen Succa Mookerjee* for Appellant.

*Baboos Romanath Bose* and *Umbica Churn Banerjee* for Respondent.

Where a sale in execution of decree is postponed, a fresh proclamation and fresh notice ought to be issued.

THE second of the objections which have been urged before us is, in our opinion, valid, and we therefore reverse the Judge's order. The sale having been postponed, a fresh proclamation and fresh notice ought to have been issued. It is true that the postponement took place with the appellant's consent and on the understanding that no further notice of the auction should be given. But then the postponement was for a month only. The sale did not, in fact, take place till after the lapse of several weeks beyond the month; and there was no understanding or assent on the appellant's part that no fresh notice should be given, however long the sale might be postponed. Want of notice is a very material irregularity, for it almost necessarily injures the sale. In the present instance, the price realized leads to the impression that substantial injury has been caused.

We therefore set aside the sale with costs.

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The 1st September 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble G. Loch, L. S. Jackson, G. Campbell, and A. G. Macpherson, *Judges.*

**Appeal to Privy Council—Jurisdiction—Execution of decree—Security.**

*Petition against an order passed by Mr. L. A. Hutchinson, Principal Sudder Ameen of Furreedpore.*

J. P. Wise (Judgment-debtor), *Petitioner,*

*versus*

Rajkishen Roy and others (Decree-holders), *Opposite Party.*

*Messrs. R. V. Doyne* and *R. T. Allan* for Petitioner.

*Messrs. W. A. Montriou* and *J. S. Rockfort* for Opposite Party.

In a suit in which an appeal to the Privy Council from a decree of the High Court has been admitted and is still pending, the Court of original jurisdiction which made the decree first appealed from has power to issue execution. But such Court, if it has notice of the appeal to the Privy Council, should stay its hand until the parties have had an opportunity of applying to the High Court under Section 4, Regulation XIV. of 1797.

*This case was referred to a Full Bench by Loch and Macpherson, JJ., under the following orders:—*

*Macpherson, J.*—IN this case, a rule was granted by Mr. Justice Kemp and Mr. Justice Campbell, calling upon the plaintiffs to show cause why an order of the Principal Sudder Ameen, that execution should issue against the defendant Wise, should not be set aside. The original decree of the Court of the Principal Sudder Ameen in this suit came up in an appeal

some time ago before the High Court, which decided against Mr. Wise and other defendants. Mr. Wise thereupon appealed to the Privy Council, and his appeal has been formally admitted, and is now pending. After its admission, the plaintiff appealed for execution to the Court of the Sudder Ameen by which the decree first appealed from was made, and that Court granted the application, notwithstanding that it was opposed on this amongst other grounds, that no Court could issue execution after the appeal to the Privy Council had once been admitted.

The application having been granted, the rule now before us was issued, calling on the decree-holders to show cause why the order for execution should not be set aside.

In support of the rule, it is contended that by Section 4 of Regulation XVI. of 1797, and the unvaried practice of the late Sudder Court, and, since its abolition, the High Court, this Court alone can issue execution if an appeal to the Privy Council has been admitted; and it is urged that the provisions of Act VIII. of 1859 are wholly inapplicable, as they relate exclusively to proceedings up to the final decision by the highest Court of Appeal in this country, and do not relate to appeals to the Privy Council, or any matter connected therewith.

In opposition to the rule, Mr. Montriou argues that Regulation XVI. of 1797 does not deprive the Lower Courts of their jurisdiction, and that, under Act VIII. of 1859, execution ought to issue.

It appears to me that, as the law at present stands, the Court which made the first decree appealed from has power to issue execution even after an appeal to the Privy Council has been admitted. Regulation XVI. of 1797, Section 4, does not expressly take away jurisdiction from the Lower Courts. It only says that, when appeals to the Privy Council are pending, the Sudder Court *may* either order the judgment which it has passed to be carried into execution, taking security, &c., or it may suspend execution during the appeal, taking security from the judgment-debtor, &c. Certain powers are given to the Sudder Court, but none are either directly or indirectly taken away from any other Court. It is to be remembered that, when this Regulation was passed, and for many years afterwards, *all* the decrees of the Sudder Court (even when there was no appeal pending to the Privy Council) were executed by the order of that Court, and not by the order of the Court of original jurisdiction. This practice, however, was abolished by Act XXV. of 1852, the first Section of which expressly enacts that, for the future, *every decree or order made in appeal* by the Privy Council, or *by the Sudder Court*, shall be enforced and executed by *the Court which made the first decree appealed from*, in the manner applicable to the execution of the original decree. Section 2 provides that any person who wishes to enforce such a decree (*e. g.*, a decree of the Sudder Court) *shall apply* by petition to *the Court which made the first decree appealed from*. And Section 4 declares that nothing in the Act shall be deemed to prevent the Sudder Court from executing any decree of the Privy Council, if the Privy Council shall order the Sudder Court to execute it. It appears to me that this Act expressly empowers the Court of original jurisdiction to execute a decree of the Sudder Court whether there is or is not any appeal pending before the Privy Council; and that, if it was intended to preserve to the Sudder Court, in the case of decrees under appeal to the Privy Council, the exclusive power of executing them (which power the Sudder Court before undoubtedly had as regards *all* its own decrees), it was necessary to do so expressly. Act XXV. of 1852 is repealed by Act X. of 1861, except so far as relates to the execution of decrees made on appeal by the Privy Council. In its room we have Section 362 of the present Code of Civil Procedure, Act VIII. of 1859. Section 338 of that Act, and Act XXIII. of 1861, Section 36, practically enable the Courts to protect the rights of parties, so far merely as the granting or refusing execution and taking security in respect thereof are concerned, as fully as Section 4 of Regulation XVI. of 1797. And, in my opinion, the Court which made the original decree first appealed from has jurisdiction to entertain and dispose of an application for the issue of execution, even though an appeal to the Privy Council has been admitted.

My opinion, however, seems to be opposed to what has always been the practice of the Court. I therefore think it desirable to refer for the decision of a Full Bench the following question, *viz.*:—

Whether, in a suit in which an appeal to the Privy Council from a decree of this Court has been admitted and is still pending, the Court of original jurisdiction which

made the decree first appealed from has jurisdiction to issue execution?

*Loch, J.*—The practice hitherto has been this: In cases disposed of by this Court, the decree-holder applies for execution to the Court in which the suit was originally instituted. If an appeal from the judgment of this Court is preferred to the Privy Council and *admitted*, the decree-holder cannot, so it has been held, take out execution, except with the permission of this Court on security being given. Till an appeal has been admitted, the Lower Court may deal with the case as an application for execution of its own decree. When the appeal to the Privy Council is admitted, the functions of the Lower Court are held to have ceased, and this Court alone, under the provisions of Section 4, Regulation XVI. of 1797, has power to allow a party to take out execution. As the correctness of this practice appears doubtful for the reasons stated in my colleague's note, I think the questions should be referred for the determination of a Full Bench.

*The case having been fully argued before the Full Bench, the following judgments were delivered:—*

*Macpherson, J.*—I remain of the opinion expressed by me in making the order referring the case to a Full Bench, that, so far as the mere question of jurisdiction is concerned, the Court which made the decree first appealed from has power to entertain and dispose of an application for the issue of execution even though an appeal to the Privy Council has been admitted. Section 362, Act VIII. of 1859, expressly enacts that "application for the "execution of the decree of an Appellate "Court shall be made to the Court which "passed the first decree in the suit, and "shall be executed by that Court in the "manner and according to the rules herein-"before contained for the execution of "original decrees." Those words are absolute, and contain no limitation of any description; and, so far as I can see, there is nothing in the fact of an appeal to the Privy Council being pending which will take a decree of the High Court out of the express words of this Section. The doubt existing in the matter arises from the provisions of Section 4, Regulation XVI. of 1797, which Section, it has been argued, either vests the power of executing such decrees solely and exclusively in the High Court, or, at any rate, limits the power which is given to the Lower Court by Section 362 of Act VIII. of 1859. Section 4, Regulation XVI. of 1797, says: "In cases of appeal to "His Majesty in Council, the Court of "Sudder Dewanny Adawlut may either "order the judgment passed by them to be "carried into execution, taking sufficient "security from the party in whose favor "the same may be passed for the perform-"ance of such order or decree as His Majes-"ty, his heirs or successors, shall think fit "to make on the appeal, or to suspend the "execution of their judgment during the "appeal, taking the like security, in the "latter case, from the party left in possession "of the property adjudged against him." It appears to me that that Section, although it gives the High Court the power of acting as in that Section is provided, does not, either expressly or impliedly, declare that no Court whatever other than the Sudder Court is to execute decrees in respect of which appeals are pending to the Privy Council. And, even if it did so declare, the subsequent enactment of Section 362 of Act VIII. of 1859 vested the Lower Courts also with the power of executing such decrees. But as, notwithstanding Section 362 of Act VIII. of 1869, the provisions of Section 4, Regulation XVI. of 1797, still are in force to the extent of empowering the High Court to take security before execution is issued, and to restrain execution when it shall see fit to do so, it appears to me that the latter Section practically does very much modify the powers which are given to the inferior Courts by Section 362 of Act VIII. of 1859. For, although the Lower Court has power under Section 362 to execute the decree, still, as there is always (as provided in Section 221 of Act VIII. of 1859) a certain discretion in every Court as regards issuing execution, the Lower Court does not, in my opinion, exercise its discretion wisely or properly if, in a case where an appeal is pending to the Privy Council, the Lower Court, with notice of that appeal, issues execution without reference to the High Court, or without at least giving the parties, against whom the execution is sought, an opportunity of applying to the High Court in order that the provisions of Section 4, Regulation XVI. of 1797, may be given effect to.

Act VIII. of 1859, Section 338, and Act XXIII. of 1861, Section 36, contain provisions by which the local Courts can take security for the execution of any order which may be made in appeal. But those

Sections, when properly construed, cannot be considered to apply to cases under appeal to the Privy Council. They are manifestly intended to apply merely to cases where appeals are pending to some Court in India. On more careful consideration, I think that the opinion which I expressed recently, to the effect that the Lower Courts are by those Sections empowered to take security pending an appeal to the Privy Council, was erroneous, and that these Sections apply exclusively to appeals to the Courts of this country.

As the Lower Court could not itself, in the present instance, take security, as the uniform practice unquestionably has been always that applications for execution after the admission of an appeal to the Privy Council should be made to the High Court, and as the law expressly gives the High Court the power to take security or to restrain execution—it seems to me that the Lower Court did not properly exercise its discretion in issuing execution without either referring to the High Court or giving the parties an opportunity of doing so.

Under these circumstances, the proper order to make now will be to stay all proceedings in this matter until the further order of this Court. That is an order which will meet the justice of the case, and cannot possibly work injustice to any one. Meanwhile, it is open to either party to make such application to this Court as he may be advised.

*Campbell, J.*—I am for the most part substantially of the same opinion as Mr. Justice Macpherson. I agree with that learned Judge that, in the case of an appeal which is not an appeal from the order of the Court which originally passed the decree, that is to say, in the case of an appeal to the Privy Council, the Court of original jurisdiction has no power to take security, and upon that security to stay execution. I think, however, that, as laid down by Mr. Justice Macpherson in the order which refers that case to the Full Bench, the Court which made the original decree first appealed from has jurisdiction to entertain and dispose of an application for the issue of execution even after an appeal to the Privy Council has been admitted; provided that no order to the contrary has been received from the High Court.

I believe that there is a great deal of hardship in the practice that has hitherto prevailed in respect of appeals from this Court to the Privy Council. It frequently happens that a man who has carried the case through the Courts for perhaps the greater part of his life, may find that the fruit of his litigation is indefinitely postponed, although he has the clearest and best of cases, simply because the other party has thought fit to file an appeal to the Privy Council, in the decision of which there must be necessarily a considerable delay. I have heard—I know not whether true or not—that a great *millionaire* of this city, who had a very large litigation, was in the habit of appealing, upon principle, every case to the Privy Council, "because," said he, "I am only charged 5 per cent. so long as the appeal to the Privy Council lasts, whereas by keeping the decree-holder out of his money I can obtain 20 per cent. in the bazaar." The practice of the Lower Courts has no doubt hitherto been that, upon appeal to the Privy Council, execution has been stayed. I am very glad that this case has been referred in order that it may be decided whether the practice (as, during the course of the argument, was suggested by Mr. Justice Jackson) is founded only upon superstition, or whether it is really founded upon law.

The general law of the country applicable to all cases, is the law laid down by the Act of Civil Procedure, Section 338, and Section 36 of the amending Act XXIII. of 1861. The general results of these provisions of the law is that it is entirely in the discretion of the Court to stay execution or not to stay execution, taking or not taking security. Well, I do not think that Section 4, Regulation XVI. of 1797 is at all at variance with that general provision of the law. That Section lays down that, "in cases of appeal to His Majesty in Council, the Court of Sudder Dewanny Adawlut may either order the judgment passed by them to be carried into execution, taking sufficient security from the party in whose favor the same may be passed, for the due performance of such order or decree as His Majesty shall think fit to make on the appeal, or to suspend the execution of their judgment during the appeal, taking the like security, in the latter case, from the party left in possession of the property adjudged against him." The word used both in the first and second Clauses is "may," and not "must." It seems that the provisions of that law do not make it compulsory upon the Sudder Adawlut, now represented by the High Court, to adopt either of those courses. There is also necessary a third case in which neither party may give security. In such cases, I do not think that Section 4 of the Regulation quoted can

in any way be made to apply, and, consequently, such cases must be left to the operation of the ordinary law. Therefore, the law being, as it seems to me, in its literal reading, plain, I do not think that we are bound to put upon it a forced construction which it does not literally bear, if that construction would work injustice, as, I think, must be worked by any construction which makes it compulsory to hang up a case upon appeal (with or without reasonable cause) in which the decree-holder is not in a position to give security. Where the literal interpretation is in favor of the poor man, we are not, I think, in any degree bound to put upon it a hard interpretation against him. Therefore, in the absence of any order of this Court, the Court below has, I think, jurisdiction to issue execution.

With regard to the matter of discretion, it certainly seems that the Lower Court, knowing the law and the practice of this Court in such cases, ought not to allow the judgment-creditor, as it were, to snap execution. The proper course for him would have been to say to the judgment-debtor, "I cannot refuse execution; I will not refuse execution, but you are entitled to apply, under Section 4, Regulation XVI. of 1797, to the High Court; and in case it should see fit to pass an order under that Section, I give you a reasonable time within which to obtain an order, if you can."

In this case, we have not had the facts completely before us. We do not know what time elapsed between the filing of the appeal to the Privy Council and the application for execution, but it does not appear that the Lower Courts ever proposed to give to the judgment-debtor such a time as I think might reasonably have been given to apply to this Court. Therefore, in my opinion, the proper order now to be passed would be this: That the order for execution passed by the Lower Court should be stayed for say two months, in order to give the judgment-debtor an opportunity of applying to this Court for the issue of any order which this Court may deem proper under Section 4, Regulation XVI. of 1797. I also think that any inconvenience which may be apprehended from the undue snapping of decrees, has been obviated by the late decision of the Privy Council. That decision rules that, even although execution may have been already carried out, nevertheless the High Court has power, under the general provisions of the law, to take such steps as it may deem proper for the protection of the property. Therefore, if it should happen that in this case execution has been carried out, still I believe that, on a proper application being made to this Court, and good reason shown, the Court may nevertheless protect the property, if it is necessary to protect it.

*Jackson, J.*—I am of the same opinion as my brother Macpherson. I have no doubt that, under Section 362 of the Civil Procedure Code, the Principal Sudder Ameen had *primâ facie* authority to execute the decree of this Court, even though an appeal against that decree to Her Majesty in Council had been preferred. At the same time, this Court is competent, under Section 4, Regulation XVI. of 1797, to provide for the due protection of the property, the subject of dispute, pending the appeal to Her Majesty in Council. That power of protecting the property under such circumstances is not vested in the Zillah Court, or in any Subordinate Court, but in the High Court only. That being so, and that power having invariably been exercised by the High Court upon application, it appears to me that, adverting to the language of Section 221 of the Code of Civil Procedure, the knowledge of the circumstance (brought to his notice) that an appeal to Her Majesty in Council had been admitted, ought to have appeared to the Principal Sudder Ameen a "sufficient cause" for not issuing the warrant for execution of decree. He must have known that it was in the power of this Court, to make an order, and that the Court, if applied to, would make an order, either for execution of the decree upon the party executing it giving sufficient security, or for the suspension of that execution on security being given by the opposite party.

It seems to me, therefore, that the Principal Sudder Ameen exercised, under the circumstances, an improper discretion in allowing execution to proceed. I think, therefore, that the proper order for us to make is that the order of the Principal Sudder Ameen directing immediate execution be set aside, and that the case stand over until the further orders of this Court.

*Loch, J.*—It appears to me that, until an appeal to the Privy Council is *admitted*, the first Court may deal with the application for the execution of the decree of the Appellate Court as if it were an application for execution of its own decree. But where an appeal has been *admitted*, I

think that the decree cannot be executed except as provided by Section 4, Regulation XVI. of 1797, that, "in cases of appeal "to Her Majesty in Council, the Court of "Sudder Dewanny Adawlut may either order "the judgment passed by them to be carried "into execution, taking sufficient security "from the party in whose favor the same "may be passed for the due performance "of such order or decree as His Majesty, "his heirs or successors, shall think fit "to make on the appeal, or to suspend "the execution of their judgment during "the appeal, taking the like security in "the latter case from the party left in pos-"session of the property adjudged against "him."

If, therefore, execution of a decree, from which an appeal to the Privy Council has been admitted, is applied for, the Court whose duty it is to execute the decree should stay its hand, as it is empowered to do under Section 221, Act VIII. of 1859, leaving the parties to apply to the High Court, either the decree-holder for execution, or the judgment-debtor to suspend execution; and that Court will be guided by the rules laid down in Section 4, Regulation XVI. of 1797.

It is unnecessary in this case to express any opinion as to whether the terms of Section 4 of the above Regulation render it imperative upon this Court to take security in all cases.

I think that, in this case, the order of the Lower Court is wrong, and that it should be reversed.

*Peacock, C.J.*—I am of opinion that, in a suit in which an appeal to the Privy Council from a decree of this Court has been admitted, and is still pending, the Court of original jurisdiction which made the decree first appealed from has jurisdiction to issue execution; but I agree with the learned Judges who are of opinion that in this case the proceedings ought to be stayed until the further orders of this Court.

One question for determination is whether, under Regulation XVI. of 1797, Section 4, it is compulsory upon the High Court (who now represent the Sudder Court) either to take security from the plaintiff or from the defendant, or whether there may not be circumstances under which the Court, exercising a sound and proper discretion, may allow a plaintiff to execute his decree without security, notwithstanding an appeal had been preferred from that decree to Her Majesty in Council. As a general rule, no doubt, a decree of this Court ought not to be executed pending an appeal, without security from one party or the other; but there may be cases in which it would be unjust to prevent a plaintiff from executing his decree without giving security even when the opposite party is willing to give security.

It was contended that, as the Court is authorized to do one of two things, it must do one of them, and that it cannot allow the decree to be executed pending appeal without taking sufficient security. The word used in the Regulation is "may." The word "may" is sometimes read as "must" or "shall." But in this case it appears to me that it may properly be read in its ordinary sense which leaves it to the discretion of the Court either to take security from one party or the other, or allow the decree to be executed without requiring security at all, if, in the exercise of a sound discretion, it sees fit to do so.

If we hold that in this case the High Court cannot, in its discretion, allow the decree to be executed without taking security, we shall, in effect, hold that this Court has a less discretion in the case of an appeal to the Privy Council, than the Lower Courts have in appeals from their judgments. If a Lower Court passes a decree, it may, under Section 338 of the Code of Civil Procedure, stay execution; but it cannot do so unless the party against whom the decree is given shall give security. The Section says: "Execution of a decree "shall not be stayed by reason only of an "appeal having been preferred against such "decree, but the Appellate Court may, for "sufficient cause shown, order that execution "be stayed. If application for execution be "made before the time allowed for appeal "has expired, and the Lower Court has "not received intimation of an appeal hav-"ing been preferred, the Lower Court, if "sufficient cause be shown, may stay the "execution." There the word "may" leaves it in the discretion of the Court to order execution to be stayed or not. But then the Section goes on: "Before mak-"ing an order to stay execution, the "Court making the order *shall* require se-"curity to be given by the party against "whom the decree was passed for the due "performance of the decree or order of the "Appellate Court." In the latter part of the Section, the word "shall" makes it compulsory on the Court to require security before staying the execution. But the converse

does not hold, and it is not compulsory on the Court to require security before it allows execution upon a decree against which an appeal has been preferred. By Section 36, Act XXIII. of 1861, it is enacted that, "when an order is made for the execution "of a decree against which an appeal has "been preferred, *it shall be lawful for the* "*Court* which pronounced the decree to "require security to be given for the re-"stitution of any property which may be "taken in execution of the decree or of "the value thereof, and for the due per-"formance of the decree or order of the "Appellate Court. The Appellate Court "may in any such case direct the Court "which pronounced the decree to take such "security." The words "it shall be lawful for the Court" leaves it discretionary. I am of opinion that the High Court has a similar discretion vested in it.

Before the passing of Act XXV. of 1852, the Sudder Court executed its own decree; but by that Act the decrees of the Sudder Court were to be executed by the Court which passed the first decree. That Act, as regards decrees of the High Court and of the Mofussil Courts, has been repealed, and Section 362, Act VIII. of 1859, has been substituted for it. By that Section it is enacted that "application for the execution "of the decree of an Appellate Court shall "be made to the Court which passed the "first decree in the suit, and shall be exe-"cuted by that Court in the manner and ac-"cording to the rules hereinbefore contained "for the execution of original decrees." No order from this Court is necessary before the Lower Court can execute a decree passed in appeal. I am now speaking of cases in which no appeal has been preferred from the decree. The decree of this Court is sent to the Court which passed the first decree; and, under Section 362, the Court has power, without any further order, to carry it into execution. It may be that, before the application to the Lower Court for execution of the decree, or pending the execution of the decree, or even after the decree has been executed, an appeal may be preferred from the decree. It may be that, though such appeal has been preferred before the application for execution, the Lower Court may not be aware of the fact. We cannot say that, simply because an appeal has been preferred against the decree, the jurisdiction of the Lower Court to execute the decree is at an end. The Lower Court has power to execute a decree of this Court whether an appeal has been preferred or not, unless restrained by an order of this Court; but then the question is whether the Court, when it is informed that there has been an appeal to Her Majesty in Council from the decree which it is called upon to execute, would be exercising a sound discretion in issuing an execution without giving the parties an opportunity of applying to this Court for an order to stay the execution, or to require security from the party left in possession.

Mr. Justice Louis Jackson has referred to Section 221 of the Act which enacts that, "when all necessary preliminary mea-"sures have been taken, where any such "are required, the Court, *unless it see* "*cause to the contrary*, shall issue the "proper warrants for the execution of the "decree." Well, then, suppose the Lower Court is informed that, since the decree was sent to it by the High Court, the parties have appealed against the decree to Her Majesty in Council. Is not that a sufficient cause why the Lower Court, in the exercise of its discretion, should stay its hand and allow time to the parties to apply to the High Court, instead of proceeding immediately to issue a warrant of execution? I should say, as a general rule, that in such case the Court ought to stay its hand, unless it should see danger of the property being made away with in the interval.

I agree with Mr. Justice Macpherson that Sections 338 of Act VIII. of 1859, and 36 of Act XXIII. of 1861, do not give to the Lower Courts power to take security in the case of an appeal from the decree of this Court to the Privy Council. It is quite clear, when we read the Sections, that they were not intended to apply to such a case.

Take Section 36: "When an order is made "for the execution of a decree against which "an appeal has been preferred, it shall be "lawful for the Court which pronounced "the decree to require security to be given "for the restitution of any property which "may be taken in execution of the decree, "or of the value thereof, and for the due "performance of the decree or order of the "Appellate Court"—"*the Court which* "*pronounced the decree.*" The Lower Court is not the Court which pronounced the decree, when the decree to be executed is a decree of a Court of Appeal.

The Section goes on to say that it may also "take security for the due performance of the "decree or order of the Appellate Court," that is, the Court of Appeal from its own

decision. But the Clause never meant that, when a decree of the High Court is sent to the Mofussil for execution, the Mofussil Court can take security for the due performance of the decree or order of the Privy Council. That must be done by this Court under Section 4, Regulation XVI. of 1797, before it can allow the appeal, for that Section declares that "in all cases security is to be given "by the appellants, to the satisfaction of the "Sudder Dewanny Adawlut, for the payment of all such costs as the said Court "may think likely to be incurred by the "appeal, as well as for the performance of "such order or judgment as His Majesty, "his heirs or successors, may think fit to "give thereupon."

If this Court must take security, it could not have been intended that the Lower Court may also take security for the same thing, for, in that case, security might be taken twice over.

In this case, the Principal Sudder Ameen was informed that an appeal had been preferred to the Privy Council. He knew that he had no power to take the required security, and he must have known that the only Court which could take the required security is the High Court. Then, was not that sufficient cause for staying his hand? It appears to me that it was, and that he ought to have stayed his hand until some orders were obtained from this Court.

Under these circumstances, I think that this Court would have the power to reverse the decision of the Lower Court on appeal; but it is not necessary to do that, because it may be that these proceedings will eventually go on, and, therefore, all that is necessary to do at present is to stay the proceedings until the further orders of this Court. That is the opinion of the majority of the Court.

On the other hand, Mr. Justice Campbell is of opinion that the order ought to be stayed for two months to give the judgment-debtor an opportunity of applying to this Court for the issue of any order which it may think proper to make; and at the end of that time, if no such order be made, the execution to go on.

The majority of the Court think that we ought not to allow execution to go on without security on one side or the other, unless we see good reason to the contrary. We ought to be satisfied either that the party who issues the execution of the decree is unable to give security, and that he will be injured by staying the execution upon security being given by the opposite party, or that there is some reason why he ought to be allowed to execute his decree without giving security. Until we know what are the actual circumstances of this case, we ought not to allow the execution to go on without security.

It is not shown to us that this is such an exceptional case as would justify us in jeoparding the property by allowing the execution to be proceeded with without security.

The order of the Principal Sudder Ameen in this case for issue of the warrant of execution will be stayed until the further orders of this Court.

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The 28th August 1866.

*Present:*

The Hon'ble G. Loch and L. S. Jackson, *Judges.*

**Limitation—Execution.**

Cases Nos. 390 and 391 of 1866.

*Miscellaneous Appeals from an order passed by the Judge of Backergunge, dated the 3rd March 1866, reversing an order passed by the Principal Sudder Ameen of that District, dated the 4th September 1865.*

Tiluck Chunder Gooho and another (Judgment-debtors), *Appellants,*

*versus*

Gour Monee Debee and another (Decree-holders), *Respondents.*

*Baboo Nil Monee Sein* for Appellants.

*Baboo Unnoda Pershad Banerjee* for Respondents.

Proceedings in execution, originating in illegality, and which have been the subject of contests by the judgment-debtor, and are still under consideration in appeal, cannot be regarded as *bonâ-fide* proceedings to keep alive the decree.

*Loch, J.*—It appears to me that there is a difference between this case and the case reported in Volume V., Weekly Reporter, dated 9th January 1866. Both sales were set aside on the score of irregularity, but, in the petition presented in this case for the purpose of getting the sale set aside, there was a further allegation that no notice had been served. This point was not enquired into, the sale being set aside on account of irregularity. Had the notice been duly served, the decree might possibly have been kept alive, but no evidence of its service has been adduced, and we cannot presume

that it has been served when its service is denied. Nor can we say whether, in the other case which has been quoted, any objection was taken, as in the present, that notice was not served. The proceedings which have been taken subsequently will not keep the decree alive when once execution is barred by limitation.

The words of the law are quite precise upon that point, and I think that the order of the Judge ought to be reversed.

*Jackson, J.*—I am of the same opinion. This was a decree, dated 25th August 1854. That was a decree, therefore, in force at the time of the passing of Act XIV. of 1859. It appears that, subsequent to the passing of that Act, the only step taken was the filing of an application in April 1861, but upon that application no effectual step was taken. The decree-holder failed to deposit the peon's tullubana; therefore no notice or any other process whatever issued upon it. Then a subsequent application was made on the 5th August 1863. Now, that application, if properly considered, was unquestionably then out of time, having been preferred more than three years after the passing of Act XIV., and no step having been taken within three years next preceding the application to enforce the decree or to keep it in force. It appears, however, that, upon that application, a notice was directed to be served upon the judgment-debtor, and a return to the effect that notice had been served was made by the Nazir. No one appeared to show cause, and certain property was afterwards taken in attachment and ordered to be sold. The sale took place, and the judgment-debtor came in and objected to the sale, for one reason, on the ground of irregularity, as the sale-notice, he alleged, had not been served; but it was also an allegation, and a most material allegation, in his petition, that the decree-holder had fraudulently, and without service of notice upon him, caused his decree to be executed. Now, there was at that time before the Court executing the decree no evidence whatever that the notice had really been served. It cannot be doubted that, upon the fact being brought to its notice in the petition of the judgment-debtor, it was the duty of the Court immediately to enquire into the circumstance, and to take evidence upon the point of service of notice. The Court omitted to do so, setting aside the sale upon a different ground, namely, the non-observance of certain formalities. This case, therefore, it seems to me, is clearly distinguished from that cited in 5 Weekly Reporter. If it were necessary for us to decide this case upon the ground on which that decision was based, I should be inclined respectfully to dissent from the judgment of the learned Judges, and to propose a reference upon the point to a Full Bench of this Court. But this appears to be, under the circumstances, unnecessary. It appears that, upon the setting aside of the sale which had taken place in execution, a renewed application to attach and sell the property was made, and a second sale has taken place. That sale, however, is the subject of a further and separate appeal to this Court which has still to be decided.

It appears to me that proceedings of that description, originating in illegality, and which have been the subject of contests by the judgment-debtor, and which are still under consideration in appeal, cannot be regarded as *bonâ-fide* proceedings taken within three years next preceding the present application.

I have no hesitation, therefore, in concurring with my brother Loch in determining that this application is after time and ought to be rejected, and that the order of the Judge be set aside with costs.

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The 28th August 1866.

*Present:*

The Hon'ble G. Loch and L. S. Jackson, *Judges.*

**Limitation—Execution—Instalments.**

Cases Nos. 404 and 405 of 1866.

*Miscellaneous Appeals from an order passed by the Judge of Backergunge, dated the 30th April 1866, affirming an order passed by the Principal Sudder Ameen of that District, dated the 30th December 1865.*

Tiluck Chunder Gooho and another (Judgment-debtors), *Appellants,*

*versus*

Gour Monee Debee and another (Decree-holders), *Respondents.*

*Baboo Nil Monee Sein* for Appellants.

*Baboo Unnoda Pershad Banerjee* for Respondents.

Where a decree passed before 1859 authorized the judgment-debtor to pay by instalments extending over a period of 13 years, and no proceedings in execution were taken within the time prescribed by Sections 20

and 21, Act XIV. of 1859, the execution of the decree was held barred by limitation even as to those instalments which were within time.

*Loch, J.*—In this case, a decree was passed upon an instalment-bond put in by the debtor in the course of the proceedings. The decree was to the effect that the decree-holder should receive from the judgment-debtor the amount of each instalment as it fell due. If the latter failed to pay, the former was at liberty to execute his decree for the amount due. It was, in fact, a decree such as the Courts are now authorized to make under Section 194, Act VIII. of 1859. The period over which the instalments extended was from 1259 to 1272. Instead of realizing the amount of each instalment as it fell due, the decree-holder allowed several years to pass by without attempting to execute his decree. He now applies for execution, giving up those instalments the realisation of which is barred by limitation, and prays that those instalments which have lately become due may be realized in execution. The question arises whether execution of the whole decree is not barred by limitation. The decree has been in existence for many years, but nothing has been done to keep it in force till the present time. It is said that, under the terms of the decree, the instalments could not be realized till they fell due; but, unless the decree were kept in force by execution as the instalments became payable under it, it would be subject to the Law of Limitation as any other decree. The fact of the debt having been made payable by instalments would not exonerate the decree-holder from keeping his decree alive as required by law. The decree was passed previous to 1859. The law, Section 21 of Act XIV. of 1859, requires that execution of such a decree should be taken out within three years from the passing of that Act. The words are imperative, and give no discretion to the Court to grant time. The decree-holder cannot, in this case, come under the provisions of Section 20 of that Act; and, even if he could, the provisions of that Section are equally stringent, and he could derive no advantage from them. That Section says: "No process of "execution shall issue from any Court not "established by Royal Charter to enforce "any judgment, decree, or order of such "Court, unless some proceeding shall have "been taken to enforce such judgment, "decree, or order, or to keep the same in "force within three years next preceding "the application for such execution." In this case, no process has been taken till the present time, while more than three years have elapsed since the date of the decree. The execution of this decree, therefore, appears to be barred by limitation.

On the other point raised in special appeal, we find no admission on the part of the judgment-debtors that the proclamation of sale had been issued. The fact that they were aware that the sale was to take place on a certain date does not now prevent their raising the objection that the proclamation was not issued according to law. The proclamation is not intended for the information of judgment-debtors, but to apprise intending purchasers of the sale. The allegation on the part of the debtors, that notice of attachment and proclamation of sale were not properly issued, may be true or false, but, if made, it should be enquired into and determined. It is not sufficient to presume from the Nazir's return that everything has been done as required by law, for the Nazir's return is no evidence.

It appears to me, therefore, that the order of the Lower Court should be reversed with costs.

*Jackson, J.*—I am of the same opinion. It would have been necessary to remand this case for decision to the Lower Appellate Court on the ground of a defect in the investigation of the case, resulting from its assumption that the petitioner had made such an admission in respect of the proclamation of the sale as to estop him from raising any objection on that head. For it appears, on looking to the petition, that the only statement made there was that the decree-holder had caused an attachment of the judgment-debtor's property, and had procured a certain day to be fixed for the sale. That might be perfectly true, and also consistent with the objection that the proclamation of sale required to be made under Section 249 of the Civil Procedure Code had not been duly made. It would therefore be necessary, if no other ground had existed of dissatisfaction with the Judge's order, to remand the case upon this ground.

Then arises the other ground which my brother Loch has mentioned as to the competency of the Court to execute this decree at all. It was objected by the respondent that this plea had not been taken either in the Court of the Principal Sudder Ameen or in the Lower Appellate Court; that, consequently, it was not open to the appellant to urge it here. But, as the objection is

one which goes to the competency—to the jurisdiction that is—of the Court to execute the decree, it appears to me that it can be taken, and ought to be taken, up in this Court. The terms of Sections 20 and 21 are such as to deprive the Courts of any authority to execute decrees where proceedings have not been taken out within the time limited by these two Sections. That is a matter, therefore, which the Court ought to have noticed, and which certainly ought to be taken up in special appeal, and be made a ground for reversing the order, should that order be found to be, as stated, improper. Now, it may be said that, as the decree-holder could not have levied the instalments, which he has now sought to recover, before the time stated for their being payable, it is a hardship to bar him now that he seeks to execute the decree in respect of those instalments. But it appears to me perfectly obvious that there could be no hardship in the case. He was quite competent, and was bound to use due diligence, to recover the instalments as they became due. It makes no difference in that respect whether the decree was payable at once or by instalments as provided. If he chooses to abstain from all efforts to execute such portions of his decree as might have been executed immediately, and thus allow his decree to be barred, he has only himself to blame. Whether he would be now competent to sue the judgment-debtor afresh upon those instalments, is a separate question, and one upon which we can at present give no opinion.

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The 28th August 1866.

*Present:*

The Hon'ble G. Loch and L. S. Jackson, *Judges.*

**Limitation—Execution of decrees of the High Court.**

Case No. 444 of 1866.

*Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Hooghly, dated the 13th April 1866.*

Maharajah Mahatab Chand Bahadoor (Judgment-debtor), *Appellant,*

*versus*

Tarucknath Mookerjee and others (Decree-holders), *Respondents.*

*Baboos Chunder Madhub Ghose* and *Juggodanund Mookerjee* for Appellant.

*Baboos Kalee Mohun Doss* and *Sreenath Banerjee* for Respondents.

The execution of decrees of the High Court are governed, as to limitation, by Section 19, and not Section 20 or 22, of Act XIV. of 1859.

*Jackson, J. (Loch, J., concurring).*—The decision of the Principal Sudder Ameen in this case appears to me to be erroneous. The facts are these: Tarucknath Mookerjee sued the Maharajah of Burdwan. His suit was decreed in part, and judgment was given for the defendant as to the other part, and upon that part defendant was declared entitled to his costs. That judgment was affirmed in appeal to this Court. Subsequently, plaintiff moved this Court to review its judgment on appeal. That application was rejected with costs, and consequently costs of this application, as well as costs on the rejected portion of the suit, were recoverable by the Maharajah, defendant, and were applicable as a set-off against the sum of money decreed in plaintiff's favor. On the plaintiff, the decree-holder, seeking to execute his decree, objections were made by the Maharajah that he was entitled to the set-off above mentioned, and, amongst other things, he referred in various petitions to the amount of costs due to him by the decree-holder. But a copy of the decision of this Court on the application for review was not filed until after three years from the date of the decree had expired. The case, then coming before the Principal Sudder Ameen, he records this order: "I think, "as I have already held in the execution-case, "No. 358 of 1864, that, the judgment-"debtor having neglected for more than "three years to sue out execution of his "decree for costs, his present application is "consequently barred by Sections 20 and 22 "of Act XIV. of 1859. The objection is "therefore overruled. Execution to proceed "for the amount still due to the decree-"holder."

Now, it appears to me that the Principal Sudder Ameen's opinion that the judgment-debtor, in the circumstances above stated, was obliged to take out a separate execution of the decree, was a mistake. It could not be necessary, in such circumstances, that the plaintiff and defendant respectively should both sue out execution of the decree. It appears to me that, upon the party who was entitled to the larger sum under the decree proceeding to sue out execution, the Court would be bound at once to set off against

that sum, or in part of that sum, the smaller sum due to the opposite party. Then the question arises whether the Maharajah not having filed a copy of the judgment of this Court upon the application for review within three years, and thus not having given the Court below any sufficient reason to know that this sum for costs was due to him, he can now claim that set-off, or be entitled to credit for that amount. I should be inclined to say that he would not be so entitled, and, if execution of the decree of this Court were barred on the lapse of three years, he would, to that extent, fail in his application. It appears to me, however, that the period of three years will not bar the execution of a decree of this Court which is a Court established by Royal Charter. The execution of decrees of this Court, therefore, as to limitation, must, I think, be guided by the 19th Section of Act XIV. of 1859, and not by Section 20 or 22. Section 22, indeed, would appear to have no bearing at all upon the question; but that the 19th Section of the Act XIV., which originally had application, no doubt, to Her Majesty's Supreme Court of Judicature at the Presidency, is now applicable to the High Courts established under 24 and 25 Victoria, Chap. 104, is manifest from the words of Section 11 of that Statute. The Act says: "Upon the establishment of the said High Courts in the said Presidencies respectively, all provisions then in force in India, of Acts of Parliament or of any orders of Her Majesty in Council or Charters, or of any Acts of the Legislature of India, which at the time or respective times of the establishment of such High Courts are respectively applicable to the Supreme Courts at Fort William in Bengal, Madras, and Bombay respectively, or to the Judges of those Courts, shall be taken to be applicable to the said High Courts, and to the Judges thereof respectively so far as may be consistent with the provisions of this Act and the Letters Patent to be issued in pursuance thereof and subject to the legislative powers, in relation to the matters aforesaid, of the Governor-General of India in Council."

I think, therefore, that the execution of the decree of this Court is not to be limited by a term of three years, but by the larger term provided by Section 19.

The decision of the Principal Sudder Ameen, being therefore erroneous, must be set aside with costs.

The 29th August 1866.

*Present:*

The Hon'ble G. Loch and L. S. Jackson, *Judges.*

**Limitation—Execution—Meaning of "judgment" in Section 20, Act XIV. of 1859.**

Case No. 412 of 1866.

*Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Rungpore, dated the 9th June 1866.*

Ram Ruttun Banerjee (Decree-holder), *Appellant,*

*versus*

Maharajah Ameer-ool-molk Bunwaree Gobind Bahadoor (2nd party), *Respondent.*

*Baboos Sreenath Doss* and *Mohendro Nath Shome* for Appellant.

*Baboo Juggodanund Mookerjee* for Respondent.

Where a decree passed by the late Sudder Court in 1859 was appealed to the Privy Council, and the decree-holder neither applied to the Sudder Court or to the High Court to take out execution, nor appeared before the Privy Council by whom the appeal was struck off for default—HELD that the execution of the decree was barred by limitation under Section 20, Act XIV. of 1859, no proceeding having been taken to enforce it within 3 years; and that, in such a case, the word "judgment" in that Section did not mean the final judgment.

*Loch, J.*—IT appears to me that, when an appeal is preferred against a decree, and the respondent appears and defends his case, he is keeping alive his decree. In this case, an appeal was preferred to the Privy Council, but we do not find that the respondent appeared or did anything in that case. He neither applied in this Court to take out execution, nor, when an appeal was preferred, did he do anything before the Privy Council, and, therefore, he cannot be said to have done anything to keep alive the decree. A case has been quoted from Volume III., Weekly Reporter, page 21, Miscellaneous Appeals, and it is said that, as laid down there, the judgment referred to in Section

20, Act XIV. of 1859, must mean the final judgment. Now, in that case, there had been a contention going on from the beginning to the end, and the Court have guarded themselves in the words which they make use of. They say, "In all analogous cases"—that is, in all cases of a similar kind in which a contest goes on—"the judgment is understood to mean the final judgment; and we think that it should be so "construed in this case." That case is not at all similar to the one which is before us.

It appears to me, therefore, that the order passed by the Principal Sudder Ameen is a correct one, and that this appeal should be dismissed.

*Jackson, J.*—I quite agree that the execution of this decree must be held to be barred by the terms of Section 20. In considering the interpretation to be put upon that Section, I think we have simply to consider of what Court it is that the decree is being executed. In cases of decrees passed by the Courts of first instance against which appeal is made to a higher Court, it seems to me that, if the judgment of that higher Court simply affirms, without modification or alteration, the decree of the Court below, then the successful party, when he comes to execute his decree, will execute really the decree of the Court of first instance, and that he will only execute the decree of the Appellate Court in respect of costs to which he may be entitled under that decree. It may be that, as respondent contesting the appeal in the higher Court, he will have been doing something or taking some proceeding to keep his decree alive, and in that way will be entitled to the benefit of the words in the 20th Section. But in the present case, which was the case of a decree passed by the late Sudder Court in 1859, against which an appeal was preferred to Her Majesty in Council, nothing apparently having been done by either party on that appeal beyond the transmission of the record to England, the appeal having been struck off the file of the Privy Council, and no adjudication having been come to, it appears to me that nothing takes the case out of the operation of those words in Section 20, which declare that, unless some proceeding shall be taken to enforce the decree, the process of execution shall not issue. We have been asked to add to the Section, after the word "judgment," the words "which has become final." It appears to me that, if the Legislature intended to attach any such qualification to the words, they must have inserted them in the Act. To insert these words would not be an interpretation, but really an addition to, or qualification of, the words in the Section. It is quite impossible for us to take upon ourselves to do anything of the sort, for, if we could add to the words of the Sections, we could also subtract from them or substitute others, and we should be really making the law instead of administering it.

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The 3rd September 1866.

*Present:*

The Hon'ble G. Loch and W. Markby, *Judges.*

**Jurisdiction—Sale.**

Case No. 472 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Gya, dated the 14th April 1866, affirming an order passed by the Sudder Ameen of that District, dated the 15th August 1865.*

Syud Velaet Hossein and others (Judgment-debtors), *Appellants,*

*versus*

Mussamut Sagrah (Decree-holder), *Respondent.*

*Mr. R. E. Twidale* for Appellants.

*Mr. C. Gregory* and *Baboo Unnodapershad Banerjee* for Respondent.

The High Court declined to interfere with an order of a Judge complained of as made without jurisdiction, confirming an order of the Sudder Ameen affirming a sale, the order of the Judge having been passed more than a year and a half ago, and having been acted upon by the petitioner.

The petitioner appeals from an order passed by the Judge on 11th January 1865, and asks this Court to interfere under the powers granted to it under Section 35, Act XXIII. of 1861, alleging that the Judge's order of that date was passed without jurisdiction. The petitioner made an appeal from that order. He has allowed more than a year and a half to elapse since it was passed. He has acted in conformity with that order, and brought objections to a certain sale held by the Sudder Ameen, and has appealed from the order of the Sudder Ameen affirming the sale, to the Judge, who has confirmed that order. Under these circumstances, we think that it is now too late to take objection to the Judge's order passed so long ago and acted upon by the petitioner. The appeal is dismissed with costs.

The 6th September 1866.

*Present:*

The Hon'ble G. Loch and J. P. Norman, *Judges.*

**Execution—Service of notice.**

Case No. 801 of 1865.

*Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Backergunge, dated the 5th September 1865.*

Bhugobutty (Judgment-debtor), *Appellant,*

*versus*

Mohun Chunder Puteedundo and others (Decree-holders), *Respondents.*

*Baboos Dwarkanath Mitter* and *Kally Mohun Doss* for Appellant.

*Mr. R. T. Allan* and *Baboo Romesh Chunder Mitter* for Respondents.

Service of notice under Section 216, Act VIII. of 1859, effected by sticking up the notice on the judgment-debtor's house, instead of returning the notice to the Court under Sections 220 and 156, when it was found that the judgment-debtor was absent, may, even if the service was defective, be notwithstanding a *bonâ-fide* proceeding to enforce the decree.

In this case, the decree-holder presented a petition for the execution of his decree on the 24th September 1864. It appears from the Nazir's return, dated the 29th of November, that service of notice, as required by Section 216, the decree being more than a year old, was effected by sticking up the notice on the door of the house of the judgment-debtor.

It is objected on appeal, *first*, that service was not proved, though it was contested in the first paragraph of the judgment-debtor's objection in the Lower Court.

But the Principal Sudder Ameen records that the service of this notice was not called in question. We presume that he means that service was admitted, or not denied, by the vakeel of the judgment-debtor in the proceedings before him. It is clear to us that all the probabilities are in favor of the truth of the Nazir's return; and, as the judgment-debtor appeared in Court in proceedings taken under their very decree by another shareholder, who was active in enforcing his decree on the 4th of December, 5 days after the action, if the return was untrue, it would have been a wanton and gratuitous falsehood most perilous to the party making it.

*Next*, it was objected that the service was not good, that the notice should have been returned to the Court under Sections 220 and 156, and not stuck up on the door of the house, when it was found that the judgment-debtor was absent. But Section 220 applies only to cases where attendance of the party is required, and the service was probably good under Section 55. Even if the service was defective, the proceeding may still have been a *bonâ-fide* proceeding to enforce the decree, notwithstanding the mistake of the Officer of the Court.

*Lastly*, it was said that the case should be remanded for trial whether the proceeding was *bonâ-fide*. But we find that not only was the notice served, but the case had been struck off in January 1865. The petitioners proceeded with reasonable promptitude to enforce their decree by making the application, with which we are now dealing, on the 5th of April 1865.

We reject the appeal with costs.

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The 7th September 1866.

*Present:*

The Hon'ble L. S. Jackson, *Judge.*

**Appeal to the Privy Council—Review of order of admission.**

Ameerunissa Begum and others, *Petitioners,*

*versus*

Ranee Indurjeet Koonwur, *Opposite Party.*

*Mr. C. Gregory* for Petitioners.

*Mr. R. T. Allan* for Opposite Party.

An appeal to the Privy Council being once admitted, whether properly or erroneously, the High Court has no further jurisdiction to review its order, and declare the appeal rejected.

Mr. Gregory makes this application, as he says, to revive the rule formerly obtained by him to show cause why the appeal to Her Majesty in Council preferred by Mr. Allan's client (Ranee Indurjeet Koonwur) should not be rejected. That rule having

been argued, it was held, in accordance with the previous ruling of three Judges of this Court, that the appeal to England, having been preferred within 6 months of the date on which this Court rejected an application to review its judgment, was in time. That question, however (namely, whether an appellant to England has 6 months within which to prefer his appeal from the date on which an application to review a judgment of this Court is rejected), having since been referred for the consideration of a Full Bench of five Judges, the Court has held that the appellant has not such time, but that, where the application to review is simply rejected, the appellant is bound to prefer his appeal to England within 6 months from the date of the original decree.

Mr. Gregory now maintains that his client is entitled to the benefit of this ruling, and that we ought to review the order by which we threw out his rule and admitted this appeal to England. It appears to me, however, that, the appeal having once been admitted, whether properly or erroneously, this Court has no further jurisdiction to entertain his objections, and declare the appeal again rejected. Moreover, it would be highly inconvenient if, on every occasion of a new ruling being promulgated by a Full Bench of this Court, such ruling were to apply retrospectively to all cases decided according to the view of the law previously laid down by the Court. I must therefore refuse compliance with Mr. Gregory's application.

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The 11th September 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, L. S. Jackson, and A. G. Macpherson, *Judges.*

**Limitation—Execution—Section 20, Act XIV. of 1859.**

Case No. 778 of 1865.

*Miscellaneous Appeal from an order passed by Mr. H. R. Maddocks, Officiating Judge of Bhaugulpore, dated the 31st August 1865, reversing an order of Baboo Nuruttun Mullick, Officiating Principal Sudder Ameen of that District, dated the 10th July 1865.*

Ram Sahaye Singh (Judgment-debtor), *Appellant,*

*versus*

Degun Singh and others (Decree-holders), *Respondents.*

*Baboos Unnoda Pershad Banerjee* and *Kally Prosonno Dutt* for Appellant.

*Baboos Onookool Chunder Mookerjee* and *Kally Kishen Sein* for Respondents.

Case No. 811 of 1865.

*Miscellaneous Appeal from an order passed by Mr. W. Ainslie, Judge of Patna, dated the 28th August 1865, affirming an order of Moulvie Gholam Jheelanee, Additional Moonsiff of that District, dated the 16th May 1865.*

Luchmun Pershad (Decree-holder), *Appellant,*

*versus*

Bissoo Bibee and others (Judgment-debtors), *Respondents.*

*Mr. W. E. Peacock* and *Baboo Mohesh Chunder Chowdry* for Appellant.

*Messrs. R. E. Twidale* and *C. Gregory* for Respondents.

Case No. 347 of 1866.

*Miscellaneous Appeal from an order passed by Mr. W. Tucker, Judge of West Burdwan, dated the 3rd March 1866, affirming an order passed by Baboo Jodoonath Roy, Moonsiff of Barjorah, dated the 31st August 1865.*

Gooroo Doss Auckholee and others (Decree-holders), *Appellants,*

*versus*

Modhoo Koondoo and others (Judgment-debtors), *Respondents.*

*Baboo Kishen Succa Mookerjee* for Appellants.

*Baboo Mohendro Lal Shome* for Respondents.

The words "some proceeding" in Section 20, Act XIV. of 1859, include every application for execution *bonâ fide* made, and all acts done either by the Court or by its Officer of the Court, or *bonâ-fide* by the applicant, for enforcing a decree or keeping it in force.

In cases falling within Section 216, a judgment-creditor should apply for the execution of the decree, and not for the issue of a notice; it is the duty of the Court to issue the notice.

The striking of an execution-case off the file is not a proceeding for the purpose of enforcing the decree. In such a case limitation will count from the date when the application for execution was first made, or when the last *bonâ-fide* act was done in furtherance of the application.

*These cases were referred to a Full Bench under the following orders:—*

*Referring order in Case No. 778 of 1865.*

*L. S. Jackson and Glover, JJ.*—THE question arising in this case on which we have considerable doubts, and on which there has been some diversity of ruling, is this: Whether the notice which is required by Section 216, Code of Civil Procedure, to issue where application is made to execute a decree more than a year after its date, or against the heir or representative of an original party to the suit, is a proceeding within the terms of Section 20 of the present Limitation Act to enforce the decree or to keep it in force.

The Zillah Judge in the present case has determined that it is so.

We understand it to be generally agreed that a mere application to execute (in cases where notice under the Section cited is not requisite), without the subsequent issue of any process against the person or property of the debtor, is not such a proceeding.

Does the issue of notice carry the decree-holder any further?

It will be observed that the words of the Code are somewhat peculiar.

It is not the business of the party seeking execution to give notice or to ask for the issue of a notice. He is (*vide* Section 207) to "apply to the Court" whose duty it is to execute the decree; that is, he is to apply for execution or enforcement of his decree.

It is the Court itself which, under Section 216, is in certain cases to issue a notice; it is the Court which, taking notice of the various particulars required by Section 212 to be contained in the application, and dealing with the matter as directed by Section 15, Act XXIII. of 1861, perceives the necessity of giving notice to the judgment-debtor and issues notice accordingly.

If, on receiving notice, the party comes in and objects, the Court is to pass such order as may be just and proper; otherwise the Court is to order the decree to be executed, and then, under Section 221, when all necessary preliminary measures have been taken, the Court may issue the proper warrants for the execution of the decree.

From this it seems to appear that the issue of notice under Section 216 is not an act of the decree-holder himself, but a voluntary act of the Court in certain cases, and that the procedure upon it is a preliminary, and, as it were, parenthetical matter apart from the actual enforcement of the decree. At least, if it go in the direction of enforcing the decree, it is not the act of the decree-holder, but that of the Court. Is the decree-holder to have the benefit of the Court's action? If so, is there any reason why his application—which in this case has the effect of causing a particular action, and thus tends to keep the decree in force—should have no efficacy in cases where, from the absence of constraining circumstances, there is no occasion for notice? And, if a mere application to execute be sufficient, then a decree will be kept alive by periodical petitions, none of which the judgment-debtor may ever see or hear of.

It may be said that, by the procedure under Section 216, the judgment-debtor has notice, and that the creditor understands that he has notice. The Act, however, does not say that notice will keep a decree alive, but requires for that purpose "some proceeding to enforce it, or to keep it in force."

If such notice would be sufficient independently of the Procedure Code, then a mere letter or verbal message would suffice, and this would lead to the most perplexing conflicts of testimony on the subject, as notice would in every case be alleged, and as certainly denied.

Although the subject is not far from doubt, we incline to the opinion that the notice is not a sufficient proceeding, and, in order that the matter may be authoritatively settled, we desire that it may be submitted to the Full Bench.

*Referring order in Case No. 811 of 1865.*

*Peacock, C.J., and Jackson, J.*—THE parties in this proceeding are to be heard before the Full Bench upon the question referred by Mr. Justice Louis Jackson.

The further hearing of this case is postponed until after the decision of the Full Bench, and the parties are then to be at liberty to re-argue this case with reference to any question which is now open to them to raise.

*Referring orders in Case No. 347 of 1866.*

*Loch, J.*—In this case the decree-holder attached certain property belonging to the debtor on 28th March 1862, and the execution-case continued on the file till 28th June of the same year, when it was struck off. On 17th May 1865 the decree-holder made a fresh application for execution, but on appeal the Judge has held him to be barred by limitation, considering that the time began to run against him from the date on which he had taken some proceedings in the case, *viz.*, 28th March 1862, and not the date on which the case was struck off the file, 28th June 1862. From the wording of the law, the Judge appears to be correct in the view that he has taken; but it was held in another case admitted to review in July last by Messrs. Loch and Glover that, in cases where some effectual steps had been taken by the decree-holder, he was entitled to the benefit of the time during which the suit was pending, and got a fresh start from the date on which it was struck off. Reading the law again, I doubt whether this is a correct ruling. It may be observed that, under orders of the late Sudder Court, execution-cases are liable to be struck off the file if no steps are taken to carry the execution on for six weeks; so that a case can never remain pending very long if a Judge exercise a proper supervision. It not unfrequently happens that a decree-holder is unable to proceed with the execution for want of a proper order from the Court. Attachment is frequently made, and the report of the Nazir is ordered to be filed, whereas there should be some order requiring the party to issue proclamation of sale within a certain period. The party remains waiting for such an order. Time passes by, and, when the case is next taken up, it is struck off the file for default. If a petition be put in asking the Court to issue proclamation of sale, it is either directed to be brought up with the record, or a report is called for from the office—which shares the fate of other reports, and is filed with the other papers, and remains there till the Judge has leisure to take it up. A certain rule should, however, be laid down for the guidance of the Lower Courts, and I propose that this case be sent up to a Full Bench of five Judges to determine the point whether the period of limitation is to run from the date on which the decree-holder last did something to keep his decree alive, or whether, where something has been done, the decree-holder may have a new start from the time when the case was struck off the file.

*Macpherson, J.*—I am of opinion that the right to take out execution has been lost in this case, and that the decree-holder is not entitled to calculate his three years from the date when his execution-case was struck off. I think the question should, however, be referred to a Full Bench, for the reasons given by Mr. Justice Loch.

*Full Bench Judgments.*

*Peacock, C.J. (Trevor, Loch, and Macpherson, JJ., concurring).*—The answer to the questions stated for the opinion of a Full Bench depends upon the proper construction of the words "unless some proceeding shall have been taken to enforce such judgment, decree, or order" in Section 20, Act XIV. of 1559. The Section is as follows:—

"No process of execution shall issue from "any Court not established by Royal Charter "to enforce any judgment, decree, or order "of such Court, unless some proceeding shall "have been taken to enforce such judgment, "decree, or order, or to keep the same in "force within three years next preceding the "application for such execution."

It was contended, in the course of the argument, that the words "unless some proceeding shall have been taken" mean "unless some warrant for execution shall have been issued." It is clear, however, that that is not the meaning of the words. Section 20 begins by saying "no process of execution shall issue," whereas Section 19 commences with the words "no proceeding shall be taken"—which shows that the Legislature did not consider the words "process of execution" and "proceeding to enforce such judgment" to be synonymous. The words used in Section 20 after the word "unless" are nearly the same as those used in the commencement of Section 19. The two Sections are framed upon a different principle. Section 19 enacts that no proceeding shall be taken to enforce any judgment, &c., but within 12 years next after a present right to enforce the same has accrued, &c., unless, &c. But, according to the literal wording of Section 20, no process of execution could ever issue to enforce a judgment even within a week from the date of it, unless some proceeding were taken to enforce or keep it in force within three years next before the application for execution. The meaning of the Section was, doubtless, to prevent process of execution from being issued on a judgment, decree, or order of a Court not estab-

lished by Royal Charter after the expiration of three years from the date of it, unless some proceeding to enforce it or to keep it in force should have been taken within three years next before the application for execution.

We think that the words "some proceeding" in Section 20 include applications for execution *bonâ fide* made under Section 207 of the Code of Civil Procedure, and all acts done either by the Court, or by an officer of the Court, or *bonâ fide* by the applicant, for enforcing the decree or keeping it in force. For instance, if a decree or order of Court were more than one year old, an application made to the Court for execution would be a proceeding to enforce the decree, although it would be necessary to issue a notice to the judgment-debtor or his representative to show cause why execution should not issue against him. So also the service of such notice if made *bonâ fide;* so also the issue of process of execution, or the execution of such process. These would all be proceedings, but no proceeding would be effectual within the meaning of Section 20, unless it were *bonâ fide.*

If the party were to make an application to the Court for execution, and should neglect to lodge the necessary tullubana, his neglect would be evidence from which the Court, upon a subsequent application for execution, would have to decide whether the former application were a *bonâ-fide* one, or merely colorable for the purpose of keeping the decree alive. In all these cases, the Court, to which application for execution is made, must decide whether the former application which is relied upon was *bonâ fide* or not. We cannot lay it down as a rule of law that an application made without lodging tullubana would not be a *bonâ-fide* application, for it might happen that, immediately after the making of the application, the defendant might die, and it might be necessary, instead of lodging the tullubana, to make a fresh application for execution against his heir at law.

The Judges who referred the question in No. 778 appear to be right in considering that, in cases falling within Section 216 of the Code of Civil Procedure, the judgment-creditor should apply for the execution of the decree, and not for the issue of a notice, and that it is the duty of the Court to issue the notice. But in such case the application for execution upon which a notice is issued is just as much a proceeding to enforce the decree as an application for execution of a decree, not a year old, on which a warrant is issued. The application in either case is a proceeding.

It also appears to us that issue of the notice by the Court is a proceeding, and that the service of the notice by the officer of the Court is a proceeding. The latter is as much a proceeding as a levy of part of the amount under an attachment in a case in which there were not sufficient assets of the debtor to satisfy the decree in full. If a question arise on any subsequent application from what period the three years shall date, it will date from the last of the proceedings, either a *bonâ-fide* application, or the last act done by the party, by the Court, or by the officer of the Court, in furtherance of the application.

That disposes of the Appeal No. 778 of 1865. In that case we are of opinion that the Zillah Judge was right.

Appeal No. 811 of 1865 must go back to the Court which referred it, because it is unnecessary to occupy the time of the Full Bench in considering whether the application for execution against Jankee Bibee was a *bonâ-fide* application or not.

As to Appeal No. 347 of 1866, we think that the mere pendency of proceedings struck off the file for want of prosecution is not the taking of a proceeding. There must be some application made, or some act done, to enforce the decree, or to keep it in force, to constitute a proceeding. The striking of an execution-case off the file is clearly not a proceeding for the purpose of enforcing the decree. In such a case, therefore, the time would date from the period when the application was first made, or when the last *bonâ-fide* act was done in furtherance of the application. From that time the period of three years mentioned in Section 20, Act XIV. of 1859, would count.

In No. 778 the appeal will be dismissed without costs. No. 811 will go back to the Division Bench, to be determined according to the view which has now been expressed; and in No. 347, the appeal will be dismissed with costs.

*Jackson, J.*—It is not necessary that I should attempt to add anything either to the judgment or the reasons which have been stated by the Chief Justice. But, as I was one of the Judges who referred the first of these three cases (Case No. 778 of 1865), and as I then inclined to the opinion that the service of a notice might not be a sufficient

proceeding to keep the decree in force, I think it right to state that I entirely concur in the judgment which has now been delivered. The principle which the Court has adopted in the present case, both obviates the doubts and difficulties which I felt on that occasion, and also lays down a safe and intelligible rule for the guidance of the Courts below.

I observed that the issue of notice under Section 216 was not so much the act of the decree-holder as that of the Court. That, perhaps, is quite true. But it is nevertheless the case that the issue of notice, although not the direct act of the party, springs from his application. It is a legitimate consequence of his application, and the issue of a notice under the Section cited, and the obtaining of an order to execute the decree thereon, would afford an extremely good criterion of the *bona fides* of his application.

For these reasons I entirely concur in the judgment.

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The 11th September 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble C. B. Trevor, G. Loch, L. S. Jackson, and A. G. Macpherson, *Judges.*

**Section 348, Act VIII. of 1859—Notice of objections by respondents.**

*Petition of objection under Section 348, Act VIII. of 1859, in Special Appeal No. 778 of 1866.*

Madhobee Dossee, *Petitioner.*

*Mr. R. E. Twidale* for Petitioner.

A respondent may file with the Registrar, before the hearing of the appeal, a written notice of the objections which he intends, under Section 348, Act VIII. of 1859, to take at the hearing.

THE question in this case, which was submitted for the decision of a Full Bench, was as to whether an objection under Section 348, Act VIII. of 1859, need be filed in writing, and, if so, whether it may be filed before the hearing of the appeal.

*Judgment of the Full Bench.*—We think that, as a point of practice, there can be no objection to a respondent filing a notice with the Registrar, and specifying in the notice the objections which he intends to take on the hearing of the appeal. It is far more convenient, and far more fair, to the Court and to the parties that such notice should be given. The Registrar should, in future, receive and file any such notice.

It is merely a matter of practice. The law does not prohibit such a notice, although the Court cannot compel the parties to give it.

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The 11th September 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble C. B. Trevor, G. Loch, L. S. Jackson, and A. G. Macpherson, *Judges.*

**Appeal to Privy Council—Review of Judgment.**

Case No. 350 of 1865.

*Appeal to the Privy Council.*

Soudamonee Dossee, *Appellant to England,*

*versus*

Maharaj Dheraj Mahatab Chand Bhadoor, *Respondent to England.*

*Baboos Onookool Chunder Mookerjee* and *Nil Madhub Sein* for Appellant.

*Mr. R. V. Doyne* and *Baboo Juggadanund Mookerjee* for Respondent.

An order rejecting an application to review a judgment passed on appeal is not an order made on appeal from which an appeal lies to the Privy Council under Section 39 of the Charter of the High Court.

*This case was referred to a Full Bench by L. S. Jackson, J., under the following order:—*

*Referring order.*—THE question before me is whether the present appeal to Her Majesty in Council ought to be allowed to proceed, the circumstances being that the appellant was a respondent in this Court, against whom a Divisional Bench pronounced a judgment. An application, to review that judgment, was afterwards made. It was admitted to argument by the learned Judge who had written the judgment, and afterwards coming to be argued before the Divisional Bench which had decided it, the application was rejected. The petition of appeal to England does not specifically state whether the appeal is against the original judgment pronounced, or against the judgment on the application to review, or against both. If the appeal be directed against the judgment originally pronounced, then much more than the period of six months allowed

by the order in Council of 1838 has expired, and the application to appeal to Her Majesty was in fact put in precisely as the period of six months after the second judgment was about to expire.

There is already a decision of three Judges of this Court, including the Officiating Chief Justice, in a case reported at page 13, Miscellaneous Rulings, I Weekly Reporter, in which it was held that, in a case similar to this, the time for making the appeal (six months) ran from the date of the order rejecting the application for review.

That decision has since been followed in at least one case on the Miscellaneous side of this Court, and I myself was certainly at one time of opinion that that decision was correct in principle. On further consideration, the question appears to me to be one of great doubt. The ruling in that case does certainly seem to be opposed to the express terms of Her Majesty's order in Council, because, in the case in question, as well as in the present case, although it may be that further arguments were adduced, and possibly new reasons assigned in the judgment of the learned Judges, yet, in fact, the decision passed on the second occasion was essentially the same as the decision passed on the first occasion. The Civil Procedure Code provides for the hearing of an application for review in cases where the appeal to Her Majesty in Council has been preferred, provided that the proceedings shall not have been transmitted to England. It is therefore quite open to parties to carry on proceedings of review and proceedings of appeal to England at the same time, and therefore a party, who has applied for a review of this Court, is in no way debarred from proceeding with his appeal to England.

Under, therefore, circumstances like the present, it appears to me very doubtful whether we are not proceeding beyond the powers entrusted to this Court by the Letters Patent and contravening the order in Council, in admitting the appeal after the lapse of six months from the date of the original judgment.

Upon the whole I incline to the opinion that, where additional evidence has been let in, or where the Division Court modifying its view of the case has given its decision on grounds other than those on which its original decision was based, there has been, in effect, a new judgment, from which a new period of six months will run, but that, where the judgment on hearing the review has merely affirmed the first judgment, then there is no new period.

Considering this point, therefore, extremely doubtful, and also considering it one of great importance, I think it better that the matter should be referred to a Full Bench, and it will be referred accordingly.

*The Judgment of the Full Bench was delivered by—*

*Peacock, C.J.*—The Charter of the High Court allows an appeal to the Privy Council "in any matter not being of criminal jurisdiction, from any final judgment, decree, or order of the said High Court of Judicature at Fort William in Bengal made on appeal."

The question is whether an order of a Division Bench rejecting an application for a review of a judgment passed on appeal is a judgment made on appeal.

In this case a Division Bench heard a special appeal and then passed a decree in the case. An application was afterwards made for a review of the judgment. Under Section 378 of the Code of Civil Procedure, no review of judgment ought to be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree of which a review is applied for. The application was made to a single Judge, and he thought it reasonable that the opposite party should be summoned. When the case came on to be heard, the Court rejected the application for the review —in other words, they would not grant a re-hearing of the appeal.

That was not an order made on appeal, but merely an order made on application to the Court to review their own judgment. If a review is admitted, then under Section 380 the case is set down to be re-heard, and the order of the Division Bench upon the re-hearing is a new decree, whatever may be the result of the re-hearing.

But, as it is, the Court merely rejected an application to review their own judgment; and that rejection is not an order made on appeal. Consequently the Court is not in a position to admit an appeal against that order. It cannot admit an appeal against the original judgment of the Division Bench, inasmuch as the petition of appeal was not presented within the period of six months prescribed by the Rules of Her Majesty in Council on the 10th April 1838, Section 1.

There is no hardship in this case. The learned Judge who referred the case has

clearly pointed out that an application for review of judgment may be made after an appeal has been preferred to Her Majesty in Council, and before the proceedings in the suit have been transmitted (*see* Act VIII. of 1859, Section 378).

If the parties choose, they may apply specially to Her Majesty in Council. But we have no power to admit the appeal.

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The 11th September 1866.

*Present :*

The Hon'ble G. Loch and J. P. Norman, *Judges.*

**Limitation—Execution.**

Case No. 456 of 1866.

*Miscellaneous Appeal from an order passed by Mr. A. Abercrombie, Judge of Dacca, dated the 9th April 1866, reversing an order passed by the Principal Sudder Ameen of that District, dated the 20th December 1865.*

Mr. W. G. N. Pogose (Decree-holder), *Appellant,*

*versus*

Boistub Lal and others (Judgment-debtors), *Respondents.*

*Mr. C. Gregory* and *Baboo Kalee Mohun Doss* for Appellant.

*Baboos Dwarkanath Mitter, Unnoda Pershad Banerjee,* and *Luleet Chunder Sein* for Respondents.

The steps taken to enforce the execution of this decree, which was in force when Act XIV. of 1859 was passed, were held to be *bonâ fide* and sufficient to keep the decree alive.

KALEE KISHORE and his mother Monikornika obtained in 1845 a joint decree for possession and mesne-profits against Narain Doss and others. Possession was taken in 1846, and the case was struck off on 8th April 1847. Kalee Kishore alone applied for execution in 1850, and the case was struck off in August of that year, as the applicant was not the sole decree-holder. In February 1852, Shibo Soonduree, the wife of Kalee Kishore, and his uncle Ram Kishore, applied to execute the decree, alleging that it had been transferred in gift to them by Kalee Kishore, who had disappeared since Jeyt 1258 (June 1851). This application was rejected, because Monikornika had not joined in it, and because Kalee Kishore had no power to make a gift of the whole decree, and it was held that no order could be passed as to the genuineness of the deed of gift in the absence of Kalee Kishore, and that his wife could not take out execution till the ceremony of "kooshapootul" had been performed.

No further steps were taken till after the passing of Act XIV. of 1859. On 28th December 1861, Shibo Soonduree again applied for execution of the whole decree, claiming her husband's share as heir, and Monikornika's under a deed of gift. Her claim was again rejected, as twelve years from the disappearance of her husband had not expired, and she had not performed the ceremony of kooshapootul; and, till this were done, she could not claim as his representative. From this order, an appeal was preferred, which was rejected on 6th December 1862. She subsequently in 1863 applied for a certificate under Act XXVII. of 1860, to collect the debts due to her husband, which was granted to her in July 1864. The present application is made by both Shibo Soonduree and Monikornika, and was preferred on 8th Bhadro 1271 (23rd August 1864). Shibo Soonduree alleges that her husband disappeared in Jeyt 1258, or about the 1st of June 1851; that, according to Hindoo Law, he could not be considered as dead till twelve years from the date of his disappearance had passed; that this period expired on or about June 1863; that she performed his obsequies by burning his effigy (kooshaputul) on 5th Assar 1270 (18th June 1863), and was then in a position to apply for execution of the decree as her husband's heir and representative; that to enable her to represent him more effectually, she had secured a certificate to collect his debts under Act XXVII. of 1860; that the steps taken by her to enforce the decree in 1861 were within time and were made in good faith; and that the present application is within time, three years from the previous *bonâ-fide* proceedings taken to keep the decree alive not having expired.

On the other hand, it is contended that neither the steps taken by Shibo Soonduree in 1852, nor those taken by her in 1861, can be considered as *bonâ-fide* proceedings, for at neither time had she any right to take out execution. On the *first* occasion, she came

in with one Ram Kishore, under a spurious deed of gift from her husband, which was rejected by the Court, and is now repudiated by herself; and on the second occasion, she claimed the whole decree, partly as heir to her husband, and partly under a gift from his co-decree-holder Monikornika; that deed of gift is now repudiated, and Monikornika, colluding with her, now joins in the present application; that, when she sought for permission to execute as heir to her husband, she was not in a position to do so, as his kooshapootul had not then been performed; that her attempts to execute the decree have been tainted with fraud, and consequently all the proceedings must be considered as null and void; and that the further execution of the decree is barred by limitation, for, as Shibo Soonduree's attempt to execute in 1852 came to nothing, that made by her husband Kalee Kishore in 1850 was equally infructuous, and therefore the date of the last effectual step to execute the decree must be taken to be in 1846, in which year possession was given; and, reckoning from that date, the period for executing the decree had elapsed before the passing of Act XIV. of 1859, and the decree was not then in force; that, as there was no legal disability to the execution of the decree when it was passed, any subsequent disability which might arise would not under the law, as it stands at present, give the petitioner a fresh start from the date when that disability ceased; that, when Kalee Kishore left his house, he might have made, and was bound to make, arrangements for the management of his affairs, and, having failed to do so, his representatives cannot plead a legal disability.

The *first* point to be determined is whether the decree was in force when Act XIV. of 1859 was passed; and, *secondly*, whether effectual steps were taken to execute this decree sufficient to keep it in force within the period prescribed by Section 21 of that Act. Now, we find that in 1852 Shibo Soonduree came in under a deed of gift from her husband, and claimed a right to execute the whole decree. The genuineness of the deed has never been enquired into, but whether genuine or not, it was evident, unless proved to the contrary, that Kalee Kishore could not make a gift of the whole decree in which there was a co-decree-holder, and this was of itself a sufficient objection to stop the execution under that application. The Court, instead of going into proof of the deed of gift, and ascertaining whether Kalee Kishore had the power to transfer the interest of Monikornika, as well as his own, refused to look into it during the absence of Kalee Kishore, and at the same time declared Shibo Soonduree incapable of claiming as heir until the kooshapootul had been performed. It appears to us that this was a *bonâ-fide* attempt to execute the decree, though Shibo Soonduree claimed more than she was entitled to. That she does not now rest her claim upon that deed of gift is not of itself sufficient ground for concluding that she did not then believe it to be genuine. Previous to the enactment of Act XIV. of 1859, a decree-holder, filing a fresh application for execution within 12 years from the date of any former proceeding in execution, was considered to be within time, the period for executing a decree getting a fresh start from the termination of the former proceedings. From 1852, as the law then stood, Shibo Soonduree's right to execute extended to 1864, and it must be borne in mind that the law, as it then stood, also took cognizance of, and allowed time for, any legal disability which might arise to the party entitled to do or claim any thing by law. In the case of minority, for instance, though the cause of action commenced in the lifetime of the father, the period during which his son was disabled by minority from enforcing his right was always allowed in calculating the period of 12 years within which a suit was to be brought. So also the Courts were authorized by law, Section 14, Regulation III., 1793, to make a deduction on good and sufficient cause being shewn; and under the old law, the legal disability under which Shibo Soonduree labored would, doubtless, have been considered a good and sufficient cause for deducting the time till the "kooshapootul" of her husband had been burnt, so that, if her second application to execute had not been made within 12 years of the first, the difference of the time during which the legal disability continued would have been allowed her. We find, however, that Shibo Soonduree did not wait till the expiry of 12 years from the date of the rejection of her former application, but on 28th December 1861, probably alarmed by the stringent provisions of Act XIV. of 1859 which was to come into operation on the 1st of January 1862, she again made an application for execution, and this time she claimed a right to execute partly as heir of her husband, and partly under a gift from Monikornika. Whether the deed of gift in this case was genuine or

not, was not enquired into. The application was rejected, because she was not then entitled to execute as heir to her husband, as his "kooshapootul" had not been burnt. Dissatisfied with the decision of the first Court, she appealed to the Judge, who confirmed the order on 6th December 1862. It is clear that this application for execution was made within the time prescribed by Section 21, Act XIV. of 1859, for it was made within three years of the passing of the Act, and before the time allowed under the former Code of Procedure had expired. We think also that it was a *bond-fide* application sufficient to keep the decree in force, for Shibo Soonduree, not satisfied with the judgment of the first Court, made an appeal to the Judge, showing thereby that she was in earnest in applying for execution. Nor does the fact that, in the application now before us, Shibo Soonduree has been joined by Monikornika, prove that the former was acting in fraud, when she applied for the execution of the whole decree in 1861. Some arrangement may have been come to between the parties. The deed of gift from Monikornika might have been a genuine document, but for some reason or other it has been put aside, and now the parties before the Court are those who are legally entitled to execute the decree, which, as has been stated above, we think was in force at the passing of Act XIV. of 1859, and has since been kept alive by the proceedings taken in 1861; and as the present application is made within three years of those proceedings of 1861, we think that the execution of the decree, as now prayed for, should be allowed to proceed. Under this view of the case, we reverse the orders of the Lower Courts with costs, and allow the petitioners to take out execution in the usual way.

We desire to add that this rather intricate case was thoroughly discussed by the vakeels, and in particular the Court has derived much assistance from the very careful argument of Baboo Kalee Mohun Doss.

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The 12th September 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Execution—Time to appeal—Deduction—Sunday.**

Case No. 506 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Jessore, dated the 25th April 1866, affirming an order passed by the Principal Sudder Ameen of that District, dated the 21st March 1866.*

Gopeenath Roy (Judgment-debtor), *Appellant,*

*versus*

Gopeenath Chatterjee (Decree-holder), *Respondent.*

*Baboo Nil Madhub Bose* for Appellant.

*Baboo Khettur Mohun Mookerjee* for Respondent.

**Under Section 11 of Act XXIII. of 1861, an appeal lies from the order of a Lower Appellate Court, rejecting an appeal in an execution-case as presented out of time.**

**The time occupied in procuring a copy of the order appealed from should be deducted from the period of limitation.**

**If the period within which an appeal ought to be filed expires on a Sunday, the practice is to admit the appeal on the following day.**

OBJECTION is taken to the hearing of this appeal, on the ground that no special appeal lies to this Court from an order passed by the Lower Appellate Court rejecting an appeal in an execution-case as presented out of time. As this is an appeal by one of the parties to the suit, we think it comes under the provisions of Section 11, Act XXIII. of 1861, and we are shown a case in which the Chief Justice and Mr. Justice Louis Jackson admitted a special appeal under similar circumstances, in the 8th Vol. of Sevestre's Reports.

The Judge rejected the appeal, because the petition was not presented in time. The order from which the appeal was preferred was passed in an execution-case on 21st March 1866. The period for appeal expired on 20th April, but the petitioner is entitled to two days which were occupied in getting a copy of the judgment appealed from. This gave him to the 22nd April, which was a Sunday, and he was thus prevented from filing his petition within time. No doubt, the petitioner shewed great negligence in applying so late for the copy he required to file with his appeal, but that application was within time; and, had the 22nd been any other day but a Sunday, he could have filed his appeal on that day. It is the general practice of the Courts, should the day on which appeals have to be filed fall on a Sunday, to receive them on the following day; and we think the Judge in this case should have followed the practice which is well-known. He has not allowed the time occupied in procur-

ing the copy of the order appealed from. Had he done so, he would have seen that the petitioner's time for filing the appeal did not expire till Sunday the 22nd. We reverse the order of the Lower Court with costs.

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The 12th September 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Summary Ejectment—Possession under decree.**

Case No. 266 of 1866.

*Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Bhaugulpore, dated the 5th February 1866.*

Rajah Leelanund Singh Bahadoor (Judgment-debtor), *Appellant,*

*versus*

Motee Singh and others (Decree-holders), *Respondents.*

*Mr. R. E. Twidale, Moonshee Ameer Ali,* and *Baboo Unnoda Pershad Banerjee* for Appellant.

*Baboo Luckhee Churn Bose* for Respondents.

A Court has no power summarily to deprive a decree-holder of possession of lands which have been decreed in his favor, and of which he has been put into possession under his decree, and to which the parties seeking possession of the lands in question laid no claim when the decree-holder took possession, though they claimed other lands.

The petitioner before us, Rajah Leelanund Singh, brought an action to recover possession of 35 villages in Tuppeh Dhumsaine, a ghatwalee tenure, and obtained a decree against three of the sons of Toofanee Singh, the late ghatwal, who had been dismissed for misconduct. On endeavouring to take possession, he was opposed by the three younger sons of Toofanee Singh, who claimed a moiety of ten villages specified by them and by two other parties, each claiming ten and nine of the other villages respectively. After the case had been before this Court in May 1857, and returned for further investigation, the Principal Sudder Ameen on 6th June 1862 dismissed the three claims, and in that proceeding the claim of the sons of Toofanee was distinctly set forth as being made for the moiety of ten villages only. An appeal was preferred to this Court by the sons of Toofanee; and on the 1st April 1863, it was held that the sons of Toofanee were entitled to a moiety of the whole property, and not merely of the ten villages they claimed, and possession was ordered to be given to them. This order was modified on 15th July 1863, but in the meantime the Principal Sudder Ameen had directed a moiety of the estate to be given up to the sons of Toofanee, in conformity with the order of the High Court of 1st April, but on 31st December 1863 he, on review, limited possession to a moiety of ten villages as directed in the High Court's subsequent order of 15th July. In the meantime the Rajah had brought a regular suit for possession of the moiety of the ten villages claimed by the sons of Toofanee, and obtained a decree on 10th September 1864, and from this order an appeal was preferred. An appeal in the Miscellaneous Department had also been preferred by the sons of Toofanee against the order of the Principal Sudder Ameen of 31st December 1863, which was dismissed by this Court on 5th April 1864, without prejudice to any rights which might accrue to them from the result of the decision in the regular appeal then pending. A review of this order was applied for, but rejected on 28th April 1865. The regular appeal was heard, and the Rajah's claim to the ten villages was dismissed in June 1865, and the sons of Toofanee now seek to recover possession of a moiety of the 35 villages, and the Principal Sudder Ameen, under a mistaken view of the Court's order of 28th April 1865, has ordered possession to be given. Now, the effect of that order was not to give to the sons of Toofanee anything that they had not claimed. The facts therein stated now appear to have been incorrectly given to the Court, but whether rightly or wrongly stated, they do not affect the principle there laid down, that possession would follow the result of the decree whether the Rajah had mentioned five or fifty villages by name in his plaint. The nature of that decree was not then made known to the Court. It was supposed to relate to the whole ghatwalee tenure of Tuppeh Dhumsaine, but as now shewn us, it was for a moiety of ten specified villages. The Rajah's claim to those villages has been disallowed, and the decree by dismissing the Rajah's claim for possession shews that the possession of the three sons in these ten villages is not to be disturbed by him,

but it gives them nothing more. It gives them no right to ask for possession of other villages decreed to the Rajah under a separate decree of 23rd November 1853, and of which he has taken possession under that decree. The three sons of Toofanee, in their original petition so far back as 1854, claimed only a moiety in ten villages and admitted the right of other parties in the other villages, and it was not till after the 1st April 1863 that they ever attempted to set up a claim for a moiety of the whole ghatwalee. Whatever may be their rights, it is very clear that there is no power in the Court summarily to deprive the Rajah of possession of lands which have been decreed in his favor, and of which he has been put into possession under his decree, and to which these three sons of Toofanee laid no claim when the Rajah took possession, though they did claim other lands. We reverse the order of the Principal Sudder Ameen with costs.

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The 12th September 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Execution of decree—Satisfaction.**

Case No. 508 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of the 24-Purgunnahs, dated the 30th April 1866, affirming an order passed by the Sudder Ameen of that District, dated the 23rd December 1865.*

Khatoo Bibee and another (Judgment-debtors), *Appellants,*

*versus*

Furukh Ali (Decree-holder), *Respondent.*

*Baboo Bungshee Dhur Sein* for Appellants.

*Baboos Mohendro Lal Shome* and *Pearee Mohun Mookerjee* for Respondent.

A decree for possession once satisfied by the plaintiff's being put in actual possession cannot afterwards be revived or re-executed on the plaintiff being dispossessed.

It appears to us that the decision of the Lower Appellate Court is wrong. The respondent got a decree for possession: an Ameen of the Court professed to have put him in possession and got a receipt from respondent, acknowledging that he had got possession. This was in September 1862, and the execution-case was finally struck off in July 1863. In September of that year, the respondent is said to have been dispossessed by the appellants, or some of them. The respondent then instituted a summary proceeding under Section 15 of Act XIV. of 1859, alleging possession and dispossession, and claiming to be restored to possession. That suit was dismissed on the ground that the lands claimed could not be identified as covered by the decree, or as being the land of which the Ameen gave possession. Having failed in that suit, the respondent then applied to revive the proceeding in the original decree, and to execute that decree anew. We think this cannot be. That decree had been fully executed and satisfied as appears from the Ameen's reports and the respondent's acknowledgment of having got possession and subsequent claim under Section 15 of Act XIV. of 1859. Under these circumstances the original decree was satisfied, and cannot be revived or re-executed. Were we to hold otherwise, no suit could ever be said to be at an end, and no decree to be finally satisfied.

The appeal is decreed, and the order of the Lower Courts reversed with costs.

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The 13th September 1866.

*Present:*

The Hon'ble J. P. Norman and L. S. Jackson, *Judges.*

**Review of judgment.**

Shumboonauth Barooree and others, *Petitioners.*

*Baboo Roopnath Banerjee* for Petitioners.

A record should always be kept by a Judge of all orders passed by him, rejecting applications for review of judgment.

*Norman, J.*—This case must go back to the Judge of Dacca, to ascertain the true facts and pass such order as may be necessary on the application for review.

In the explanation submitted by him to this Court, the Judge states that, "if an application for review is rejected on application without any notice to the opposite

party and returned to the applicant, no order is written on it."

This practice is in the highest degree irregular and improper. The Judge deprives himself of all check on misrepresentation, such as he supposes to have taken place in the present case, and makes no record of an application of which it is his duty to preserve a memorandum.

*Jackson, J.*—I entirely agree with the observations made by my brother Norman. An application for review of judgment is an application which the law permits parties to make, and on which they are entitled to have an expression of the judicial opinion of the Judge. The practice followed by the Judge of Dacca is not only unfair to the parties, but it is most irregular, and what one may call unbusiness-like to reject an application of this sort, without recording any order upon it.

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The 15th September 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble G. Loch, L. S. Jackson, G. Campbell, and A. G. Macpherson, *Judges*.

**Interest—Jurisdiction—Execution.**

Case No. 249 of 1865.

*Miscellaneous Appeal from an order passed by Moulvie Mahomed Rufiq Khan, Principal Sudder Ameen of Monghyr, dated the 3rd September 1865.*

Mosoodun Lall (Decree-holder), *Appellant*,

*versus*

Bheekaree Singh and others (Judgment-debtors), *Respondents*.

*Mr. R. E. Twidale* and *Baboo Kishen Succa Mookerjee* for Appellant.

*Baboo Debendro Narain Bose* for Respondents.

When a decree is silent as to interest, the Court executing the decree has no power to award interest.

*This case was referred to a Full Bench by Loch and Macpherson, JJ., under the following order:—*

*Referring Order.*—The petitioner in this case held a decree against one Beharee Singh. Another decree-holder, now represented by the respondent, sold the property of the judgment-debtor, and took away the proceeds on the ground that by her exertions certain collusive transfers of the property in question had been removed, and the property had been rendered liable to sale for the debts of the judgment-debtor. The petitioner brought a suit against the successful decree-holder, Joycoomaree, to recover a rateable portion of the sale-proceeds, as under the course of procedure in force previous to the enactment of Act VIII. of 1859 he was entitled to share, and he obtained a decree on 31st July 1857 (page 1366, S. D. R.), which, after deducting the expenses to which Joycoomaree had been put in bringing her successful suit, whereby the obstructions to the sale of the property of Beharee Singh were removed, awarded a rateable share of the remaining sale-proceeds to the petitioner. The sale took place in or about 1850; and, in execution of the petitioner's decree, the Principal Sudder Ameen has awarded a rateable share, with interest up to date of decree to be recovered from the respondents.

The decree-holder, petitioner, now asks this Court to give him interest up to the date of realization, urging that he has been kept out of his money, notwithstanding the decree passed in his favor so far back as 1857. As, however, the decretal order contains no provision for the payment of interest, we think that we cannot in execution give that which is not awarded in the decree. In support of the application, a decision of a Divisional Bench of this Court, present Justice Bayley and Justice E. Jackson, reported in Volume VI., W. R., page 14, Miscellaneous Rulings, Hookum Bebee, appellant, is shown us, in which mesne-profits during the pendency of the suit were awarded, though these were not comprised in the decree. And we find another case reported in page 26, Miscellaneous Rulings, of Volume VI., W. R., before the same Judges, who held that, under the provisions of Section 11, Act XXIII. of 1861, the Court executing the decree can award interest from date of decree to date of payment on the amount decreed, though the decree itself is silent as regards the payment of interest. These rulings are contrary to former rulings of this Court on the same point, to one of which reference is made in the later decision quoted; for this Court has held that in execution nothing can be imported into a decree which must be executed as it stands, and that, if there be any omission to award mesne-profits or interest claimed, or which may accrue during the pendency of the suit, the party asking for the same should apply to the Court which made the decree to amend it. And the reason for following this course is obvious, for there

may have been reasons not set forth in the decree which may have led the Court making it to disallow such claims, and it is impossible for another Court executing the decree to say whether any such reasons did or did not exist. The words of the law (Section 11, Act XXIII. of 1861), which are considered to give authority to Courts executing a decree to award mesne-profits or interest not comprised in the decree, are the following: "or of any mesne-profits or interest which may be payable in respect of the subject-matter of a suit between the date of institution of the suit and execution of decree." These words do not, we think, admit of the interpretation now sought to be put upon them, but relate to something which has been actually decreed, the amount of which cannot be ascertained at the time of passing the decree. The first part of the Section refers to mesne-profits generally, as claimed in the suit. The second part, which contains the words above quoted, refers to mesne-profits and interest from the institution of the suit to the complete execution of the decree; but in either case we apprehend there must be a distinct award for them in the decree, leaving the amount to be settled at the time of execution, and it is only as regards the amount that the Court executing the decree has jurisdiction. As there are conflicting rulings on this point, and we differ from the opinion expressed by the Judges who decided the Miscellaneous cases quoted above, we submit the point for the authoritative ruling of a Full Bench. The question which we refer is whether, if the decree itself be silent as to interest, the Court executing the decree has power to award interest.

*The judgment of the Full Bench was delivered by—*

*Peacock, C.J.*—The point referred for the opinion of a Full Bench by Mr. Justice Loch and Mr. Justice Macpherson is whether, when a decree is silent as to interest, the Court executing the decree has power to award interest.

The circumstances under which the question arose are clearly stated by the Judges who referred it, and they have also pointed out the cases which conflict upon the point.

We have no doubt that, in executing a decree, the Court which executes it has no power to alter or add to it. In many cases a decree may lawfully order amounts which are uncertain to be ascertained in execution. Sections 196 and 197 of Act VIII. of 1859 furnish examples of cases in which the enquiry as to the amount of interest or mesne-profits decreed may be reserved for the Court executing the decree.

If a decree awards a certain amount, for principal with interest thereon, at a certain rate from a certain day to the date of realization, it is not possible for the Court passing the decree to fix the sum payable for interest, as it cannot know on what date the amount will be realized. The period being fixed or capable of being ascertained, for which interest is by the terms of the decree to be allowed, and the rate at which it is to be allowed being also fixed by the decree, it is a mere ministerial duty to ascertain the amount by calculation.

The enquiry into the amount due for mesne-profits is more of a judicial nature. But in both cases, by the express terms of the law, it may be left for the Court which executes the decree to ascertain what the amount is.

But this is a very different thing from leaving it to the Court which executes the decree to discharge the judicial functions of the Court which passed the decree, to the extent of awarding interest or mesne-profits in cases in which the decree is silent in regard to interest or mesne-profits, or of awarding interest or mesne-profits at a higher rate, or for a longer period than is warranted by the decree, or of awarding interest or mesne-profits in cases in which the Court passing the decree has actually disallowed them.

It is said that the power of allowing interest or mesne-profits is delegated by Act XXIII. of 1861, Section 11, to the Court which executes the decree.

That Section enacts as follows: "All "questions regarding the amount of any "mesne-profits which by the terms of the "decree may have been reserved for ad-"justment in the execution of the decree, "or of any mesne-profits or interest which "may be payable in respect of the subject-"matter of a suit between the date of the "suit and execution of the decree, as well "as questions relating to sums alleged to "have been paid in discharge or satisfaction "of the decree or the like, and any other "questions arising between the parties to "the suit in which the decree was passed, "and relating to the execution of the de-"cree, shall be determined by order of the "Court executing the decree, and not by "separate suit, and the order passed by the "Court shall be open to appeal."

b

It appears to us that the only question which is left to be determined by the Court executing the decree is the question of amount. The words are "all questions regarding the amount of any mesne-profits "which by the terms of the decree may "have been reserved for the adjustment in "execution of the decree or of" (that is to say regarding the amount of) "any mesne-"profits or interest which *may* be *payable* "in respect of the subject-matter of the "suit between the date of the suit, and the "execution of the decree, &c., *shall* be de-"termined by order of the Court executing "the decree."

The latter branch of the Section clearly refers to cases in which the payment of mesne-profits or interest are provided for in the decree under Section 196 of Act VIII. of 1859, the former branch to cases under Section 197.

In both cases the mesne-profits are payable within the meaning of Section 11, Act XXIII. of 1861, and the amount only remains to be ascertained according to the principles laid down in the decree. It clearly could not have been intended, by words which convey a discretion to determine all questions regarding the amount of mesne-profits or interest payable in respect of the subject-matter of the suit between the date of the suit and the execution of the decree, to authorize the Court executing the decree to determine, it may be contrary to the terms of the decree, or in the absence of any decision upon the subject, whether interest or mesne-profits were or were not payable at any rate for the period between the date of the suit and the date of the decree.

Such a question is certainly one which would more properly be determined by the Court entrusted, to pass the decree than by the Court authorized to execute it. But it may be said that the Legislature intended to give to the Court executing the decree power to determine, not only the amount of, but the right to, interest or mesne-profits between the date of the decree and the date of execution. But whatever is the power given to the Court with reference to the period between the date of decree and the date of realization, the same power is also given with reference to the period between the date of suit and the date of decree. Nay, further, the questions intended by Section 11, Act XXIII. of 1861, whatever they are, which may be determined by the Court executing the decree, *must* be determined by that Court. The words of the Section are "shall be determined." It could not have been intended to prevent the Court passing the decree from determining as to the legal right of the plaintiff to recover interest or mesne-profits.

But whatever questions *must* be determined by the Court executing the decree cannot be determined by the Court which passes it. This shows that the questions intended are questions of amount only. If the amount is fixed by the decree, no question remains as to it. The Section clearly refers to questions of amount upon the subjects mentioned, which are left open and not determined by the decree.

We are, therefore, of opinion that the question propounded by the Division Bench must be answered in the negative.

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The 15th September 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble G. Loch, L. S. Jackson, G. Campbell, and A. G. Macpherson, *Judges*.

**Appeal to Privy Council—Jurisdiction—Suspension of writ of restitution—Security.**

Rajkissen Singh, *Petitioner*,

*versus*

Baroda Dabee and another, *Opposite Party*.

*Baboo Khetternath Bose* for Petitioner.

*Mr. R. T. Allan* and *Baboos Sreenath Doss* and *Nilmadhub Sein* for Opposite Party.

Plaintiff obtained a decree for possession which was reversed by the High Court on appeal, and restitution of the property was ordered. Plaintiff, having appealed to the Privy Council, applies to be allowed to remain in possession of the property upon the security which he his already given—HELD that the High Court has no power, under Section 4, Regulation XVI. of 1797, to suspend the restitution, and that the defendant was entitled to enforce restitution without giving security.

*This case was referred to a Full Bench by L. S. Jackson, J., under the following order :—*

*Referring order.*—THIS was a rule obtained by Baboo Kally Prosuno Dutt on the part of Rajah Rajkissen Singh, calling upon the opposite party to show cause why the execution of the decree of this Court should not be stayed, pending appeal to England on the petitioner giving security.

The facts were these: Rajah Rajkissen Singh had sued in the Court of the Principal Sudder Ameen of Mymensingh to recover

possession of an estate, the *Shooshong Raj*, and in that suit he obtained a decree. The decree was subsequently reversed by this Court on appeal; but the plaintiff being dissatisfied with the judgment of this Court has made a further appeal to Her Majesty in Council. It appears that, during the pendency of the appeal in this Court, he was permitted to retain possession of the property in dispute, giving security to perform the decree of this Court. After the judgment had been reversed here, he made a further application to the Court below, to be allowed to remain in possession on the security he had already given.

But the Lower Court observed that, as the decree of that Court had been reversed by the High Court of Appeal, and an appeal to the Privy Council had been preferred, it had no longer any jurisdiction to make an order on the matter. The application now being before this Court, Baboo Onookool Chunder Mookerjee appears to show cause, and he contends that this Court has no authority to make an order for taking security in a case like the present. In support of his contention, he refers to the decision of the Officiating Chief Justice and Mr. Justice Shumbhoonath Pundit on the 6th February 1865, which is reported at page 23, Miscellaneous Appeals, 2 Weekly Reporter. The learned Judges in that case laid down that there is no power to make such an order under Section 4, Regulation XVI. of 1797. They observe that "the first Clause of that Section empowers the Court 'to order the judgment passed by them to be carried into execution' 'on taking sufficient security from the party in whose favor the judgment may be passed.' But that Clause does not apply, because in the present case there is no judgment which is to be carried into execution; the judgment of the Lower Court, which would have altered the state of things existing prior to the commencement of the suit, having been simply reversed and annulled by the order of this Court."

With every deference to those learned Judges, it seems to me that there must be some judgment to be carried into execution, because, if there had been no judgment to be carried into execution, the plaintiff, who had executed his original decree, would then have retained possession of the property, and the defendant would not have recovered his costs of this Court, or of the Court below. Consequently it seems to me there was a judgment and also an execution. I am not prepared, as at present advised, to concur with those two learned Judges on that point; and, therefore, I think it necessary to refer the question for the decision of a Full Bench.

Execution is to be stayed on the existing security, until the decision of this question.

*The Judgment of the Full Bench was delivered by—*

*Peacock, C.J.*—Rajah Rajkissen Singh, having sued in the Court of the Principal Sudder Ameen of Mymensingh for possession of part of the zemindaree Mulk Shooshong, obtained a decree, and the decree was executed upon his giving security, under the provisions of Section 36, Act XXIII. of 1861, for the restitution of the property or the value thereof, and for the due performance of the decree of the Appellate Court.

The defendants appealed, and the decree was reversed by the High Court, and the restitution of the property was ordered. The plaintiff, having appealed to the Privy Council, applied to the Court below to be allowed to remain in possession of the property upon the security which he had already given. The Lower Court refused to make any order, observing that, as the decision of that Court had been reversed by a decree of the High Court against which an appeal had been preferred to Her Majesty in Council, it had no longer any jurisdiction. It is said, in the plaintiff's petition to this Court, that the defendants have applied for execution of the decree of the High Court made on appeal. More correctly speaking, they are applying for restitution of the property from which they were ousted under the decree which has been reversed.

The question is whether the case falls within Regulation XVI. of 1797, Section 4; and whether this Court can suspend the restitution upon the security which the plaintiff has already given, or upon his giving fresh security for the due performance of the decree which Her Majesty in Council may think fit to make on the appeal against the decree of reversal; or whether they can compel the defendants to give the like security before they are allowed to enforce restitution.

In support of the contention of the defendants, that this case does not fall within the Section of the Regulation above quoted, the case of Nilkishen Thakoor *vs.* Beer Chunder Thakoor Gossain, decided by the Officiating Chief Justice and Mr. Justice Shumbhoonath Pundit, reported in the 2 Weekly Reporter, Miscellaneous Appeals,

page 23, is relied upon, in which it was laid down that there was no power to make such an order under Section 4, Regulation XVI. of 1797. In that case the Judges said: "The first Clause of that Section empowers the Court to 'order the judgment by "them to be carried into execution' on "'taking sufficient security from the party "'in whose favor the judgment may be "'passed.' But that Clause does not apply, "because in the present case there is no "judgment which is to be carried into execution; the judgment of the Lower Court, "which would have altered the state of "things existing prior to the commencement of the suit, having been simply "reversed and annulled by the order of "this Court."

The learned Judge who has referred this case to the full Bench remarks: "With "every deference to those learned Judges, "it seems to me that there must be some "judgment to be carried into execution, "because, if there had been no judgment to "be carried into execution, the plaintiff, "who had executed his original decree, "would then have retained possession of "the property, and the defendant would not "have recovered his costs of this Court, or "of the Court below. Consequently, it seems "to me there was a judgment, and also an "execution. I am not prepared, as at present advised, to concur with those two "learned Judges on that point; and, therefore, I think it necessary to refer the "question for the decision of a Full Bench."

We are of opinion that the ruling in the case quoted is correct.

Even if the decree reversing the decision of the Lower Court had not contained an order for restitution, the defendants would have been entitled to be restored to the property of which they had been turned out of possession under the decree which was reversed.

A writ of restitution cannot properly be said to be a writ of execution of the decree of reversal, and such a writ is never classed under the head of writs of execution.

If a man is turned out of possession of property under a decree which is afterwards reversed on appeal, it would be very unjust and inequitable to allow the party who obtained possession under that decree to retain possession of the property pending his appeal against the decree of reversal even upon his giving security; it would also be unjust and inequitable to refuse restitution of the property to the party who had been turned out, unless he should give security. It is very just that, where execution of a decree would change the state of things as they existed at the commencement of litigation, the party wishing to enforce that decree should give security, or that the party against whom an existing decree is given should not be allowed to remain in possession of the property decreed against him, pending an appeal against that decree without security. These are the cases intended to be provided for by the Regulation above quoted.

Here there is no decree now in existence against the defendants who were in possession at the time when the litigation commenced, the decree under which they were turned out by the plaintiff having been reversed. Why, then, should the plaintiff retain the defendant's property upon giving security; or why should not the defendants have their property restored to them without giving security?

There being now no decree against the defendants, they ought to be put in the same position as they were in before the decree of the Lower Court was given. This will not be the case if they be required to give security, which they may be unable to do, or if the plaintiff be allowed, upon giving security, to retain possession of that which by the decree of reversal now appears not to be his.

The defendants must be restored without security to all that was taken from them in execution of the decree of the Lower Court. In fact, the plaintiff gave security for such restitution before he was allowed to execute his decree. There is no reason why he should be absolved from such security, because he has thought fit to appeal against the decree of reversal.

As regards costs, if any, either in the Lower or Appellate Court, awarded to the defendants by the decree of reversal, we think that the case comes within the Regulation, and that security may be required either from the one party or the other at the discretion of the Court. In this respect we also agree with the Judges who decided the case above cited. They say, "if the application had been simply for security to the "extent of the decree, so far as it applied "to the costs, we might have acceded to its "prayer."

The case will go back to the Judge who referred it, in order that he may deal with the application so far as it relates to the

costs, if any, awarded to the appellants by the decree of reversal.

*Jackson, J.*—I do not dissent from this decision.

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The 17th September 1865.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble G. Loch, L. S. Jackson, G. Campbell, and A. G. Macpherson, *Judges.*

**Practice—Ex-parte motions.**

*Application for an order of enquiry in the Criminal Department as to an offence alleged to have been committed by Appellant in the Civil Court of the Principal Sudder Ameen of Hooghly.*

Baroda Soondery Dossee, *Petitioner,*

*versus*

Hurry Hur Mookerjee, *Opposite Party.*

*Babooo Peary Mohun Mookerjee* and *Mohendro Lal Shome* for Petitioner.

No one for Opposite Party.

It is not the practice to hear more than one Counsel or vakeel in support of *ex-parte* motions.

*The following were the grounds of the application:—*

*Grounds of Application.*

1. THAT Hurry Hur Mookerjee, having, with a view to defraud my interest in the property he sold to me, falsely stated, in the verified written statement he filed in the above case on the 18th May 1865, that he had sold the property to another person, and not to me, has clearly committed the offence described in Section 24 of Act VIII. of 1859, and Section 193 of the Indian Penal Code.

2. That Hurry Hur Mookerjee, having falsely and fraudulently deposed on oath on the 11th November 1865, in the above case, to the above effect, has committed an offence under Section 193 of the Penal Code.

3. That Hurry Hur Mookerjee, having examined several witnesses in the above case to support his aforesaid false statement, has committed the offence described in Sections 109 and 193 of the Indian Penal Code.

*The case came on for hearing before Bayley and Campbell, JJ., by whom the following orders were passed:—*

*Campbell, J.*—We see no reason whatever for granting this application which the Principal Sudder Ameen has already rejected.

Our judgment shows us nothing to lead us to suppose that the case is one calling specially for public example, and we will not interfere. Application rejected.

*Bayley, J.*—At this stage the pleader for the appellant, Peary Mohun Mookerjee, as second pleader, stated he wished to be heard, and cited a decision from the Weekly Reporter. He then wished to be heard still further on the facts as shewn in the decision of the first Court which, he argues, will prove the necessity of our referring to the Criminal Court for enquiry.

Mr. Justice Campbell, considering that the case has been sufficiently gone into by the first pleader, who was fully heard and sat down, declines to hear the second pleader.

I think he must be heard, but on the responsibility as to improper use of the Court's time.

On this point let the papers be laid before the Chief Justice at once.

*By the direction of the Chief Justice, the case was ordered to be laid before the Full Bench then sitting; and the following order of the Full Bench was delivered by—*

*Peacock, C.J.*—It is not the practice to hear more than one Counsel or vakeel, in support of original motions or applications against which no cause is shown in the first instance.

*The case then went back to the Division Court, which originally heard it, and the following final order was passed by—*

*Bayley, J.*—Referring to my previous minute to the effect that I thought a second pleader should be heard in this motion, a Full Bench have now unanimously ruled that a second pleader should not be heard.

It, therefore, only remains for me to say that I concur in the above opinion of Mr. Justice Campbell on the merits of the motion. But I would add that, as our judgment does not express any view of an offence having been committed, it would be quite an improper exercise of our judicial discretion to order enquiries in the Criminal Department on the basis of our judgment.

Then it is pressed upon us that, as the views expressed in the judgment of the

former Principal Sudder Ameen indicated that there were grounds for supposing that there had been such offence, we should act upon the views of that *other* Court, and direct enquiry in the Criminal Department. But the law is quite clear that *the* Court, which expresses the opinion that the offence may have been committed *before it*, should order the enquiry in the Criminal Department; and it would be then, to my mind, quite illegal (even if the same Principal Sudder Ameen is no longer in the Lower Court) for us to order, upon views expressed *in the Principal Sudder Ameen's Judgment*, an enquiry into an offence as to the fact of the existence of which *our* judgment is quite silent.

This being my opinion, I would reject this application.

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The 22nd September 1866.

*Present:*

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

**Judgment (Mode of recording).**

Case No. 466 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Patna, dated the 13th April and 19th June 1866.*

Syud Lotf Ali Khan (Decree-holder), *Appellant,*

*versus*

Syud Velaet Ali Khan and others (Judgment-debtors), *Respondents.*

*Baboo Mohendra Lal Shome* and *Moulvie Syud Murhumut Hossein* for Appellant.

*Moonshee Ameer Ali Khan Bahadoor* for Respondents.

Directions as to the manner in which a Judge should write his judgment.

WE regret that we are compelled to remand this case, owing to the careless and informal manner in which it has been disposed of by the Judge. We regret to have to call the attention of a Judge of Mr. Ainslie's standing and experience to Sections 184 and 185 of Act VIII. of 1859. There is no English decision in the Judge's hand-writing, as appears by the Judge's reply to a question forwarded to him by the Court, and we cannot take into our consideration any vernacular proceedings or summary orders rejecting petitions, and giving no reasons nor any clear statement of the dispute and the points decided.

The Judge will take into his consideration the report of the Ameen on this long-standing quarrel; he will hear the arguments or objections advanced by either party for or against that report. He will state clearly the points for his decision, and what his decision may be on each disputed point, and whether he adopts the report in part and whole, and why. He will in short write a clear and intelligible judgment as is or ought to be done in all such cases, and he will leave any dissatisfied party to prefer an appeal if he should think fit to do so.

The appeal is decreed, and the case is returned to the Judge for that proper trial and decision, which it has not yet received.

Costs will follow the ultimate result.

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The 25th September 1866.

*Present:*

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

**Limitation—Execution—Admission.**

Cases Nos. 535 and 536 of 1866.

*Miscellaneous Appeals from an order passed by the Deputy Commissioner of Kamroop, dated the 10th May 1866, reversing an order passed by the Moonsiff of Burpettah, dated the 7th February 1866.*

Joteeram Doss (Decree-holder), *Appellant,*

*versus*

Shaikh Huruf and another (Judgment-debtors), *Respondents.*

*Baboo Chunder Madhub Ghose* for Appellant.

*Baboo Motee Lal Mookerjee* for Respondents.

An admission by a judgment-debtor gives the creditor a fresh start, and avoids the limitation which might otherwise run against execution.

WE are shewn precedents of this Court which rule that an admission by the debtor gives the creditor a fresh start, and avoids the limitation which might otherwise run against execution (*see* Weekly Reporter, Volume III., page 27, Volume V., page 31, and Volume VI., page 12, Miscellaneous cases). Following these precedents against which no adverse decision has been quoted, we reverse the orders of the Deputy Commissioner and restore those of the Moonsiff. The decision of the Lower Appellate Court, we observe, is very brief and obscure, and it gives no reasons for shewing the Moonsiff to be wrong in ruling that the decree-holder

might have filed his application on the 31st of July 1865, but that, the Court being then closed, he could not file it until the 24th of August folllowing, when he was in time.

Appeals decreed with costs.

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The 25th September 1866.

*Present:*

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

**Suit for Minor (by relative without Certificate).**

Case No. 537 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 8th May 1866.*

Mussamut Luchmee Koonwar, *Appellant,*

*versus*

Bhugwan Doss, *Respondent.*

*Mr. R. T. Allen* for Appellant.

*Mr. R. E. Twidale* for Respondent.

Where there are sufficient grounds for permitting it, a Court may, under Section 3, Act XL. of 1858, permit a relative to bring a suit for the benefit of a minor without obtaining a certificate.

We see no grounds for interfering with the order passed by the Judge. If there are sufficient grounds for permitting it, the Court may, under the provisions of Section 3, Act XL. of 1858, permit a relative of a minor to bring a suit for the benefit of the minor, though such relative have not obtained a certificate under that law. The appeal is dismissed with costs.

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The 28th September 1866.

*Present:*

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

**Sale in execution—Decree against representative—Irregularity—Section 256, Act VIII. of 1859.**

Cases Nos. 835 and 841 of 1865.

*Applications for review of judgment passed on the 30th January 1865, in Miscellaneous Appeals No. 306 of 1864 and No. 384 of 1865.*

Chowdhry Shaik Wahed Ali (Decree-holder), *Appellant,*

*versus*

Musst. Jumaye (Judgment-debtor), *Respondent.*

*Messrs. R. V. Doyne* and *R. E. Twidale,* and *Moonshee Ameer Ali* for Appellant.

*Mr. C. Gregory* for Respondent.

A decree can be enforced against the representative of a deceased person only to the extent of the property inherited by the former from the latter. An objection by the representative, that he has taken nothing by inheritance, however valid, is not an irregularity contemplated in Section 256, Act VIII. of 1859, and must be raised before the sale in execution of the decree has taken place; otherwise, the objector must seek to set aside the sale by suit in the Civil Court.

Two preliminary objections to hearing this application are raised by Mr. Gregory, the pleader for the opposite party, to the effect that the application is beyond time, and no good cause for the delay in making it is assigned; and, *secondly*, the application being after time should be on full stamp.

As the application for review has been brought in compliance with the suggestion made in the judgment of this Court, dated 21st September 1865, and was filed on 6th December 1865 within three months from the date of that judgment; and, as the Court think from the litigation which has been going on that there was sufficient ground for delay, the Court reject the first objection and also the second, as this is a miscellaneous appeal, the proper stamp for which is one of rupees 2.

To have the case clearly before us, it is necessary to take down the dates connected with the litigation. In 1861 Wahed Ali brought an action, and obtained a decree for possession and mesne-profits against the heirs of Waris Ali, among whom was Mussamut Jumaye, one of the parties now before the Court. The judgment of the first Court against the heirs of Waris Ali was confirmed by this Court on 10th July 1863. The property of the defendant Jumaye was attached and sold in execution on 8th October 1863; and on the same date she filed in this Court an application for a review of the judgment passed on 10th July. This application was rejected on 2nd December 1863, on the ground that the point then raised in the application was not taken when the case was before the Court. The point urged by the petitioner was to the effect that Jumaye had not succeeded to any property of Shaikh Waris Ali, and, as his heir, could not be held liable for the wasilat decreed in favor of the plaintiff.

When the property claimed by Jumaye was attached, she filed a petition of objection on 9th September 1863, stating that she and other appellants had been released from the plaintiff's claim for mesne-profits, but

the Judge on 5th October 1863 passed an order rejecting the application, on the ground that her name did not appear among those released by the High Court, "that her "share in the estate amounts to 18*d.* 6*c.* "12*b.*, she cannot be charged wasilat "on that share, but she is liable for her "share of wasilat on those shares decreed, "*viz.*, her share in 10*as.* 8*d.* 14*c.* 15-12, she "being one of the heirs of Waris Ali." From this order she preferred an appeal to this Court, and on 8th July 1864 it was held that Jumaye's liability under the decree, as one of the heirs of Waris Ali, extended only to such property as she may have inherited or received as such heir. On 27th November 1863, Jumaye filed a petition, objecting to the sale on account of certain alleged irregularities in the sale-proceedings, and that she was not liable, not having inherited from Waris Ali. Her objections were disallowed by the Judge on 15th March 1864, and from this order she preferred an appeal to the High Court, dated 18th June 1864. The Court, on 30th January 1865, held that no irregularities in proclaiming or conducting the sale had taken place; but, as the High Court had ruled on 8th July 1864 that the petitioner could be made liable only to the extent of the property she inherited from her father, the case was remanded to the Judge for the determination of the following point: Did Jumaye inherit from her father, and, if so, to what extent? and her liability would be in proportion. On 27th May 1865, the Judge found that Jumaye had inherited no property from her father, and he reversed the sale. An appeal was then filed by the decree-holder, which was dismissed on 18th September 1865, with this order that, under the circumstances, the proper course for the appellants was to apply to the High Court for a review of its order of 30th January 1865, for, were the Court then to reverse the decision of the Lower Court, it would virtually be setting aside its own order. The present application for review has been made in consequence.

In the judgment of 15th March 1864, the Judge rejected the application to set aside the sale on two grounds: *1st*, that there was no proof of irregularity; *2nd*, that, though under Section 211 Mussamut Jumaye was responsible only to the extent of the property inherited from Waris Ali, this was no ground for interfering with a sale actually made under Section 256. By some oversight this second point was not brought before the Court when the appeal was heard on 30th January 1865, or, if it were alluded to at all, it certainly was not pressed as it should have been. When, however, the decree-holder came up in appeal from the order of the Judge of 27th May 1865, by which the sale was reversed, this point was taken up and very strongly pressed upon the Court; but, as the Judge's decision from which the appeal was preferred was clearly passed in conformity with the instructions given him by this Court in their order of 30th January 1865, the Court felt that they had not grounds for reversing that order so long as the judgment of the 30th January 1865 continued in force. The opposite party has now been called upon to show cause why this order should not be set aside.

It is urged upon the part of Jumaye that, as the decree was passed against her in her representative capacity as heir of her father Waris Ali, the Court, in executing the decree, is bound to proceed under the provisions of Sections 203 and 211, Act VIII. of 1859; that, though, as found by the Courts, no irregularity in the proclamation or conduct of the sale is proved to have taken place so as to render the sale liable to reversal under the provisions of Section 256, yet the sale is altogether illegal and a nullity, for it has been distinctly found by the Judge that she inherited no property from Waris Ali, and it is only to the extent of such property, supposing her to have inherited and misappropriated it, that she could be held liable.

On the other hand, it is urged that the objection now taken by Jumaye that she inherited nothing from her father was never made till after the sale took place; that, however valid the objection might be, unless it were urged before the sale, it could be of no avail to her, for Section 256 of Act VIII. of 1859 prescribed the grounds on which alone a sale could be set aside, and the objection now taken was not one of those irregularities which would entitle Jumaye under Section 256 to ask the Court to set the sale aside. In her petition of the 9th September 1863 objecting to the attachment of the property, she did not raise this objection, and it was only in her application for review of the Court's judgment of the 10th July 1863, filed by her pleader on 8th October 1863, and rejected by the Court on 2nd December 1863 that she brought forward her present objection to the execution of the decree against herself.

We think the objection taken by Jumaye to the sale of her property is certainly a valid one, but it was necessary that such objection should have been raised before the sale took place, or, if raised, it should have been made in good time (Section 247), otherwise it could not be attended to, and the objector must seek his remedy in the Civil Court. It is true that, in the judgment of this Court, dated 8th July 1864, it is said that Jumaye has *all along* put forward this contention; but with the whole record before us, the pleader for Jumaye has failed to show that it was urged before the sale took place except once in her answer in the regular suit, when no issue was raised upon it. We agree with the learned Counsel for the petitioner that this objection, however valid, is not an irregularity contemplated in Section 256 of Act VIII. of 1859; that consequently the sale which took place before this objection was properly raised cannot be legally set aside and must be confirmed; and that the only course open to Jumaye to set it aside is by suit in the Civil Court. Under this view of the case, we amend our order of the 30th January 1865, and the order of the Judge of the 27th May 1865, and the order of this Court dated the 21st September 1865, and we restore and confirm the order of the Judge of 15th March 1864, rejecting the application of Jumaye to set aside the sale, and we award costs to the petitioners in the appeal No. 306 of 1864 disposed of by this Court on 30th January 1865, as well as the costs of the present application. The parties will bear their own costs of the intermediate proceedings.

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The 28th September 1866.

*Present:*

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

**Limitation—Execution—Jurisdiction.**

Case No. 517 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Tirhoot, dated the 30th June 1866.*

Luchmun Suhoy and others (Judgment-debtors), *Appellants,*

*versus*

Bhugwan Chunder Dutt (Decree-holder), *Respondent.*

*Mr. C. Gregory* and *Baboo Dwarkanath Mitter* for Appellants.

*Baboo Mohesh Chunder Chowdry* for Respondent.

When execution is barred by limitation, subsequent proceedings taken by the decree-holder, without objection on the part of the debtor, cannot get rid of the bar of limitation and revive the decree.

Objections such as limitation, which practically affect the jurisdiction of the Court, should be tried by the Court executing the decree.

THIS was an application for the execution of a decree of the Patna Court in force at the time of the passing of Act XIV. of 1859. The first attempt to execute it was made on 2nd April 1861, when the decree-holder presented a petition which was struck off on the 20th September following. On 25th March 1863, the petitioner applied for a certificate to enable him to execute the decree in zillah Tirhoot; and, after calling for a report, a certificate was granted on the 16th June 1863, and on 14th August property belonging to the debtor in zillah Tirhoot was seized. On 7th October the debtor appeared and asked for time to apply to the Patna Court, by which the decree had been passed, to set it aside as fraudulent. No order was passed on this petition till 27th June 1864, when it was rejected, and an appeal to the High Court was dismissed on 10th March 1865. In the meantime, as the plaintiff took no further steps to execute his decree, the execution-case was struck off on 22nd December 1864. The present application was filed on 22nd November 1865, and the Judge overruled the plea of limitation urged by the debtor, on the ground that he had neglected to plead it on a former occasion, and had allowed the decree-holder to keep the decree alive, and he therefore directed execution to proceed.

As the decree-holder did nothing effective till March 1863, execution was then barred by limitation, and the Court executing the decree should then have refused the certificate. When execution is barred by limitation, subsequent proceedings taken by the decree-holder, without objection on the part of the debtor, cannot, as ruled by this Court in several cases, get rid of the bar of limitation and revive the decree. But it is urged for the respondent that, as this was a decree sent to another Court for execution, objections to the execution could only be made under Section 280 of the Code of Procedure in the Court which passed the decree

and not in that which executed it. But we find that it was ruled by a Division Bench on 31st January 1866 that objections such as limitation, which practically affect the jurisdiction of the Court, could and should be tried by the Court executing the decree and from the opinion expressed in this judgment, we see no reason to differ. As, therefore, the decree-holder has failed to show us that any effective steps to keep the decree alive were taken till March 1863, when he was clearly out of time, we think that further execution is barred; and the order of the Judge must be reversed. The appeal is decreed with costs.

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The 29th September 1866.

*Present:*

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

**Special Appeal—Sale—Section 257, Act VIII. of 1859—Powers of High Court (as a Court of revision).**

Case No. 414 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Purneah, dated the 15th June 1866, modifying an order passed by the Principal Sudder Ameen of that District, dated the 15th June 1865.*

Abdool Kureem (Decree-holder), *Appellant,*

*versus*

Ooghun Lal (Judgment-debtor), *Respondent.*

*Messrs. C. Gregory* and *R. E. Twidale* for Appellant

*Baboo Pearee Lal Roy* for Respondent.

A special appeal will not lie from an order passed under Section 257, Act VIII. of 1859, confirming a sale of immoveable property in execution of a decree.

The High Court cannot interfere under Section 35, Act XXIII. of 1861, where a subordinate Court has not exceeded its jurisdiction.

*Seton-Karr, J.*—It is urged by the respondent that there is no appeal in these cases under Section 257 of Act VIII. of 1859, but Mr. Gregory for the appellant has endeavoured to show that there is an appeal under that Section, as also that, even if an appeal be barred by that Section, this Court can interfere under Section 35, Act XXIII. of 1861.

As regards the *first* point, I have myself no doubt whatever that no appeal lies under Section 257. This has been already ruled by the Full Bench at pages 83-4 of the Special Number of the Weekly Reporter, and, indeed, it is not easy to see how the words of the Section, "if appealed from, then the order passed on appeal, shall be final," can bear any other meaning, *viz.*, that there is no further appeal. The same interpretation has been put on these very words, when they occur in Section 378, by the majority of the Full Bench in regard to reviews. *See* Ruling, page 93, Volume V., Weekly Reporter.

As regards the *second* point, Mr. Gregory relies on the Full Bench Ruling of the 31st of August 1866, which lays it down that our Court can interfere under Section 35, Act XXIII. of 1861, whenever a subordinate Court exercises a jurisdiction which it has not, or goes beyond its jurisdiction.*

Mr. Gregory has endeavoured at great length to show that the Judge has gone beyond the jurisdiction given him in Section 256, in finding that the sale of the 6-pie share is irregular, because it is clear that no second proclamation is necessary, and that, therefore, no material irregularity can have been committed. *Ergo*, he contends, the Judge has considered facts not contemplated by the law, and has gone beyond his jurisdiction in reversing the sale, for the sale could only be reversed on the ground of a material irregularity in publishing or conducting the sale.

These arguments appear to me to amount to an ingenious bit of special pleading, and to nothing more. The case does not fall within the view of the ruling of the Full Bench of August last. The Judge had certainly jurisdiction. He has lawfully exercised, and he has not gone beyond it, though he may have been wrong in holding that a second proclamation for the attachment of the 6 pies was necessary. But, granting this, the error of the Judge, if any, would merely be that he has taken a wrong view of the case. He is not, to my thinking, and as I read his judgment, shewn to have gone beyond the jurisdiction vested in him to decide the case. Mr. Gregory's contention, if accepted, would strain the law beyond the intention of its framers, and would lead to no satisfactory results.

Even if the Judge be wrong, the judgment-holder can take out his execution again.

I would dismiss the appeal, as untenable by us, with costs.

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* *See* Vol. 6, Miscellaneous Rulings, p. 77.

*Loch, J.*—I agree with my colleague in thinking the reasons urged by Mr. Gregory in support of the admission of the appeal to be untenable. Mr. Gregory asks us to read the words in Section 257 "and such order unless appealed from, and, if appealed from, then the order passed in the appeal shall be final" with the following and closing words of the Section, and urges that the word "final" in this place does not mean finality as regards appeals, but finality in regard to a fresh action. He does not, however, deny that the words "the judgment shall be final" used in Section 325, and similar words used in Section 378, prohibit an appeal. And it may be observed that, in Section 257, the word "final" is used twice, and, if the closing words of the Section are to be read in connection with the one, they should be so with the other. Now, it is not pretended that the words "if the objection be allowed, the order made to set aside the sale shall be final" mean "final" only in regard to a fresh suit, and not final as regards an appeal; and it is difficult to perceive why the same word, in such close proximity, should have two diverse meanings; the one meaning finality as to appeal, the other meaning finality as to another suit but a right of appeal. If further appeal were intended, it is remarkable that the Legislature did not make use of terms such as are used in Section 231, "The decision passed by the Court shall be subject to appeal under the rules applicable to appeals from decrees." Though this question was not immediately before the Full Bench, when it pronounced the judgment reported at pages 83-84 of the Special Number of the Weekly Reporter, yet the reasons then given for holding that the word "final" meant that there was no special appeal in such cases, are quite applicable and may be adopted in the present case.

The second point, that the Court is empowered to interfere under Section 35, Act XXIII. of 1861, because the Judge has exceeded his jurisdiction, cannot be supported. The Judge has formed an opinion of what the law requires to be done, and has passed judgment accordingly. His view of the law may be incorrect, but, if he has committed such error in law, I do not see that he has necessarily exceeded his jurisdiction. Were the view taken by the pleader correct, every erroneous view of the law would be an exceeding of jurisdiction.

Under these circumstances, I agree with my colleague in thinking that the appeal is inadmissible, and reject it with costs.

The 29th September 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, *Judge.*

**Mookhtears (Admission of)—Rule 39—Limitation.**

*Petition against an order passed by the Magistrate of Maldah refusing to enrol the petitioner as a Mooktear under the provisions of Act XX. of 1865.*

Mr. H. C. Joachim, *Petitioner.*

There is no limitation of time for the grant of a certificate by a Judge under Rule 39 of the Rules for the admission of Mooktears.

*Peacock, C.J.*—It appears to me that there is no limitation which would prevent the Judge of Dinagepore from granting a certificate now under Rule 39 of the Rules for the admission of Mooktears, if he considers that the applicant is a proper person and properly qualified. Circular Order No. 15 of 20th April last, para. 3, is not a limitation of the time for exercising the power conferred upon the Judges under Rule 39 above mentioned.

*Jackson, J.*—I am of the same opinion.

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The 29th September 1866.

*Present:*

The Hon'ble L. S. Jackson, *Judge.*

**Appeal to Privy Council (Recall of order admitting.**

*Petition praying for a review of an order admitting an appeal to the Privy Council, and for the rejection of the appeal in accordance with the decision of a Full Bench.*

Woomatara Debea, *Petitioner.*

*Baboo Opprokash Chunder Mookerjee* for Petitioner.

The High Court cannot, by reason merely of a different view of the law subsequently taken by a Full Bench, recall an order admitting an appeal to the Privy Council.

The appeal having once been admitted, the Court cannot, by reason merely of a different view of the law since taken by a Full Bench, recall the order which it has made. This application must be refused.

The 3rd December 1864.

*Present :*

The Hon'ble L. S. Jackson, *Judge.*

**Jurisdiction (of High Court)—Appeal to Privy Council (Re-admission of).**

Mussamut Bolakun, *Petitioner.*

*Baboo Ashootosh Dhur* for Petitioner.

The High Court has no authority to re-admit an appeal to the Privy Council which has once been dismissed for default.

I do not consider, nor has the petitioner shown, that the Court has any authority to re-admit an appeal to the Privy Council which has once been dismissed for default.

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The 3rd December 1866.

*Present:*

The Hon'ble L. S. Jackson, *Judge.*

**Jurisdiction (of High Court)—Registration.**

Jugti Sahoo and another, *Petitioners.*

*Baboo Mohinee Mohun Roy* for Petitioners.

The High Court refused to express any opinion on a petition complaining of the refusal of the Deputy Commissioner of Hazareebaugh to enforce a bond specially registered under Act XVI. of 1864, and intimated that the petitioner's proper course was to appeal to the Judicial Commissioner, and if dissatisfied with his order, to come up in special appeal to the High Court.

THIS is an application by Baboo Mohinee Mohun Roy on behalf of Jugti Sahoo in respect of a bond specially registered under Act XVI. of 1864, which bond the petitioner is said to have presented to the Deputy Commissioner of Hazareebaugh, with a view to its being enforced under the provisions of Section 52 of the Act cited. The Deputy Commissioner, it is stated, before making any order in the matter, made a reference to his immediate superior, the Judicial Commissioner of the Province; and the Judicial Commissioner, entertaining an opinion adverse to the application of the petitioner, communicated that opinion to the Deputy Commissioner, who consequently refused to enforce the bond. The petitioner now desires this Court to interfere in a manner somewhat similar to that adopted by the Commissioner, that is, to express its opinion, and in that way to influence extra-judicially the action of the Judicial Commissioner.

It appears to me that this would not be a proper course for this Court to take. The petitioner, whose application for the enforcement of the bond has been refused, is, it seems to me, in the position of a decree-holder, whose application to execute his decree has been dismissed or thrown out of Court. The petitioner's proper course, if he is dissatisfied with that order, is to appeal to the regular appellate tribunal against the order of the Deputy Commissioner; and if he obtain no relief from that tribunal, he should then come up, in the usual course, by way of special appeal to this Court.

It appears to me therefore that this application, in its present shape, must be refused.

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The 4th December 1866.

*Present :*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Interest—Relinquishment—Instalments.**

Case No. 383 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Beerbhoom, dated the 16th March 1866, affirming an order passed by the Principal Sudder Ameen of that District, dated the 31st October 1865.*

Mohanund Mojoomdar (Judgment-debtor), *Appellant,*

*versus*

Rajah Purtap Chunder Singh (Decree-holder), *Respondent.*

*Baboo Roopnath Banerjee* for Appellant.

*Babbo Dwarkanath Mitter* for Respondent.

If a decree-holder gives up a portion of his claim and verbally agrees to receive the remainder by instalments, he does not thereby give up interest to which he is entitled under the decree.

*Loch, J.*—THE only objection taken before us is that the decree-holder claims interest, which, under the terms of the verbal agreement by which he was to receive a portion of the money due under the decree

by instalments, he is not entitled to. We see no grounds for interfering with the order passed below; for if the decree-holder gave up a portion of his claim, and verbally agreed to receive the remainder by instalments, he did not thereby give up interest to which he is entitled under the decree. The appeal is dismissed with costs.

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The 4th December 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Procedure—Benamee.**

Case No. 567 of 1866.

*Miscellaneous Appeal from an order passed by Mr. H. B. Lawford, Judge of Jessore, dated the 2nd August 1866.*

Omesh Chunder Roy, *Appellant,*

*versus*

Bibee Ashrufoonissa and another, *Respondents.*

*Baboos Sreenath Doss* and *Bungshee Dhur Sein* for Appellant.

No one for Respondents.

*A* purchased *B's* rights at a sale in execution of a decree of a Civil Court, but found the lands in the possession of *C*, a purchaser at a sale by the Collector's Court. *A* prayed to be put in possession summarily, alleging *C* to hold merely benamee for *B*.—HELD that *A* could not proceed summarily, but must bring a regular suit.

*Macpherson, J.*—IT appears to us that, whether under Sections 227 and 228 of the Civil Procedure Code, or Section 269, the Lower Court has acted rightly, and that the proper course for the appellant is to bring a regular suit to establish his rights.

The appellant, having purchased the rights of Ashrufoonissa in certain lands at a sale in execution of a decree of the Civil Court, finds one of the respondents in possession, the latter having purchased at a sale in the Collector's Court, and having been put in possession by that Court. The appellant's case is that the respondent in question holds merely *benamee* for Ashrufoonissa, and therefore that his title is worthless as against appellant. That is matter for a regular suit, and cannot be disposed of summarily on the present application.

The appeal is dismissed.

The 5th December 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Sale—Section 256, Act VIII. of 1859.**

Case No. 554 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Backergunge, dated the 28th July 1866, reversing an order passed by the Moonsiff of that District, dated the 12th May 1866.*

Ishan Chunder Dutt (Decree-holder), *Appellant,*

*versus*

Mothooranath Doss (Judgment-debtor), *Respondent.*

*Baboos Romesh Chunder Mitter* and *Nil Monee Sein* for Appellant.

No one for Respondent.

An application for the reversal of a sale, made after its confirmation and after the expiry of 30 days from the date of sale, is inadmissible under Section 256, Act VIII. of 1859.

*Loch, J.*—THIS application for the reversal of the sale was made several days after the sale had been confirmed, and after the period of thirty days from the date of sale had expired. We think, therefore, that the debtor was not entitled to be heard under Section 256, Act VIII. of 1859. We reverse the order of the Judge with costs.

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The 6th December 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Decree (Amendment of)—Appeal—Review.**

Case No. 625 of 1866.

*Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Patna, dated the 11th August 1866.*

Mussamut Busseerun (Objector), *Appellant*,

*versus*

Mussamut Alfun (Decree-holder) and Mussamut Buzlun (Judgment-debtor), *Respondents*.

*Baboos Kishen Kishore Ghose* and *Greesh Chunder Ghose* for Appellant.

No one for Respondents.

**An appeal will not lie against an order for execution merely on the ground that there is an error in the decree, and that the decree should have been in terms other than it is.**

*Macpherson, J.*—THE decree in this case is against the defendant (appellant) personally. She appeals against an order for execution which has been issued against her personally, on the ground that the decree is wrong, having been by mistake drawn up against her personally, instead of as representative of her late father Ahmed Ali. It may be, and very probably is, as she contends, that the decree has been carelessly drawn up, and that the Court which passed the judgment did not mean to render her personally liable. But this is a matter which we cannot interfere with, in the form in which it is now brought before us. If the decree is wrongly drawn up, it may be set right by the Court which passed it, on an application being made for a review of judgment in order to correct the error.

The appeal is dismissed with costs.

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The 6th December 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges*.

**Certificate (under Act XL. of 1858)—Will.**

Case No. 574 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Backergunge, dated the 28th July 1866.*

Nund Coomar Gungopadhya, *Appellant*,

*versus*

Rakhal Chunder Roy and others, *Respondents*.

*Baboo Romesh Chunder Mitter* for Appellant.

*Baboo Dwarkanath Mitter* for Respondents.

**A Judge is not precluded, by reason of a will and the existence of executors under the will who have taken out certificate under Act XL. of 1858, from enquiring into a complaint against the executors.**

*Loch, J.*—THE pleader for the respondents states that he is unable to support the judgment of the Lower Court. We think that the Judge is in error in supposing that, by reason of the will and the existence of executors under the will who have taken out certificate under Act XL. of 1858, that he is precluded from enquiring into this case. The terms of Section 21 are general, and we think the Judge should examine the will, and also take evidence as to the truth of the complaint made by the petitioner against the executors. We remand the case for the purpose.

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The 7th December 1866.

*Present:*

The Hon'ble L. S. Jackson, *Judge*.

**Security for costs.**

Hufazutoollah Chowdry (Respondent), *Petitioner*,

*versus*

Humeedhur Rohman (Appellant), *Opposite Party*.

*Baboo Mohinee Mohun Roy* for Petitioner.

*Mr. R. T. Allan* for Opposite Party.

*Quære.*—Whether, in a case in which the appellant is not residing out of the British territories in India, the High Court has authority to demand security for costs from the appellant after the issue of summons, *i. e.*, notice of the appeal.

THIS was a rule by Hufazutoollah Chowdry, in accordance with an order passed by Mr. Justice Norman calling upon the appellant Humeedhur Rohman to show cause why he should not be required to give security for costs.

Mr. Allan appears on behalf of the appellant, and has shown cause.

The questions as it appears to me, which have to be considered in dealing with this application, are these: *first*, whether the

Court has authority to demand security for costs from the appellant (the case not being one in which the appellant is residing out of the British territories in India) after the issue of summons, *i. e.*, notice of the appeal; *secondly*, whether this application has been made within a reasonable time; *thirdly*, whether the respondent, by his appearance and appointing vakeels generally to defend the appeal, has not waived any right which he might have to call upon the appellant to furnish security; and, *fourthly*, whether any case for demanding such security has been made out.

On the *1st* point I confess that I have considerable doubt; and, if it were necessary expressly to decide the point, I am inclined to think that I should refer it for the decision of a Full Bench, because it has been pointed out to me that a case has already been determined, and security been taken by a Bench of this Court in circumstances very like those of this case. But it is not necessary to decide this point in the present case, for, on the *2nd* point, it appears to me that this application has not been made within a reasonable time. The appeal was preferred to this Court on the 7th May. The 11th August was the date ultimately fixed for hearing the appeal. The respondent actually appeared on the 13th June. He appoints, by the vakalutnamah filed on that day, several of the vakeels of this Court for the purpose of defending the appeal generally; and, by so doing, he unquestionably allowed the appellants to believe that it was his intention to defend the appeal upon its merits. It was not until the 20th August (2 months and 7 days later) that this application was put in. The case decided in the Privy Council, 7 Moore, p. 431, (case of Wise *vs.* Juggobundhoo Bose) seems to show that the Judicial Committee of the Privy Council favored the contention of the appellant's Counsel in that case that, by such conduct, the respondent had in fact waived his right, if he had any, to demand security for costs. I doubt very much whether, in such circumstances as this, even if a *primâ facie* ground for demanding security were made out, the defendant would be entitled to insist upon it.

But, beyond that, it appears to me perfectly clear that, in this case, no good ground is made out for demanding security for costs. I observe it stated in the petition that the suit in this case was for Rs. 47,220, and the Court has given a decree to the plaintiff for Rs. 1,410. That shows that the suit was not altogether groundless. Then, again, documents have been filed which show that the appellant (plaintiff) has mortgaged certain portions of this property. But it is not shown either that these properties have been mortgaged to the extent of their full value, or that the plaintiff (appellant) has no other property, or is unable to pay the costs of this appeal if unsuccessful.

It appears to me, therefore, irrespectively of the first point on which I have intimated a doubt, that this is not a case in which the appellant should be called upon to furnish security for costs.

The rule will therefore be discharged.

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The 8th December 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Costs.**

Cases Nos. 601 and 606 of 1866.

*Miscellaneous Appeals from an order passed by the Judge of Mymensingh, dated the 7th July 1866, affirming an order passed by the Officiating Principal Sudder Ameen of that District, dated the 8th December 1865.*

Horo Moyee *alias* Horo Monee Debia and another (Decree-holders), *Appellants,*

*versus*

Ram Kishore Acharjee (Judgment-debtor) and Bhoobun Moyee Debia Chowdrain (Objector), *Respondents.*

*Baboos Romesh Chunder Mitter* and *Mohineè Mohun Roy* for Appellants.

*Baboo Sreenath Doss* for Respondents.

*A*, under a decree against *B*, took possession of *B's* estate and continued a litigation which had been commenced by *B's* manager and in which he was unsuccessful and charged with the costs of suit. *B* meanwhile, having appealed to the Privy Council, obtained a decree restoring her to possession of the estate.—HELD that *A* could not recover the costs he was charged with from the estate.

*Loch, J.*—THE suits to which these execution-cases relate were instituted by a manager appointed to take charge of the estate of Bhoobun Moyee Debia, whose right to the said estate was at the time contested by Ram Kishore Acharjee. Ram Kishore Acharjee succeeded in obtaining a decree against Bhoobun Moyee; and under that decree, having taken possession, accepted the acts of the manager, and carried these cases up in appeal to the High Court, where

he was defeated and charged with the costs of suit. In the meantime Bhoobun Moyee, having appealed to the Privy Council, obtained a decree restoring her to possession of the estate, and Ram Kishore now prays that he may be relieved of the costs with which he has been charged in these two cases, and that they may be charged to the estate of Bhoobun Moyee; and the pleader, in support of his application, quotes a decision reported at page 1, Volume 1, Weekly Reporter, Miscellaneous, in which the costs incurred by a manager *bonâ fide* were charged to the estate. We think that the position of a manager appointed by order of a Court, and that of a party found to be wrongly in possession as Ram Kishore, was declared to be by the judgment of the Privy Council, are very different. Ram Kishore, on obtaining possession, took up the cases, and carried on the appeals, and was made liable to the costs. He cannot, we think, now seek to make the estate, of which he was wrongly in possession, liable for those costs, on the ground that, if he had succeeded, the estate would have benefited. We dismiss these appeals with costs.

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The 10th December 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Sale in Execution (Reversal of)—Section 286, Act VIII. of 1859.**

Case No. 596 of 1866.

*Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Bhaugulpore, dated the 2nd June 1866.*

Mussamut Parbutty (Judgment-debtor), *Appellant,*

*versus*

Girdharee Lall (Decree-holder), *Respondent.*

*Mr. R. T. Allan* and *Baboo Romesh Chunder Mitter* for Appellant.

No one for Respondent.

**On an application to set aside a sale of immoveable property in execution of a decree under Section 256, Act VIII. of 1859, before ascertaining whether any substantial injury has accrued to the debtor, the Court must come to a distinct finding that there has been an irregularity in publishing or conductiug the sale.**

*Loch, J.*—We think that the Principal Sudder Ameen has disposed of this case on a wrong principle. Section 256 provides that application may be made to set aside a sale on the ground of material irregularity in conducting or publishing the sale, and then provides that, even if such irregularity be proved, the sale shall not be set aside, unless the debtor have sustained substantial injury by reason of such irregularity.

In this case the Principal Sudder Ameen, instead of coming to a distinct finding as to the existence or otherwise of irregularity in publishing the sale, has turned his attention to ascertain whether any substantial injury has accrued to the debtor. But, till an irregularity be shewn to have taken place, further enquiry is unnecessary, for it is only, if substantial injury be caused by reason of the irregularity, that the applicant can claim to have the sale set aside. The Principal Sudder Ameen must first determine whether the provisions of Section 249 have or have not been complied with. If they have not, then he must determine whether the applicant has suffered substantial injury by reason of the omission of one or other of the steps prescribed. The fact that the judgment-debtor was aware that the sale was about to take place is nothing to the purpose. The object of the proclamation prescribed by Section 249 is to give notice to purchasers, not for the information of the debtor. The Principal Sudder Ameen should have examined the peadah who issued the proclamation and who made the attachment, and persons who accompanied him on the part of the decree-holder. If it be necessary to go into the question of injury, the Principal Sudder Ameen should endeavour to secure the attendance of those witnesses, whose evidence the applicant declares to be material to the case. We remand this case to the Principal Sudder Ameen to be disposed of with reference to the above remarks.

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The 10th December 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Mahomedan Law—Guardianship of Minors—Mother—Paternal Uncle.**

Case No. 594 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Chittagong, dated the 9th June 1866.*

Shaikh Alimodeed Moallem, *Appellant,*

*versus*

Musst. Syfoora Bibee, *Respondent.*

*Moulvie Syud Murhumut Hossein* for Appellant.

No one for Respondent.

According to Mahomedan Law, a mother has a preferential right over the paternal uncle to the guardianship of minors and to the custody of their persons.

*Macpherson, J.*—We see no reason to nterfere.

The paternal uncle has no legal right (according to Mahomedan Law) to the guardianship of the property of the minors in preference to the mother, while it is admitted that the mother has the preferential right to the custody of their persons.

The case might have been different, had the appellant proved that he had been appointed guardian or manager by the deceased, but this he has not done.

The appeal is dismissed.

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The 10th December 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Onus probandi—Transfer of decree.**

Case No. 671 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of West Burdwan, dated the 3rd July 1866, affirming an order passed by the Moonsiff of Radhanuggur, dated the 12th December 1865.*

Gunesh Mohapattur (Judgment-debtor), *Appellant,*

*versus*

Chundee Churn Kitunya (Decree-holder), *Respondent.*

*Baboo Poorno Chunder Shome* for Appellant.

*Baboo Kalee Kishen Sein* for Respondent.

The *onus* is on the party, to whom a decree has been transferred, to prove his title to execute if it be disputed.

*Loch, J.*—This case must be remanded in order that the Judge may ascertain whether the party seeking to execute the decree, who is not the original decree-holder, has any legal title to execute it. The debtor is not bound to prove anything in such a case, but the party to whom a decree has been transferred must prove his title to execute if his title be disputed.

The 12th December 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Re-sale in execution of decree—Appeal—Section 254, Act VIII. of 1859.**

Case No. 592 of 1866.

*Miscellaneous Appeal from an order passed by Moulvie Iradut Ali Khan, Principal Sudder Ameen of Shahabad, dated the 7th July 1866.*

Baboo Sooruj Buksh Singh (Decree-holder), *Appellant,*

*versus*

Sree Kishen Doss (Auction-purchaser), *Respondent.*

*Baboo Sreenath Doss* for Appellant.

*Baboo Poorno Chunder Shome* for Respondent.

*A* bid for a property put up to sale in execution of a decree held by *B*, and the lot was knocked down to him. The next day the property was sold in execution of a decree held by *C* who had a previous lien on the estate, and *A* consequently refused to pay the purchase-money. The property having been re-sold under Section 254, Act VIII. of 1859, for a sum less than that bid by *A*, he was held liable for the difference.

An appeal lies from an order in such a case, Section 254 placing the decree-holder and the defaulting purchaser in the position of parties to a suit.

*Loch, J.*—We think the decree-holder is entitled to recover from the first auction-purchaser the difference between his bid which he failed to make good, and the sum for which the property was ultimately sold. The grounds on which the Lower Court has released the respondent from this claim are altogether untenable. The respondent bid for a property put up to sale in execution of the decree held by the appellant. The lot was knocked down to him. The next day the property was sold in execution of a decree held by another party who had a previous lien on the estate, and consequently the respondent refused to pay the purchase-money; and, under the provisions of Section 254, the property was resold for a sum less than that bid by the respondent, and it is to recover that difference that the present application is made. We think the respondent, notwithstanding the subsequent sale on the following day, was bound to make good his purchase. He had purchased something, though perhaps less than what he expected; and, if he chose to bid, he was bound to complete his purchase.

It is said that in this case no appeal lies to this Court, as the parties are not in the

position of parties to the suit; but, looking at the wording of the latter end of Section 254, we think the parties for the purposes of this case may fairly be considered to come within the meaning of the term "parties" used in Section 11, Act XXIII. of 1861. The words of Section 254 are as follows: "If the proceeds of the sale which is even-"tually consummated be less than the price "bid by such defaulting purchaser, the "difference shall be leviable from him, under "the rules for enforcing the payment of "money in satisfaction of a decree of "Court." The law, therefore, for the purpose of realizing the difference between the defaulter's bid, and the sum for which the property is actually sold, places the decree-holder and the defaulting purchaser in the position of parties to a suit; and, as such, the rules applicable in other appeals are applicable to them. We reverse the order of the Lower Court with costs, and direct the Principal Sudder Ameen to realize the amount due by the defaulting purchaser under the provisions of Section 254.

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The 13th December 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Review—Execution.**

Case No. 569 of 1866.

*Miscellaneous Appeal from an order passed by Mr. W. Ainslie, Judge of Patna, dated the 30th May 1866.*

Syud Lotf Ali Khan (Decree-holder), *Appellant,*

*versus*

The Court of Wards on behalf of the Maharajah of Durbhanga (Judgment-debtor), *Respondent.*

*Moulvie Murhumut Hossein* and *Baboo Mohendro Lall Shome* for Appellant.

*Baboos Kishen Kishore Ghose* and *Jugadanund Mookerjee* for Respondent.

**A Judge has power to review an order passed by him in execution of decree. Thus, where the High Court, in rejecting an application for review of judgment, amended an error in the decretal order reducing the amount recoverable by the decree-holder, and the decree-holder, though aware of the alteration made in the decree, applied to the Court below, and took away the whole amount of the original decree, the Judge's subsequent order, directing a refund of the sum taken in excess by the decree-holder, was upheld.**

*Loch, J.*—It is evident in this case that, though the application for review of judgment was rejected, this Court, when rejecting it, amended an error in the decretal order regarding the mode in which the amount of interest was to be calculated, and this alteration made a considerable difference in the amount recoverable by the appellant. The money due under the decree with interest calculated at the rate, as originally directed in the decree, had been deposited by the respondent, and the appellant, though aware of the existence of the subsequent alteration made on 26th July 1864, applied to the Court below and took away the whole of the money, no opposition being made by the respondent, and no reference being made either by him or the Court to the amended order. On 14th March 1866, the respondent appeared before the Judge, with the amended order in his hand, and prayed that the decree-holder might be called upon to refund the sum of Rupees 7,694-6-4 taken by him in excess of the sum actually due to him, and the Judge directed the refund to be made.

It is urged by the appellant that no case is before the Court—that the decree having been struck off as satisfied, and so long a time having elapsed since that order was made, the case cannot be re-opened. It has, however, been ruled (Weekly Reporter, Special Number, p. 66, Haradhun Mookerjee, Petitioner), by the majority of a Bench of three Judges, that a Judge has power to review an order passed by him in execution of decree, and the present application may be considered as of the nature of a review. The respondent was doubtless very negligent in not producing the amended order of the High Court at an earlier period, but the appellant had no right to apply for money to which, under that amended order, he knew that he had no claim. We confirm the order of the Judge, requiring the decree-holder, appellant, to refund the sum of Rupees 7,694-6-4; but, considering the great negligence manifested by the respondent, which has rendered necessary these subsequent proceedings, without interest, and each party will pay his own costs in this appeal.

The 14th December 1866.

*Present:*

The Hon'ble L. S. Jackson, *Judge.*

**Special Appeal—Section 27, Act XXIII. of 1861—Contribution for costs.**

*Lowazima Special Appeal from a decision passed by the Additional Principal Sudder Ameen of Mymensingh, dated the 26th July 1866, modifying a decision passed by the Sudder Ameen of that District, dated the 14th September 1865.*

Kisto Coomar Chowdhry (one of the Defendants), *Appellant,*

*versus*

Anund Moyee Chowdhrain (Plaintiff), *Respondent.*

*Baboo Romesh Chunder Mitter* for Appellant.
No one for Respondent.

The admissibility of a special appeal in a case of the Small Cause Court class, for contribution in respect of costs, is a matter which ought not to be decided by an officer of the Court, but judicially by the Court itself.

THIS case is brought before me by Baboo Romesh Chunder Mitter, in consequence of an order recorded on the back of the petition of special appeal by the Deputy Registrar, to the effect that this is a special appeal in a case of the Small Cause Court class, in which, according to Section 27, Act XXIII. of 1861, no special appeal lies. The subject-matter of the suit appears to have been a claim by the plaintiff against the defendants for contribution in respect of costs which the plaintiff had to pay in a suit in which he and the defendants were jointly interested.

It is not quite clear whether this case does or does not come within the terms of the doubt thrown out by two Judges of this Court in the case of Behari Narain Sahoo, reported at page 60, IV. Weekly Reporter, and it appears to me that the admissibility of this appeal is a matter which ought not to be decided by an officer of the Court, but judicially by the Court itself, the special appellant, of course, taking the risk of having his appeal disallowed with all costs. I therefore direct that the appeal be admitted.

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The 14th December 1866.

*Present:*

The Hon'ble L. S. Jackson, *Judge.*

**Sherishtadar (Refusal of Zillah Judge to confirm nomination of—by Sudder Ameen).**

Case No. 599 of 1866.

*Miscellaneous Appeal from an order passed by Mr. J. R. Muspratt, Judge of Purneah, dated the 15th June 1866.*

Abdool Mujeed, *Appellant.*

*Messrs. C. Gregory* and *R. E. Twidale* for Appellant.

Where a person was nominated by the Sudder Ameen as sherishtadar, and the Zillah Judge refused to confirm his appointment upon no ground at all, the High Court directed the Judge to confirm the appointment.

THE petitioner in this case was nominated by the Sudder Ameen of Purneah as sherishtadar, and the appointment was reported to the Zillah Judge for confirmation by him. The Zillah Judge refused to confirm the nomination, and the petitioner thereupon applied to this Court. The Judge, who appears to have been actuated in these proceedings by certain anonymous petitions presented or forwarded to him, was called upon by Mr. Justice Loch in his order of the 19th September last, to report, for the information of this Court, some instances in which the petitioner has neglected his duty; and, in answer to that request, the Zillah Judge now says: "As the confirmation of sherishtadar and "peshkar of subordinate Judicial Courts "lies in the hands of the Judge under para. "4 of the Circular Order of the late Sudder "Dewanny Adawlut, No. 177, dated 6th "May 1861, and as the appellant was "acting sherishtadar and responsible for all "the irregularities committed by his subordi-"nates when the second petition was present-"ed, I decline to confirm him in the appoint-

"ment of sherishtadar of the Sudder Ameen "and Sudder Moonsiff's Court. He has there-"fore reverted to his original appointment "of fysala navees;" and then the Judge says that "the petitions," that is, the anonymous petitions in which the petitioner's character was aspersed, "as well as the Sud-"der Ameen's explanation and the rooba-"caree are forwarded for the perusal of the "Judges of the High Court." It is a matter of surprise to me that the Zillah Judge has thought fit to take into consideration, but still more that he should have forwarded for the perusal of this Court, anonymous petitions affecting the character of anybody.

As to the Sudder Ameen's explanation, I find in it nothing whatever to inculpate the petitioner Abdool Mujeed; on the contrary he appears to be quite cleared of any imputations made against him. That the Judge himself considered this petitioner to be an unobjectionable person is obvious from the fact that he has not only retained him in his former appointment of fysala navees, but has also intimated that his claims to the office of sheristadar will be taken into consideration on a further vacancy.

Now, the Judge appears to consider that the confirmation of officers nominated to the office of sherishtadar rests exclusively with the Zillah Judge; and he assumes this authority to rest upon the terms of the Circular Order of 1861. The fact is that the law upon this subject is contained in the concluding Section of Regulation XXV. of 1837. That Act empowers Principal Sudder Ameens, Sudder Ameens, and Moonsiffs, to nominate officers to their own establishments "subject to the general control of the Zillah "and City Judges and Court of Sudder "Dewanny Adawlut," that is, now the High Court.

This Court will not, as a general rule, interfere in the exercise of discretion vested in the Zillah Judges subject to its control, but it certainly will interfere where any person has been excluded from an office for which he was thought qualified by a subordinate Judge, when promotion to that appointment has been refused by the Zillah Judge upon grounds which are no grounds at all.

I must, therefore, direct the Judge to confirm the appointment of this petitioner, and repeat the caution conveyed to him by Mr. Justice Loch as to the reception of anonymous petitions affecting the character of public officers.

The 21st December 1866.

*Present:*

The Hon'ble L. S. Jackson, *Judge.*

**Dismissal of suit (for want of evidence)—Regular Appeal.**

Case No. 838 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Midnapore, dated the 23rd July 1866, affirming an order passed by the Moonsiff of that District, dated the 30th May 1865.*

Kooraram Chuckerbutty (Plaintiff), *Appellant,*

*versus*

Shama Soonduree Debea and others (Defendants), *Respondents.*

*Baboo Tarucknath Dutt* for Appellant.

No one for Respondents.

Where a suit was dismissed by a Moonsiff for want of evidence on the side of the plaintiff (the plaintiff's pleader having stated that he had no instructions, and that he could not proceed with the case in the absence of his client)—HELD that a regular appeal ought to have been preferred to the Zillah Judge from the judgment dismissing the case.

*Note by the Deputy Registrar.*—THIS appeal does not appear to me to come under Section 119, Act VIII. of 1859.

The facts are as follows:—

In the Court of first instance, the plaintiff's pleader was in attendance when the case was called up for hearing, though the plaintiff himself was absent, on account, as he alleged, of illness.

The pleader stated that he had no instructions, and could not proceed with the case in the absence of his client.

The Court thereupon dismissed the suit, as no evidence was produced in support of the claim.

From that order the plaintiff appealed summarily to the Lower Appellate Court, and that Court dismissed the summary appeal, as it did not, in its opinion, come under Section 119, which was pleaded by the plaintiff.

Against that order the present appeal is preferred.

I beg to refer, for the orders of the Judge in the Miscellaneous Department, the point involved, *viz.*, whether this *miscellaneous* appeal will, under the circumstance, lie.

*Jackson, J.*—It appears to me quite clear from the facts stated that this is not a case dismissed on default under the provisions of Section 111 or Section 114 of Act VIII. of 1859, but a case dismissed for want of evidence on the side of the plaintiff. The appeal ought therefore to have been a regular appeal to the Zillah Judge against the judgment dismissing the suit. The circumstances which appear to have occurred may possibly be viewed by the Judge in the light of a justification of delay in preferring a regular appeal in this case, and perhaps the Judge may now think fit to admit a regular appeal if the parties are advised to bring it.

I cannot say that a special or miscellaneous appeal lies in the case under Section 119.

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The 21st December 1866.

*Present:*

The Hon'ble L. S. Jackson, *Judge.*

**Re-admission (of dismissed appeals)—Section 6, Act XXIII. of 1861.**

*Miscellaneous Appeal from an order passed by Mr. O. Toogood, Judge of Beerbhoom, dated the 9th August 1866, affirming an order passed by the Sudder Ameen of that District, dated the 29th May 1866.*

Ramessur Dutt (one of the Defendants), *Appellant,*

*versus*

Lootfunnissa Bibee (Plaintiff) and others (Defendants), *Respondents.*

*Baboo Lukhee Churn Bose* for Appellant.

No one for Respondents.

There is no provision in Section 6, Act XXIII. of 1861, for the re-admission of appeals once dismissed under the provisions of that Section.

It appears to me that in this case no appeal will lie. The vakeel for the petitioner has brought to my notice a case which was decided in this Court (Ramzad jemadar) reported in 8 Sevestre, page 329. In that case the Principal Sudder Ameen in the first instance dismissed the appeal for default of prosecution, and within 30 days the appellant applied under Section 347 of the Civil Procedure Code for a re-hearing. After a very long delay, the Principal Sudder Ameen rejected that application without giving any reason whatever. Against this order it was held that an appeal lay. There is another case to the same effect in 2 Weekly Reporter, page 254 (Hurro Chunder Doss Chowdry). These cases, however, appear to me to be quite distinct from the present case, which is one under Section 6, Act XXIII. of 1861. That Section extends to appeals the provisions of Section 5 of the Act. It is not contended in this case that the appeal was dismissed, otherwise than in accordance with the provisions of Section 5; but it is alleged that the appellant petitioned the Court, and offered to satisfy it that he had good and sufficient reasons for not having made the required deposit within the time allowed. The Judge refused to entertain this petition, and he did so on the ground that the application had not been made to him in time. The vakeel of the petitioner here contends that the application was made in time. Upon being asked by the Court to show how the Judge was legally bound to entertain the petition, even if it had been made in time, he fails to do so. In point of fact there is no provision in Section 6 for the re-admission of appeals when once dismissed under the provisions of that Section. It may be said that there is a hardship in such a case; if it be so, it is one which the law has created, and the Court cannot cure. The law has provided no remedy in such cases, and the Court can only refuse the application.

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The 20th December 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Registration.**

Case No. 638 of 1866.

*Miscellaneous Appeal from an order passed by the Judge of Gya, dated the 15th August 1866, affirming an order passed*

*by the Sudder Ameen of that District, dated the 12th February 1866.*

Mutukdharee Lal (Plaintiff), *Appellant,*

*versus*

Shaik Fuzul Hossein and others (Defendants), *Respondents.*

*Mr. R. E. Twidale* for Appellant.

*Baboo Mohendro Lal Shome* for Respondents.

The Registrar to whom a deed is presented for registration has nothing whatever to do with its recitals or its possible operation as regards third parties who are not parties to it, but is bound to register it if the party applying for registration has complied with the provisions of Section 29, Act XVI. of 1864.

According to Section 15 of the same Act, a *regular suit* and not a miscellaneous application must be brought to compel a Registrar to register.

*Macpherson, J.*—THE order of the Lower Appellate Court is clearly wrong, and is set aside with costs.

The Registrar to whom a deed is presented for registration has nothing whatever to do with its recitals or its possible operation as regards third parties who are not parties to it. All the Registrar has to enquire into is "whether the instrument was executed or not by all the parties thereto by whom it purports to have been executed," and to satisfy himself of the representative character of any person who shall claim to represent or to be entitled to act for any party to the deed (Section 29, Act XVI. of 1864). If the Registrar has no doubt that the instrument really has been executed by those by whom it purports to have been executed, his clear duty is to register it. If the deed contains recitals, those recitals cannot bind third parties who are strangers, and who have not executed the deed, nor can the rights of such third parties be legally in any possible way affected by such recitals. Why then such recitals should induce the Judge to hold that a deed containing them is not "obnoxious to registration," and is "not susceptive of registration," we are wholly at a loss to comprehend.

We direct that the Registrar do register the deed if the parties have complied with the provisions of Section 29 of the Act XVI. of 1864.

This matter has been treated by the Lower Appellate Court as a miscellaneous application. But by the express words of Section 15 "a regular suit" must be brought in order to compel a Registrar to register. Acting according to the direction contained in that Section, the appellant properly instituted a regular suit to establish his right; and it is the decision of the Court of first instance in that regular suit that the Lower Appellate Court has treated as the subject of a miscellaneous appeal.

We treat the matter as if it had come before us on special appeal in regular course.

# RULINGS OF THE HIGH COURT IN CRIMINAL CASES.

The 9th June 1866.

*Present:*

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

**Appeal (on the facts)—Trial by Jury—Offence committed before passing of Penal Code.**

Queen *versus* Grish Chunder Bundoo.

*Committed by the Magistrate, and tried by the Sessions Judge of East Burdwan, on a charge of being a member of an unlawful assembly, by one of which culpable homicide not amounting to murder was committed.*

A person tried by a Jury is entitled to an appeal on the facts if the offence was committed before the passing of the Penal Code.

THE real question in this case is the identity of the prisoner in a riot, attended with homicide, which took place some 11 or 12 years ago.

The offence for which the prisoner has been convicted is substantially that of which others were convicted previous to the passing of the Penal Code. Though the prisoner has been tried by a Jury, he has a right to an appeal on the facts, inasmuch as the offence was committed before the passing of the new laws.

The conviction appears right and proper. The prisoner was named from the very first, and it is shown that he absconded on the hue and cry, though it seems likely that he has returned to his village for some little time past, and has been lately denounced owing to the breaking out of some new quarrel.

Taking the guilt of the prisoner to be established by his proved participation in the unlawful assembly by which a man was killed. it is to be observed that the prisoner was very young at the time. The Sessions Judge says more than 20 years of age. But one of the witnesses for the prosecution says he was 17 or 18 years of age at that time.

Looking to his youth and inexperience, the sentence on the prisoner may fairly be reduced to two years' rigorous imprisonment. Reduced accordingly.

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The 9th June 1866.

*Present:*

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

**Recognizances to keep the peace.**

Criminal Jurisdiction.

*Referred under Section 434, Act XXV. of 1861, and Circular Order dated the 15th July 1863.*

Keshub Chundro Sandyal and three others.

An unproved charge of false imprisonment is not the credible information contemplated in the law, on which a Magistrate may take recognizances to keep the peace.

WE concur with the Sessions Judge. The unproved charge of false imprisonment is certainly not the credible information contemplated in the law. As regards the establishment of a new or rival haut, there does not appear to have been any evidence taken by, or laid before, the Magistrate, nor anything beyond a mere petition of Poresh Narain.

We consider the proceedings of the Joint Magistrate to be irregular and illegal, and, under Section 434 of the Criminal Procedure Code, we quash the order for recognizances from the parties mentioned in the Magistrate's decision.

This order would be no bar to the reinstitution of proceedings with a view to recognizances, on fresh and credible information, should any new contingency occur to necessitate such a proceeding.

The 9th June 1866.

*Present:*

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

**Jurisdiction—Abduction of child for the purpose of stealing its ornaments—Theft.**

Criminal Jurisdiction.

*Referred under Section 434, Act XXV. of 1861, and Circular Order of the High Court, dated 15th July 1863, No. 18.*

Queen *vs.* Sohoy Dome.

Case of abduction of a child for the purpose of stealing its ornaments, which, instead of being committed to the Court of Session for trial, was improperly disposed of by the Magistrate as a case of theft.

In this case the prisoner has been tried before the Assistant Magistrate, Mr. Merington, and convicted of theft, and sentenced to 30 stripes. The sentence has been carried out.

The accused was charged with inveigling away the infant child of the prosecutor late in the evening to an *aheer* at some distance from the village, and robbing him of some ornaments. He was discovered by his parents, at some distance from their home, after dark. The prisoner, in his confession as recorded in the vernacular, admits that he took the child away, and, as the Magistrate, Mr. Drummond, remarks, his statement is substantially a confession of the offence of abduction as defined in Section 362. He should, no doubt, have been committed for trial to the Court of Session under Section 369.

The offence of abducting little children, for the purpose of stealing their clothes or ornaments, is a very serious and dangerous one; and we agree with the Magistrate and Sessions Judge in thinking that the conduct of the Assistant Magistrate in trying and punishing the offence, over which he had no jurisdiction, as one of theft, is highly censurable.

But, as the sentence has actually been carried into effect, we think it, under the circumstances, not necessary to quash the conviction, though the punishment is certainly inadequate.

The 9th June 1866.

*Present:*

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

**Irregularity—Reference to proceedings in former cases.**

Queen *vs.* Shobrattee Sheikh.

*Committed by the Magistrate, and tried by the Officiating Sessions Judge of Nuddea, on a charge of false evidence.*

A reference to proceedings in a former case declared to be irregular.

The prisoner has been tried and convicted, by the verdict of the Jury, of giving false evidence as a witness before the Court of Session, that "*on his return from the Mofussil, on or about the 26th of September last, he did not go to the Police Station of Moheshpore, nor see the Inspector on that day, but, by reason of sickness, went straight to his house without going to the Thannah, and remained in his house till the 29th of September.*"

The prisoner appeals, and the only point is whether the evidence of the Head Constable, who stated that he *did* come to the Police Station on that day, is sufficiently corroborated. In support of his statement, the Head Constable produced a copy of an extract from the day book kept at the Thannah, which he said was written by Wasil Mahomed, a Constable—which extract, according to the regular and usual practice, was sent to the District Superintendent of Police on the 26th, and was subsequently signed by him. On looking at the extract so signed, it appeared that the prisoner's name was down as having been in the Police Station at about midday on the 26th September, and that he was appointed to keep the 2nd watch on that day. This document being an entry made contemporaneously with the fact which it recites and in the usual course of business, and being authenticated by the signature of the District Superintendent, is strong evidence to corroborate the statement of the Inspector that the facts took place as they are there recorded.

Under these circumstances, the appeal must be dismissed, there being evidence to go to the Jury to prove the falseness of the statement made by the prisoner. We observe, however, that there has been a serious irregularity in the trial.

The Sessions Judge read to the Jury the remarks recorded by the Judge after receiving the verdict of the Jury, and of the Jury

in the former case, being expressions of the opinion of the Judge and Jury, that the now defendant, who had given evidence in that case, was in league with the prisoners who were in that case convicted of forgery.

This was wholly irregular. A reference to the proceedings in the former case in this manner must have tended to prejudice the minds of the Jury on the present occasion. Taking the case to be one of simple false statement, we think that the sentence may be properly reduced to 6 months' rigorous imprisonment.

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The 11th June 1865.

*Present :*

The Hon'ble L. S. Jackson, *Judge.*

**Cognizance of offence by Magistrate without complaint but on information.**

Miscellaneous Case.

Ramruttun Neogee and others, *Petitioners.*

*Baboos Oprokash Chunder Mookerjee* and *Onookool Chunder Mookerjee* for Petitioner.

**A Magistrate may take cognizance of a case, on the information of a third person, without any complaint by the party injured.**

THE argument of the petitioner's vakeel in this case is that, as the party injured has not complained before the Magistrate, but information was given by a third person with no personal interest in the matter, the Magistrate ought not to have taken up the case. Section 68 of the Code of Criminal Procedure, however, authorizes the Magistrate of the District, or a Magistrate in charge of a Division of a District, without any complaint, to take cognizance of any offence which may come to his knowledge, except in the cases provided for by Chapter XI. of the Code. The Magistrate, therefore, was justified in taking up this case on the information which he received, and there is nothing illegal in his proceedings.

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The 11th June 1866.

*Present :*

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

**Insane prisoners—Procedure.**

Criminal Jurisdiction.

*Referred under Section 394, Act XXV. of 1861, and Circular Order No. 18, dated 15th July 1863.*

Queen *vs.* Rughooa.

**Where a Magistrate has kept in custody an insane prisoner and reported the case to Government, his successor, instead of striking off the case, is bound to resume the investigation under Section 391, Code of Criminal Procedure.**

ONE Rughooa being charged with stealing an ox, it was reported that he was of unsound mind. Mr. Brett, the Assistant Commissioner of Lohurdugga, ordered that he should be examined by the Civil Surgeon, whose evidence was duly taken by him, in accordance with Section 388 of the Code of Criminal Procedure, on the 17th June 1864. The Civil Surgeon stated that the prisoner was of unsound mind, and not responsible for his actions.

Mr. Brett then took the evidence of some witnesses, and, finding that there was no doubt that the prisoner did take the cattle, directed him to be kept in confinement, and that the case should be reported for the orders of Government.

He did not put the prisoner on his defence, or express any opinion as to whether or not he was of unsound mind at the time when the cattle was taken ; and though he refers to Section 393 as making it necessary, when a prisoner is acquitted upon the ground of insanity, that the finding should state whether he committed the act or not there was in fact no complete trial and no acquittal.

The proceeding and order of the Magistrate, though irregular by reason of the reference to Section 393, appears to us to be good as an enquiry and order under Section 390.

The prisoner was sent, under the orders of Government, to the Patna Lunatic Asylum, and subsequently discharged. He was then brought before Mr. Lillingstone, the present Deputy Commissioner, who, instead of resuming the investigation, as he should have done, under Section 391, ordered the case to be struck off.

No intelligible reason is assigned by Mr. Lillingstone for this order. He says that, "as the Magistrate, in the first instance, *proceeded* as if the prisoner was *considered* insane

at the time of committing the offence, I consider it would be irregular now to act upon any other view."

We wholly fail to understand the force of this observation. The present Assistant Commissioner has nothing to do with the opinions, or presumed opinions, of his predecessor. He had before him a prisoner who had never been put upon his trial. He was bound to take up the case under Section 391 and to try him, and his order striking off the case must be quashed.

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The 11th June 1866.

*Present:*

The Hon'ble L. S. Jackson, *Judge.*

**Land Disputes.**

Miscellaneous Case.

Mussamut Zuhoorun and Mussamut Begum, *Petitioners.*

HELD that it would be highly technical and unnecessary to interfere with a Magistrate's order under Section 318, Code of Criminal Procedure, on the ground that the Magistrate had not formally stated that he was satisfied that a dispute likely to induce a breach of the peace existed, when obviously the Magistrate had information of that kind before him.

IT appears that, in this case, the Magistrate had actually before him information from the Police Officer, founded upon an enquiry which that Officer had made on the spot, that a breach of the peace was likely to occur in respect of the property concerned, and, in fact, the order of the Magistrate, instituting proceedings under Section 318 of the Code of Criminal Procedure, was actually endorsed on the report of that Officer. This being so, although the Magistrate has not formally stated that he was satisfied that a dispute likely to induce a breach of the peace existed, when obviously the Magistrate had information of that kind before him, which he manifestly acted upon, it would be highly technical and unnecessary to interfere with the Magistrate's order on the ground of such informality.

The appeal is, therefore, rejected.

The 18th June 1866.

*Present:*

The Hon'ble L. S. Jackson and G. Campbell, *Judges.*

**Land Disputes.**

Criminal Jurisdiction.

*Referred under Section 434, Act XXV. of 1861, and Circular Order dated 15th July 1863, No. 18.*

Kisheb Chunder Sandyal, *Petitioner.*

Prompt action is generally requisite in cases of dangerous disputes regarding the possession of land.

*Campbell, J.*—I CAN see no illegality. The parties, being called on to show cause, said that they had no objection to enter into recognizances, and I think that the English record is sufficient. It appears to me that the Magistrate, upon the pleadings, could hardly have done more under Chapter XVIII. But I think that, seeing the gravity of the reports made to him, he much failed in his duty in neglecting to make prompt enquiry whether there really was a dangerous dispute regarding the possession of certain lands, and, if so, deciding the matter under Chapter XXII. If, in the course of such an enquiry, he had found that any parties were to blame, he might well have also taken recognizances or security from them or punished them.

*Jackson, J.*—I am of the same opinion. When the parties professed their readiness to be bound, and declared they had no objection, it is difficult to see how the "examination" on this point could have been usefully continued.

The case, as reported by the Inspector of Police, appears to have been just such a case as to call for an enquiry under Section 318, and in the course of that enquiry it might very probably have come out who the parties were from whom a disturbance was chiefly to be apprehended. But I do not think there is ground for censuring the Joint Magistrate or for setting aside his order.

Prompt action is generally requisite in these cases.

The 18th June 1866.

*Present:*

The Hon'ble L. S. Jackson and G. Campbell, *Judges.*

**Theft and Mischief (Double sentence for).**

Criminal Jurisdiction.

*Referred under Section 434, Act XXV. of 1861, and Circular Order dated 15th July 1863.*

Bichuk Aheer *versus* Auhuck Bhooneea and others.

A double sentence for theft and mischief is illegal and improper.

THE double sentences for theft and mischief are clearly illegal and improper, and the sentence passed under Section 429 must be set aside.

But the Judicial Commissioner's statement, that the conviction of the prisoner Leydah under Section 379 is illegal, and that there was no evidence against him, is not correct, as a more careful examination of the case would have shown. The question apart whether the statements of some of the prisoners are evidence against another, it appears that there was abundant evidence that Leydah himself confessed, and the conviction seems entirely proper. The witnesses might, perhaps, have been more particularly examined on the point; but the Assistant Commissioner says that the man even confessed to himself.

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The 18th June 1866.

*Present:*

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

**Evidence—Section 48, Act II. of 1855 (applicable to Criminal trials)—Comparison of seals.**

Queen *vs.* Amanoollah Mollah.

*Committed by the Magistrate, and tried by the Sessions Judge of Rajshahye, on a charge of dishonestly using as genuine false documents, &c.*

Section 48, Act II. of 1855, is applicable to criminal trials.

The test of comparison of Native seals is at best but a fallible one, and must always be received with extreme caution.

THIS prisoner has been convicted, by the Sessions Judge of Rajshahye, of the offence described in Section 471 of the Indian Penal Code, that is to say, of fraudulently using as genuine two documents which he knew, or had reason to believe, to be forged documents. The sentence is seven years' transportation and fine of rupees five hundred; in default of payment, one year in addition in transportation.

The documents alleged to be forged are a pottah dated the 2nd Bysakh 1267, and an entry in a *hath-chittah.*

The Sessions Judge mainly relies upon a comparison of the impression of the seal affixed to the will of Radha Kishto Shaha, which is said to be a genuine instrument, with the impressions of the seal affixed to the pottah and entry in the *hath-chittah* which are impugned.

The learned Counsel for the prisoner, Mr. Paul, contends that Section 48, Act II. of 1855, is not applicable to criminal trials, and, further, that a comparison is only admissible when it is made with a seal which is not disputed by the prisoner.

We are of opinion that the Section is applicable to criminal trials (*see* Goodeve on Evidence, page 201). The will of Radha Kishto and the seal affixed thereto are not admitted by the prisoners, and we have not been shewn that this will has been formally accepted as proved in any Court of Justice. The prisoner challenged its authenticity, and, under the circumstances, we are of opinion that the will and the seal impressed upon it cannot be said to be "undisputed."

To draw any inference of the guilt of the prisoner from a comparison with a document of this nature is, in our opinion, not fair to the prisoner.

At the best, the test of comparison between the impression of one Native seal with another is but a fallible one, and must always be received with extreme caution. We have taken considerable pains in comparing the impressions of the seals affixed to the pottah and *hath-chittah*, the suspected documents, with the impression of seals said to be genuine. The result is that the impressions of the alleged genuine seals do not precisely agree the one with the other, for measuring one letter to another of the inscriptions—the method adopted by the Sessions Judge—we find that there are differences even in the alleged genuine seals. The impressions of the seals affixed to the pottah and *hath-chittah*, when compared with the impressions of the alleged genuine seals, certainly do not differ more than the alleged genuine impressions do one with another. On the whole, and after careful consideration, the evidence, in our opinion, is so very

doubtful that we hesitate to convict the prisoner upon it, more particularly as the evidence in this case is based upon comparison of seals—a test which this Court is quite as competent to apply as the Lower Court. We observe that the pottah purports to be a farming lease, for a term of ten years, of an eight-anna share in an estate of which it is admitted the prisoner holds the other moiety.

We entirely differ with the Sessions Judge, who holds that the evidence proves that the prisoner managed the moiety of the estate as a servant, and not as a lessee. We do not find that the witnesses for the prosecution deposed to the fact that prisoner managed it as a servant. The account-books of Radha Kishto, which have been admitted to be genuine by the prosecution, have been examined by us, and they certainly seem to prove that the prisoner held the estate as a lessee; but, be this as it may, we are not at all satisfied that the documents which are impugned are forged. The prisoner must be released.

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The 18th June 1866.

*Present:*

The Hon'ble L. S. Jackson and G. Campbell, *Judges.*

**Security for good behaviour—Section 297, Code of Criminal Procedure.**

The order in this case calling upon the prisoner to furnish security for good behaviour under Section 297, Code of Criminal Procedure, set aside as erroneous, that Section not referring to persons of a violent or turbulent character.

Miscellaneous Case.

Narain Sooboodhi, *Petitioner.*

It appears to us that the order passed by the Deputy Magistrate, and confirmed by the Sessions Judge in this case, is entirely erroneous. The petitioner was called upon to furnish security for his good behaviour under Section 297 of the Code of Criminal Procedure. That Section, however, refers, not to persons of a violent or turbulent character, but to "robbers, house-breakers, thieves, or "receivers of stolen property who are of "a character so desperate and dangerous "as to render their release, without security, "at the expiration of the limited period of "one year, hazardous to the community." The order must, therefore, be set aside.

The 18th June 1866.

*Present:*

The Hon'ble F. A. Glover, *Judge.*

**Section 405, Code of Criminal Procedure—Mitigation of sentence.**

Queen *versus* Bissonath Mitter.

*Committed by the Magistrate, and tried by the Sessions Judge of Hooghly, on a charge of criminal breach of trust.*

The High Court (like the Sessions Judge) cannot nullify the verdict of a Jury by interfering to lessen the punishment. Section 405 refers to cases where the offence is proved, but where the punishment inflicted is held to be too severe, and not to cases where the conviction itself is considered improper.

Mr. Cochrane, for the prisoner, urges that, under Section 405, Code of Criminal Procedure, this Court should exercise its power of modifying the sentence passed by the Sessions Judge.

It has been several times ruled by this Court that, although a Judge may dissent from the verdict of a Jury, he is still bound not to nullify it by passing a sentence inadequate to the offence held by the Jury to be proved, and the prisoner's remedy is to apply to the Local Government for a remission of his sentence.

This Court is, in my opinion, bound equally with the Sessions Judge not to make a verdict of no effect by interfering to lessen the punishment. Section 405 refers to cases where the offence is proved, but where the punishment inflicted is held to be too severe, and not to cases where the conviction itself is considered improper.

As I am bound to take the verdict of the Jury to be a proper verdict, it follows that I cannot consistently modify a sentence which, if the offence be proved, is not too severe.

The prisoner can, if he be so advised, apply to the Executive Government, with which the opinion of the Judge will doubtless have proper weight.

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The 18th June 1866.

*Present:*

The Hon'ble L. S. Jackson and G. Campbell, *Judges.*

**Evidence—Proceedings in other trials.**

Queen *versus* Kishen Dyal Aheer and others.

*Committed by the Magistrate, and tried by the Officiating Sessions Judge of Shahabad, on a charge of dacoity attended with grievous hurt.*

Every trial must be complete in itself. In deciding on the guilt of a prisoner, the proceedings in other trials ought not to be relied upon.

THE petition of appeal in this case contains no specific ground of dissatisfaction with the judgment of the Court of Session; and, referring to the record, we are not inclined to think that the prisoners have suffered any substantial prejudice, or that there are good reasons for doubting their complicity in the dacoity.

But it is our duty to remark upon the irregular and almost insufficient mode in which the Court of Session has recorded the evidence against the prisoners.

The Sessions Judge remarks that it has been on former occasions recorded at length, apparently forgetting that the prisoners then before him had not been present on those occasions, and that, although a good argument as to the credibility of the witnesses might be drawn from the fact that convictions founded on their testimony had been sustained in appeal before this Court, yet the circumstance of those witnesses having been already examined at length, on a previous trial, was no reason at all for examining them on this occasion with such brevity as to leave it almost in doubt as to the commission of what crime they were deposing to.

If there had been the least additional reason for doubting whether the prisoners were really guilty, it would have been necessary to annul the sentence and to order a new trial, to the great hardship of the witnesses for the prosecution.

We trust the Sessions Judge will, on future occasions, bear in mind that every trial must be complete in itself, and that it is not admissible, in deciding on the guilt of the prisoners before him, to rely upon the proceedings in other trials.

The appeal of the prisoners is rejected.

The 20th June 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble F B. Kemp, W. S. Seton-Karr, G. Campbell, and A. G. Macpherson, *Judges.*

**Code of Criminal Procedure, Sections 405 and 428—Mitigation of a sentence confirmed or passed by Sessions Judge on appeal.**

Miscellaneous Case.

Bissumbhur Shaha, *Petitioner.*

*Baboo Otool Chunder Mookerjee* for Petitioner.

*Baboo Juggodanund Mookerjee* for Government.

The High Court has power to mitigate, on the ground of its being excessive, a sentence passed by a Magistrate and confirmed in appeal by the Sessions Judge, or a sentence passed in appeal by the Sessions Judge altering a sentence passed by a Magistrate.

*This case was referred to a Full Bench by Justices Seton-Karr and Macpherson, with the following orders:—*

*Macpherson, J.*—IN this case, Mr. Doyne, on behalf of the petitioner, applies to the Court to reduce a sentence passed by a Magistrate and confirmed in appeal by the Sessions Judge, on the one ground that the sentence is excessive. It is not alleged that there is any defect in law in the conviction. The first question that arises is whether the Court has power to entertain such an application.

It appears to me, reading Section 405 of the Criminal Procedure Code along with Section 428, that this Court has the power which Mr. Doyne contends it has. But it has recently been ruled otherwise (Reg. *versus* Ramdhun Mundul, 4 W. R. 15 C. R.). In that case, Mr. Justice Seton-Karr inclining to the opinion that, under Section 405, the Court may interfere to mitigate a sentence of a Magistrate confirmed by the Sessions Court, and Mr. Justice Kemp thinking such a sentence is final, the question was referred to Mr. Justice Loch, who also held that the sentence is final. In that view of the matter I do not concur, because it seems opposed to the terms of Section 428. By Section 405, the Court is empowered to mitigate the sentence passed in any case tried by any Court of Session. It is said, and

has been decided in Ramdhun Mundul's case, that the words "tried by any Court of Session" means tried by a Court of Session sitting, not as an Appellate Court, but as a Court of Original Jurisdiction only. But Section 428 enacts that, "*except as provided in Section* 405 of this Act, sentences and orders passed by an Appellate Court upon appeal shall be final." The exception in this Section seems to me expressly to provide for the case which is now before us, and I therefore cannot limit Section 405 to cases tried by the Court of Session sitting as a Court of Original Jurisdiction. Mr. Justice Loch attempts to get over the difficulty created by Section 428 by holding that Section 405 is mentioned in Section 428 by mistake for 404, and he accordingly deals with the question as if 404, and not 405, were referred to in Section 428. But it is not for this Court to say that the Acts of the Legislature do not mean that which the words used in them do and necessarily must mean. If the Legislature has excepted Section 405, it is not for this Court to say that in fact it has excepted, not Section 405, but Section 404, merely because it appears to the Court that the Act would have been better or more consistent if 404 had been the Section excepted. If Section 405 is the Section mentioned in Section 428, this Court goes beyond its jurisdiction, and enters on the province of Legislation in reading Section 428 as if the Section excepted in it were Section 404.

Under these circumstances, I think that the following question ought to be referred for the decision of a Full Bench: Has this Court power to mitigate, on the ground of its being excessive, a sentence passed by a Magistrate and confirmed in appeal by the Sessions Judge, or a sentence passed in appeal by the Sessions Judge altering a sentence passed by a Magistrate.

*Seton-Karr, J.*—I have always had doubts on this point, and expressed them in the judgment referred to by my colleague, Mr. Justice Macpherson.

I think it very desirable that the question should be referred to a Full Bench.

JUDGMENT OF FULL BENCH.

*Peacock, C.J. (Kemp, J., concurring).*—I do not think that there is any doubt in this case, when we read Sections 405 and 428 of the Code of Criminal Procedure together. There might have been some doubt if Section 405 stood alone. It says: "It shall "be lawful for the Sudder Court to call for "and examine the record of *any case tried* "*by any Court of Session.*" The words "any case tried by any Court of Session" might mean only a case tried by a Court of Session in the exercise of original jurisdiction. But, when we read Section 428, all doubt is removed. It says: "Except as "provided in Section 405 of this Act, "sentences and orders passed by an Appel-"late Court upon appeal shall be final." When the Legislature refers to Section 405, we must construe the Act as meaning Section 405, and not Section 404. If "Section 404" is in the original record of the Act, and "Section 405" is merely an error of the printer, the case would be different. But we do not think it likely that the words "Section 405" are a misprint. We have not the original here to compare it with the print.

Then if we read "405" as the Section referred to in Section 428, Section 428 shows that the Court under Section 405 may be an Appellate Court. If so, then the words "tried by any Court of Session" must mean a Court of Session sitting either as a Court of original or as a Court of appellate jurisdiction, and the case becomes perfectly clear.

If we look to the reason of the thing, I think it quite right and just that Section 405 should be read with the interpretation which I have put upon it.

Suppose a man should be indicted before the Sessions Court for house-trespass in order to commit theft under Section 451 of the Penal Code, and that it should be proved that he was a starving man in Cuttack and Pooree who was passing by a godown where there was rice, and that he went in and stole a handful. He would be guilty of house-trespass for the purpose of committing theft, and would be liable to imprisonment for 7 years and also to fine. Suppose the Sessions Judge should try him and sentence him for such an offence as that to 2 years' rigorous imprisonment; this Court could call for the record and set the matter right by mitigating the sentence. But suppose another man was tried for a similar offence committed under similar circumstances, not by the Court of Session, but by the Magistrate of the district, and should be sentenced to 2 years' rigorous imprisonment and to fine, and the Sessions Judge on appeal should mitigate the sentence by omitting the fine and leaving the 2 years' rigorous imprisonment. If this Court could not interfere in the latter case, this consequence would follow, that the Court could mitigate a sentence of 2 years' rigorous imprisonment passed by a Court of Session

as a Court of original jurisdiction, but that it could not mitigate a sentence of 2 years' rigorous imprisonment allowed by a Court of Session on appeal to stand for a similar offence. I think it very reasonable that, whenever this Court is satisfied that a sentence is wrong in point of law, or is too severe for the offence proved, it should have the power of setting that sentence right. It could not do so upon appeal in a case tried originally by a Lower Court, and appealed to the Sessions Court. But I think that the Legislature intended that the highest Court should have the power to grant relief in a case in which a sentence affirmed by a Court of Session sitting as an Appellate Court, or altered by that Court on appeal, and therefore substantially passed by it, is either contrary to law or improper as being too severe. In a case heard by a Sessions Court on appeal, the relief cannot be obtained as a matter of course; but the High Court must have such a case made out as to induce it to call for and examine the record.

*Seton-Karr, J.*—I wish to add nothing to what has fallen from the learned Chief Justice, with whom I entirely concur, except that I always entertained the doubts which I expressed in the case of Ramdhun Mundul adversely to the opinion of my colleagues (reported in 4 Weekly Reporter, Criminal Rulings, p. 15); that I still entertained those doubts, when I referred the case to a Full Bench, with Mr. Justice Macpherson; and that I am confirmed in the opinion I entertained on both occasions, after hearing the arguments on both sides to-day, which have converted those doubts into certainties.

*Campbell, J.*—I also concur. I had a good deal of doubt in the case. It did not appear to me altogether so clear as it has been now put by the learned Chief Justice. Still, on the whole, I agree in the opinion expressed by my learned colleagues.

Taking Section 405 alone, I should have been inclined to consider that the words "*tried* by any Court of Session" refer to the Court sitting as a Court of original jurisdiction; because, looking at Chapter XXV., there throughout the word "trial" is used as referring to the proceedings in the Court of original jurisdiction, and to that kind of trial only. But, as I think that the Section admits of doubt, it may be construed by a reference to other Sections.

Section 428 is clearly inconsistent with the construction that Section 405 is restricted to trials by Courts of Session in original jurisdiction. At the same time I should like to point out that, in any construction, there is some inconsistency in this part of the Code, because, where a Subordinate Magistrate has passed a sentence which has been appealed to the Magistrate of the District, and the Magistrate of the District, in deciding that appeal, has committed, it may be, a gross illegality, in that case, under Section 404, this Court has the power to set the matter right as respects the point of law; whereas Section 428 would seem to provide that sentences or orders of an Appellate Court shall be final except as provided in Section 405, making no reference to Section 404. There, it seems to me, must necessarily be some contradiction. But, because there is one inconsistency, that is no reason why we must also make another; and, as I am not satisfied that in Section 428 the figure "405" is a misprint or mistake for "404," I think we must consider that Section "405" refers to the proceedings of an Appellate Court, *viz.*, Court of Session, and that this Court has the power to interfere as regards the decisions of a Court of Session sitting as an Appellate Court for the trial of criminal cases to the full extent provided by Section 405.

*Macpherson, J.*—I remain of the same opinion as that which I have already expressed. Whatever inconsistencies there may be in the provisions of the Criminal Procedure Code, I think that, reading Sections 405 and 428 together, it is impossible to come to any other conclusion than that which has been arrived at to-day.

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The 21st June 1866.

*Present:*

The Hon'ble W. S. Seton-Karr, *Judge.*

**Dacoity (aggravated)—Calendar (to contain grounds of commitment and remarks of committing officer).**

Queen *versus* Khooda Sonthal and others.

*Committed by the Deputy Magistrate, and tried by the Sessions Judge of Midnapore, on a charge of dacoity.*

Severe sentence of transportation for life in a case of aggravated dacoity confirmed as required by the state of the district.

The grounds of commitment and the remarks of the committing officer should be entered or copied in the Calendar which ought to be complete in itself.

THE prisoners have been convicted of a very aggravated dacoity, on their own admissions before the Deputy Magistrate. Some of the dacoits repeated, at the Sessions, their

admissions of their presence at the dacoity. The admissions are confirmed by the immediate search which was instituted, and by the discovery of sundry articles of property with the dacoits.

The crime, as the Sessions Judge observes, is a very aggravated one. One man was killed, and one old woman was frightfully beaten. The state of the district requires a severe example, and I shall not interfere.

I observe a practice which, I believe, is confined to the Midnapore district, namely, that the grounds of commitment are not copied into the Calendar as they ought to be, but are left buried in a mass of papers in the record.

This is irregular, and causes loss of time to the Appellate Court. The Calendar should be complete in itself, and the remarks of the committing officer should be entered in, or copied into, the proper column of the Calendar.

The appeals are all rejected.

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The 23rd June 1866.

*Present:*

The Hon'ble W. S. Seton-Karr and W. Markby, *Judges.*

**Land dispute—Possession under decree of Civil Court.**

Shama Soondery Debia, *Petitioner,*

*versus*

Messrs. Jardine, Skinner, & Co.

*Committed by the Magistrate of Berhampore, and tried by the Sessions Judge of Moorshedabad, on a charge of unlawful possession of lands.*

A Magistrate ought not to interfere, under Section 318, Code of Criminal Procedure, with the execution of a decree of the Civil Court. If called in to interfere at all because he is apprehensive of a breach of the peace, he should, under Section 319, maintain in possession the person who has been actually put in possession by a decree of the Civil Court.

THIS is a case which has been referred to us under Section 434 of the Criminal Procedure Code, and we have heard Mr. Paul in support of the recommendation of the Sessions Judge that the order of the Magistrate should be quashed, as well as Mr. Allan in reply to him, at some considerable length.

We are clear that the order of the Magistrate is illegal, and cannot be permitted to stand.

The petitioner, Ranee Shama Soondery, has been put in possession of the share in the lands claimed by her under a decree of the Principal Sudder Ameen, confirmed in appeal by the High Court on the 18th July 1865 (Weekly Reporter, p. 144, Civil Rulings).

An Ameen has been deputed to the spot, and the petitioner has given him a receipt stating herself to have been placed in "khas" possession of the lands, or, to speak correctly, of her 2¾ annas share in them, the lands amounting to some 8,633 beegahs in extent.

We hold that it was not competent to the Magistrate to interfere, under Section 318 of the Criminal Procedure Code, with the execution of a decree of the Civil Court, affirmed, as it had been, by the highest Court of the country, or to say that the word "khas," as used in giving possession, must be "an error," or to lay it down that the petitioner had no right to come on the lands "except as collector of rent."

Mr. Allan contends that his clients, Messrs. Jardine, Skinner, and Co., have actual and tangible possession of certain parts of the lands which have not been actually defined or interfered with by the Ameen, and that they cannot be ousted, as no provision for their ouster is contained in the decree. We find, however, on reference to the decision of the High Court of July last, already quoted, that Messrs. Jardine, Skinner, and Co. never then pleaded any right derived from occupancy, and that the Divisional Bench then expressly ruled that they could not call on the plaintiff, the Ranee, to acknowledge them as her tenants.

Moreover, we are informed that the case, giving the Ranee possession, is pending in appeal in the Miscellaneous Department, and, if there had been any doubt as to the exact meaning, intent, and object of the decree, the matter was one which ought to be adjudicated on in that Department, and not in the Criminal Court.

In fact, looking to the possession of the parties and to the state of the dispute, the Magistrate, if called in to interfere at all under Chapter XXII. of the Code of Criminal Procedure, because he was apprehensive of a breach of the peace, should have kept the Ranee in possession under Section

319 as the party who had been actually placed in possession by a decree of the Civil Court.

For the purposes of the reference before us, we, therefore, acting under Section 434 of the Code, quash the proceedings of the Magistrate held under Section 318, and declare them null and void. In so doing, we are acting in strict accordance with a decision of this Court of the 27th April 1864, in the case of Kali Soondery Chowdraney, referred from Rajshahye, and decided by Justices Loch and L. S. Jackson under the above Section.

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The 25th June 1866.

*Present :*

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

**False Evidence—Discretion of Civil Court in sanctioning charge of.**

Queen *versus* Poosa Ram and two others.

*Committed by the Magistrate of Darjeeling, and tried by the Sessions Judge of Dinagepore, on a charge of giving false evidence.*

*Mr. R. E. Twidale* for Petitioners.

Unsatisfactory conviction for perjury, where the evidence was balanced as to numbers, and where the story for the prosecution was improbable, reversed.

The discretion vested in a Civil Court under Section 169, Code of Criminal Procedure, of sanctioning a criminal charge of perjury, is one that should be most carefully exercised.

Remarks on the present case in which the discretion was improperly exercised.

*Jackson, J.*—It appears to me that it would be quite unsafe to sustain a conviction arrived at under such circumstances as the present. The prisoners were, two of them witnesses, and the third plaintiff, in a civil suit brought against the prosecutor, Mr. Cleeve. Motee Ram sued Mr. Cleeve upon a note of hand (an I. O. U.) for 1,600 rupees. He alleged that, although he had executed the I. O. U., there was an understanding that he was to pay in 18 months' time. The witnesses called by the plaintiff, on the other hand, deposed that there was no such verbal agreement, but that he was to pay within 8 days. The Civil Court which tried the suit, it appears, gave a decree against Mr. Cleeve as prayed by the plaintiff. After this, on Mr. Cleeve's application, the Civil Court allowed him to institute criminal proceedings against these parties for giving false evidence and making use of this evidence knowing it to be false. On the trial, Mr. Cleeve himself appeared with three persons whom he called as witnesses, and they deposed that the third prisoner, Motee Ram, who came to Mr. Cleeve for the purpose of settling his account, came alone, unaccompanied by any one else; and upon this the Sessions Judge, sitting with two European Assessors, has convicted the prisoners, and sentenced them to one year's rigorous imprisonment.

The first thing which strikes one on looking at this case is, that it is merely one of a balance of testimony. On the one side were the plaintiff and his two witnesses; on the other were Mr. Cleeve and his three witnesses; and then we find that the prisoners called another independent witness, who very strongly and substantially corroborated what they had originally said, and thus bringing the testimony to an absolute balance, there being four oaths on the one side, and four oaths on the other.

In addition to this, I am bound to say that the account given by Mr. Cleeve is one which it would be extremely difficult to believe. He states in his deposition before the Sessions Court :—

"On that same day, after making up the "account between us, I gave defendant "No. 3 a note of hand or I. O. U. for 1,600 "rupees payable at my convenience. It "was my intention to leave Hope Town for "good early in the month of February "following, but previous to doing so I sent "for defendant No. 3, and told him that, on "condition of his not taking any steps to "sue me for the amount of the I. O. U., "I would agree to pay him twelve per cent. "per annum until such time as the amount "was liquidated."

Now, here was a European resident of this remote place, Hope Town, having money-transactions with a trader there, and he says that he was about to leave the place for good, and yet we are to suppose that this trader accepted, without any sort of security, a note of hand with 12 per cent. interest payable up to the time of liquidation. That statement in itself is almost incredible; and then, again, if we look at the testimony upon which these persons have been convicted, we find (take only one instance; there may possibly be more, but here there is a very startling discrepancy) Mr. Cleeve says :—

"Defendant No. 3 came up alone to my "house; I saw him walking up to my door. I "first spoke to him outside the house, and "then asked him to walk into the dining-"room, when I made out the account."

Then, on turning to the evidence of one of his witnesses, Bhochun, witness No. 3, he says :—

"Motee Ram came of his own accord; "when he came, I gave notice to the sahib. "He came alone. The sahib told me to call "him in. The sahib did not go outside. "Witness No. 2 was in the room at the "time."

This is directly the contrary to what is said by Mr. Cleeve himself.

Then the prisoners were persons, it seems, in a respectable class of life, and not the sort of persons who might have been hired or retained as common witnesses, and whose testimony apparently was not, *primâ facie*, unworthy of belief. It certainly cannot be said that the witnesses for the prosecution were witnesses of a higher grade, or more worthy of belief. One was a chuprassee, another a mistree, and all of them either then were or had been previously in the service of the prosecutor.

Under these circumstances, it appears to me that it would be quite unsafe to affirm the conviction of these prisoners.

I think, therefore, that the conviction ought to be reversed, and they released.

Moreover, it appears to me that this is precisely a case in which the Judge of the Civil Court, who tried the original suit, ought to have very carefully exercised the discretion vested in him by Section 169 of the Code of Criminal Procedure. That Section provides :—

"A charge of an offence against public "justice described in Sections 193, 194, 195, "196, 199, 200. 205, 206, 207, 208, 209, 210, "211, or 228 of the Indian Penal Code, "when such offence is committed before or "against a Civil or Criminal Court, shall "not be entertained in the Criminal Courts, "except with the sanction of the Civil or "Criminal Court before or against which "the offence was committed."

That was a provision substantially similar to the law which formerly prevailed, and which expressly provided that persons against whom a civil suit had been successfully prosecuted, and who from vindictive motives should be desirous of bringing their adversaries into the Criminal Courts, and harassing them by charges of perjury and forgery, should not be allowed to do so, unless the Court where the suit was tried saw cause to permit it.

In this case, whatever the Judge might have thought as to the accuracy of the witnesses in matters of detail, it is plain that he believed their story in the main, because he passed a decree for the plaintiff.

I think, therefore, this was a case in which the Judge should have been extremely unwilling to allow a prosecution. But Mr. Cleeve says (on the question being put to him, "Did defendants 1 and 2 give their evidence before you in the civil suit, and did you then, before the Judge, impugn it as false?"): "Yes; and the Judge told me "to prosecute them criminally if I had any "charge against them," thus, in fact, encouraging him to bring the criminal charge.

It appears to me that the discretion vested in the Court was very improperly exercised in this case, and that the proceedings ought not to have been permitted.

*Markby, J.*—I also entirely agree that the decision of the Judge ought to be reversed.

It appears that the defendants were tradesmen in partnership, and that the prosecutor was in their debt. The prosecutor had given to the defendants an acknowledgment of his debt in the form of an I. O. U. A suit to recover the debt was afterwards brought by the defendants, and the defence set up by the prosecutor was that, at the time the acknowledgment was given, an arrangement was made that no proceeding should be taken to recover the debt as long as interest was paid at the rate of 12 per cent. The defendants, however, denied that that arrangement had been made. On the contrary, they all three swore that they were all present when the I. O. U. was given, and that the arrangement was that the money was to be paid within 8 days. On the other hand, the prosecutor swore that one of the defendants alone was present.

There was, therefore, in that suit, a direct conflict of testimony between the prosecutor and the defendants. The suit was decided in favor of the defendants, whereupon the prosecutor turned round and charged the defendants with having given false testimony; and it is hardly necessary to say that this was a proceeding which ought to be very carefully watched.

The Judge below disposes of the case by saying that the evidence adduced by the defendants is extremely weak and inconsistent. If that had been so, it would have been a good reason for finding them guilty. But, I think, the evidence given by the defendants is at least as strong as that given by the prosecution. Indeed, looking at the inconsistency pointed out by my brother Jackson between the evidence of the prosecutor and that of one of his witnesses, I think the

preponderance is rather in favour of the evidence given for the defence. On the one hand, there was the statement of the prosecutor himself, and three witnesses, all more or less dependent on him. On the other hand, there is the statement of the three defendants, supported by a witness who is entirely independent of them, who positively supports their statement, and who was not even cross-examined by the prosecutor.

I think, therefore, that there is no ground for the remark that the evidence for the defendants was weak and inconsistent, and that there was no sort of evidence given by the prosecutor which is necessary in a case like the present to convict the prisoners.

I also entirely agree in the remarks made by my brother Jackson as to great caution being necessary in allowing such prosecutions for perjury, which are, in fact, an indirect mode of re-opening a case upon which a decision had been already given. It would be most undesirable that criminal proceedings should be for any such purpose so totally misapplied.

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The 25th June 1866.

*Present:*

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

**Discharge—Acquittal—European British subjects—Evidence.**

Criminal Jurisdiction.

Queen *versus* Robert Sheriff.

*Revised under Section 404, Criminal Procedure Code.*

Where no charge in writing has been drawn up, and the prisoner has not been asked to make his defence, the Magistrate, if he thinks that no offence has been proved, can only discharge and not acquit the prisoner.

Nor can the Magistrate acquit a prisoner whom he has no jurisdiction to try.

Mode of procedure by a Magistrate with regard to European British subject accused of an offence.

Remarks on the imperfect enquiry in this case with reference to the examination of witnesses.

THIS case has been sent for under Section 404, the attention of the Court having been called to it by the Government of Bengal.

On the evening of the 13th of February last, the officiating District Superintendent of Police at Cachar received information that Mr. Sheriff, the Manager of the Deedar Kaash Gardens, was charged with causing the death of an infant only a few days old, the child of one Kulgi, a cooly labourer in that garden. The woman said she was sitting in the lines giving the child suck, when the accused came into the lines, began to beat the men, and also beat her. One blow accidentally hit the child which was at her breast; blood flowed from its nose, and it died almost immediately. The Superintendent made an enquiry. It being late in the evening, he allowed Mr. Sheriff to go to the Cachar Planters' Hotel, taking from him a recognizance binding him to appear the next morning. On the 14th, the Civil Surgeon examined the bodies of the deceased infant and the woman Kulgi, and on the same day the report of the police officer was forwarded to the Magistrate.

It does not appear that the Magistrate proceeded with the case from the 14th to the 28th of February—a delay which appears to us inexcusable. The report of the Superintendent of Police informed the Assistant Commissioner that an offence had been committed which was apparently punishable with imprisonment for two years under Section 338 of the Indian Penal Code, or possibly under Section 323. In either case, it was an offence which the Assistant Commissioner, who appears to have the full powers of a Magistrate, was competent to deal with.

On the 28th of February, the Assistant Commissioner proceeded to take the evidence of the witnesses. The record of this proceeding is most imperfect. It does not show that the witnesses examined on the 28th were either sworn or, if Hindoos or Mahomedans, affirmed under Act V. of 1840. There is nothing in the record, from the beginning to the end, to show whether or not the accused was ever in custody or present during any part of the enquiry, though it appears that he was summoned for the 28th. There are certain expressions in the evidence which look as if some one had put questions in the interest of the accused, but there is nothing to show whether or not there was any cross-examination by him. Except in the case of the first, and perhaps the second, witness examined on the 28th of February, and the Civil Surgeon on the 7th of March, the evidence, as taken down, does not appear to have been read over and explained to each witness, as required by Sections 198, 199, and 249 of the Code of Criminal Procedure.

The 30th June 1866.

*Present :*

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

**Grievous Hurt and Robbery.**

Queen *versus* Chakor Haree and others.

*Committed by the Magistrate of Bancoorah, and tried by the Sessions Judge of West Burdwan, on a charge of murder, &c.*

Where, in a case of robbery attended with death, there was no intention of causing death or such bodily injury as was likely to cause death, the conviction was altered from voluntarily causing hurt in committing robbery, to voluntarily causing grievous hurt in committing robbery.

THESE four prisoners were committed to take their trial before the Sessions Court of Zillah West Burdwan on the following charges :—

*1st.* Murder (Section 302, Indian Penal Code).

*2nd.* Dacoity (Section 395, Indian Penal Code).

An additional charge was framed by the Sessions Judge, *namely*, robbery and voluntarily causing hurt.

The Sessions Judge, in concurrence with the opinion of the Assessors, convicts the prisoners of robbery, and voluntarily causing hurt in the commission of robbery, and sentences the prisoners to transportation for life (Section 394, Penal Code). The Judge observes that the evidence for the prosecution is particularly good and trustworthy, and proves that the deceased, with his wife, her babe, her brother, and her nephew, were returning at night from a neighbouring market with their little purchases, and a few brass and copper utensils, and that they were suddenly attacked on the road, and robbed of their all by the prisoners. The deceased received a blow on the head from a latee; the child also received a blow, but was not severely injured.

Bissoo the deceased died, says the Judge, "from the effects of the blow on the head, or rather of the shock occasioned thereby."

The Judge remarks that "in this case the deceased was struck but once, and with a *latee only*, and the intention of his assailants was evidently merely robbery, and they had no desire nor idea of causing death. Indeed, from the evidence of the medical officer, it appears the blow was by no means a severe one, and death may have been caused by the shock of an unexpected attack causing certain vessels of the brain to burst. The prisoners, therefore, cannot be found guilty of the capital charge."

The Judge, as stated above, convicts of voluntarily causing hurt in committing the offence of robbery under Section 394.

On turning to the evidence of the medical officer, we find that he deposes that there was a contused wound on the scalp two inches long and about a quarter of an inch deep, that the cut commenced a little above the forehead on the right side and ran backwards towards the crown of the head.

There was a considerable quantity of blood round the brain under the "*dura mater.*" The effusion of blood was no doubt the cause of death. "This was probably caused by the shock of the blow which ruptured some of the small blood-vessels of the brain." From this evidence it is very clear that the blow received by the deceased caused his death.

The prisoners have committed the grave offence of highway robbery at night upon unoffending people with whom it is clear from the evidence that they had no previous enmity. The evidence to prove an *alibi* on the part of the prisoners is wholly untrustworthy, and we entertain no doubt of the guilt of all the prisoners who have been clearly identified as present, and taking a part in the robbery.

The conviction of voluntarily causing hurt is, however, we think, not suited to the facts proved in evidence. The offence of hurt is described in the Penal Code, Section 319, as causing bodily pain, disease, or infirmity. In this case, a latee was used, the deceased was struck a heavy blow on the head, on a tender part of the head—the forehead—and this blow undoubtedly was the immediate cause of death, and not the shock occasioned by the blow, as observed by the Judge.

The Penal Code does not provide for simple cases of manslaughter, but it provides for cases of homicide ; whereas, in the case before us, there has been no intention to cause death, or to cause such bodily injury as is likely to cause death, it falls under the head of grievous hurt (Section 325. Penal Code): and the practice of our Court has been to rely on this Section on such cases.

We therefore alter the conviction to "voluntarily causing grievous hurt in commission of robbery," and confirm the sentence passed by the Sessions Judge of transportation for life on Chakor and Brojo, who beat the deceased, as well as on the other two who are Chowkeedars, and whose crime is aggravated by their position as guardians of the public peace.

The 30th June 1866.

*Present :*

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

**Sentence without defence.**

Criminal Jurisdiction.

*Referred under Section 434, Act XXX. of 1861, and Circular Order, dated 15th July 1863, No. 18.*

Bamaboistobee, *Petitioner.*

A sentence of imprisonment passed on a woman, who was never put on her defence, quashed as illegal.

WE have referred to the Sections of the law quoted by the Sessions Judge and to the proceedings of the Magistrate, and we are of opinion that the sentence of one month's imprisonment passed under Section 182 of the Penal Code, in the case of Mussamut Bama, who was never put on her defence, is illegal.

The sentence is accordingly quashed.

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The 2nd July 1866.

*Present :*

The Hon'ble G. Loch, *Judge.*

**Kidnapping.**

Queen *versus* Sheikh Oozeer.

*Committed by the Magistrate, and tried by the Sessions Judge of Dacca, on a charge of kidnapping, &c.*

Section 368 of the Penal Code refers to some other party who assists in concealing any person who has been kidnapped, and not to the kidnappers.

THE Sessions Judge is right in supposing that the conviction by the Jury on the 3rd charge is incorrect. Section 368 evidently refers to some other party who assists in concealing any person who had been kidnapped, and does not refer to the kidnappers. As, however, the Jury have convicted the prisoner on the 1st and 2nd charges, and the prisoner has failed to show that there is any error in law in this finding or in the sentence passed upon him, I reject the appeal.

The 2nd July 1866.

*Present :*

The Hon'ble J. P. Norman and G Campbell, *Judges.*

**Evidence of accomplices—Corroboration—Misdirection.**

Queen *vs.* Khotub Sheikh and others, *Appellants.*

*Committed by the Magistrate, and tried by the Sesssions Judge of Nuddea, on a charge of dacoity, &c.*

A verdict of guilty of dacoity against certain of the prisoners set aside on the ground of misdirection, the Judge having omitted to point out to the Jury the danger of relying upon the uncorroborated testimony of accomplices.

IN this case, the Sessions Judge has committed the error pointed out by the Court in the case of Queen *vs.* Elahee Buksh, 5 Weekly Reporter, p. 80, Criminal Rulings. He has omitted to point out to the Jury the danger of relying upon the uncorroborated testimony of accomplices.

As regards Khotub, a large quantity of property belonging to prosecutor was found in his possession. This fact raises a presumption of his guilt, and exactly tallies with what might have been expected if the evidence of the accomplices were true, and abundantly corroborates the statement that Khotub was concerned in the dacoity.

As regards the prisoners Sreemonto Sirdar, Tinoo Chung, and Nobin Sirdar, it is proved that they were absent from their houses, which are in the village of Chuprah, on the night of the dacoity. On the following morning at day-break they were met by three independent witnesses at Assumnugger, a place about four koss to the south-east of Chuprah, to which village they were apparently returning. By reference to the map, and from the evidence, Assumnugger appears to be about 3 or 3½ koss to the north-west of Bazeedpore. As traces of robbers and of the plundered property were found to the west of that village, it is clear that these people were in a place in which, if the story of the accomplices is true, they would naturally have passed on their return from the scene of the dacoity to their own houses. Their presence at Assumnugger is unaccounted for, except on the supposition that the story of the accomplices is true.

Acting on the rules laid down in Elahee Buksh's case, we think it unnecessary to interfere with the conviction of the above-mentioned four prisoners.

As regards Denoo Ghose, the finding of the pieces of burnt *masal*, with a sword, affords some slight corroboration.

As regards Modhoo Ghose, the finding of the silver ornament, which the prosecutor claims, in the possession of a member of the prisoner's family resident in his house, could afford some corroboration. But the Sessions Judge (disregarding the Circular of the 20th August 1864), instead of treating the possession of it as part of the evidence against the prisoner on the main charge, framed a separate charge in respect of the illegal possession under Section 412; and the manner in which the question on that charge was left to the Jury leaves it entirely doubtful whether or not they believed the ornament to be the property of the prosecutor.

As regards Woomesh Ghose, his absence from home on the night of the dacoity, and the circumstances referred to by the Sessions Judge, afford some slight corroboration of the story of the accomplice. It appears that the prisoner and Khodeeram have both houses in Kistopore. It may be that Khodeeram, knowing the fact that this prisoner had gone on the Saturday to Kishnaghur to the Small Cause Court, worked that fact into his tale to give an apparent confirmation to it. It is a matter which should be left to the Jury whether or not, from the position of the parties, Khodeeram could have known that the prisoner went to Kishnaghur, and left it again that night, except from the statement of Woomesh Ghose given in the mode detailed by Khodeeram. It must be observed that Khodeeram does not deny that this prisoner's brother had given evidence against him in a case in which he was imprisoned for one year.

As regards Gungaram and Nobin Ghose, there appears to be really no corroboration; and the same observation appears to apply to Poteet Ghose, because, as we understand it, the Jury think that the *thal* found in his possession is not identified.

We dismiss the appeal as regards Sreemonto Sirdar, Nobin Sirdar, and Teenoo Chung.

As regards Khotub Sheikh, we dismiss the appeal as regards the charge of dacoity, but reverse the conviction upon the 2nd head of charge, *viz.*, that of dishonestly retaining stolen property, the possession of which he knew to have been acquired by dacoity.

And we direct that the verdict be set aside on the ground of misdirection, and a new trial had, as regards the remaining prisoners.

The 2nd July 1866.

*Present:*

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

**Revision by High Court—Orders of Sessions Judge under Section 409, Code of Criminal Procedure—Security for good behaviour.**

Miscellaneous Case.

Juswunt Singh, *Petitioner.*

Orders passed by Sessions Judges in confirmation of orders by Magistrates calling upon parties to give security for their good behaviour, though not subject to appeal, are open to revision by the High Court under Section 404, Code of Criminal Procedure.

With reference to Sections 301 and 409, after the expiration of the term of confinement in default of security, a second security cannot be demanded except upon some new proof of bad livelihood or that a person is not capable of following an honest calling.

*Jackson, J. (Markby, J., concurring).*—In this case, the petitioner appeals against an order of the Sessions Judge of Purneah, by which he has been directed to furnish security for his good behaviour in the sum of Rs. 2,000 for the period of three years; and, in default of furnishing security, he has been committed to prison. Section 409 of the Criminal Procedure Code provides an appeal against orders of Magistrates calling upon parties to give security for their good behaviour, such an appeal lying to the Court of Session to which the Magistrate is subordinate. Section 408, however, which allows appeals from persons convicted on trials held by a Court of Session to the Sudder Court, does not allow any appeal against an order of the present kind. But, undoubtedly, such orders passed by a Sessions Judge in confirmation of an order by a Magistrate are open to revision by this Court under Section 404 of the Code of Criminal Procedure.

It appears that the petitioner has been repeatedly convicted and imprisoned on various criminal charges, and it also appears that, when he was about to be released at the expiration of one of these periods of imprisonment, the Magistrate instituted an enquiry

into his character, and passed an order calling upon him to give security for a period of one year; and that order upon appeal was confirmed by the Sessions Judge of the District on the 29th September 1864. Under that order, the petitioner appears to have remained in prison. Just as that period was about to expire, the Magistrate commenced a second enquiry into his character, detaining the petitioner, it seems, in the meantime in custody. Having made a sufficient enquiry, he recorded an order on the 23rd October 1865 in the following terms: "This man "is one of the most notorious dacoits in the "district: he is a sort of Dick Turpin. "Every one knows Juswunt Singh: it would "be the height of folly to let him out "of jail. Every Magistrate who has been "here has taken care to keep Juswunt "Singh in hand. The accused must find "security in the sum of Rupees one thousand "(1,000) for his good behaviour, for "one year, from this date; in default, to "remain in custody for the said period."

That order went before the Sessions Judge. The Sessions Judge quashed it, and directed a further enquiry, on which the Magistrate took further proceedings. On the orders coming again before the Sessions Judge, they were once more, and afterwards a third time, quashed, and the case remanded to the Magistrate. Finally, however, the Magistrate passed an order on the 20th February of the present year, recommending that the petitioner should be called upon to furnish security in the sum of Rs. 5,000 for three years. In modification of that proposal, the Sessions Judge has passed the order now complained of.

By Section 301, Code of Criminal Procedure, which closely follows the Section under which the Sessions Judge's order appears to have been made, it is provided that, "in the "event of any person required to give secu-"rity under the provisions of the forego-"ing Sections failing to furnish the security "so required, he shall be committed to pri-"son until he furnish the same; provided "that *no party shall be kept in prison for* "*a longer period* than that for which the "security has been required from him." And it appears that this Court, in the case of Sheikh Enayet, on the 29th July 1862, held that, "after the expiration of the term "of confinement in default of security, a "second security cannot be demanded ex-"cept upon some new proof of bad liveli-"hood, or that a person is not capable of "following an honest calling."

Now, it appears that the Magistrate, being of opinion that it was "the height of folly" to allow this person to come out of custody and to be at large, has kept him in prison for a longer period than that for which the original security was required from him, and has made a second enquiry into his character, although that enquiry could only relate to the character of the petitioner during the period previous to his late incarceration. It could never have been intended that, under the operation of these Sections of the Code of Criminal Procedure, security should be time after time demanded from a party, so that, by renewed orders of that kind and without any chance of leading a new life, and showing himself to be a proper person to be left at large, he should be kept in prison for the whole period of his life.

It appears to me, therefore, that the order which the Magistrate and Sessions Judge have passed in this case is not in accordance with the law or with common justice. It may be very necessary for the peace of the district, if the prisoner be a person of the kind described, that he should be kept under close surveillance—that the police should keep an eye upon him, and narrowly observe his conduct.

If, upon being set at liberty, he should return to his former course of life, and show that he continues to be, after being set at liberty, a person of dangerous and desperate character, whom it is hazardous for the community to leave at large, no doubt he may again be brought before the Magistrate, and after evidence of his proceedings has been laid before the Magistrate, a further order may be passed requiring him to furnish security. It does not appear to me that, without having been set at liberty and allowed a fair chance of leading a new life, orders of this sort should be passed, one after the other. I think, therefore, that the order ought to be set aside, and that the prisoner ought to be released.

At the same time I observe that the Magistrate states that, on the occasion of the investigation into the prisoner's character, he appears to have used threatening language towards the witnesses who appeared to depose against him. It would have been a proper course for the Magistrate to call upon the petitioner to give security to keep the peace towards those persons, and it may now be a wise precaution for the Magistrate to do so before releasing the prisoner.

The 7th July 1866.

*Present :*

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

**Forgery in Civil Court—Framing of charge.**

Criminal Jurisdiction.

*Referred under Section 434, Act XXV. of 1861, and Circular Order, dated 15th July 1863, No. 18.*

Queen *versus* Mohesh Chunder Acharjee and another.

When a Civil Court sends a prisoner before a Magistrate on a charge of forgery, it is competent to the Magistrate to commit the prisoner for trial on a charge either of forgery, or of using as genuine a false document, or of abetting forgery.

One Beeharam sued Mungla Dabea, the prisoners Mohesh Chunder and others, for possession of a tank. Mungla Debea, in answer, alleged that the tank was sold by a deed, dated the 23rd Bhadro 1225, to one Boirop, and that the deed was in the possession of Mudoosoodun Kasaree as mortgagee. A summons was served upon Judoonath, the heir of Mudoosoodun, requiring him to produce the deed.

Judoonath filed a petition, Exhibit A, stating that the defendant had alleged that the deed of sale had been in pledge with his father Mudoosoodun, and prayed that it might be called for from the petitioner; that it was in reality with the petitioner's brother, Koylash Chunder, but that he had now obtained and filed it.

And accordingly he filed the deed, Exhibit B.

The Moonsiff examined Judoonath, and found that he knew nothing about the deed, and that it had been made over to him for the purpose of being filed by the prisoner, Mohesh Chunder Acharjee. He also examined Mohesh Chunder Acharjee. It appeared to the Moonsiff proved beyond all doubt, that the deed was a forgery, and that it had been fabricated by Mohesh Chunder. He accordingly forwarded the papers to Mr. Ryland, the Deputy Magistrate, under Sections 169 and 170 of the Code of Criminal Procedure, that he might proceed against Mohesh Chunder Acharjee under Sections 463, 196, and 193 of the Penal Code.

The Magistrate, apparently finding that there was no clear evidence that the deed had been actually forged by Mohesh Chunder himself, and consequently that it was doubtful whether he could be convicted under Sections 463 and 467, and also apparently finding in the course of the enquiry that there was ground for charging Nobin Chunder of abetting the offence, thinking that Mohesh Chunder should be charged under Sections 471 and 193, and Nobin Chunder as an abettor applied for the sanction of the Moonsiff. The Moonsiff informed the Magistrate that he might try the prisoners under whatever Sections of the Penal Code he considered proper.

The Magistrate committed Mohesh Chunder and Nobin Chunder on charges under Sections 471, 193, and 109.

We are unable to understand why the Sessions Judge did not at once try the charges in regular course.

We think that there is nothing in any of the objections which he takes to the regularity of the Magistrate's proceedings.

The Sessions Judge says he holds the commitment illegal for reasons which we shall discuss in detail.

*First*, that Sections 169 and 170 only give sanction to a charge to be entertained, and that, as no charge had been made by any prosecutor, the Magistrate was not competent to institute a charge himself. Section 68, which is quoted by the Sessions Judge, affords the most complete answer to this objection. It enables a Magistrate having such powers as Mr. Ryland possessed, except as is otherwise provided in Chapter XI, to take cognizance of any offence which may come to his knowledge in the same manner as if a complaint had been made against such person. Now, there is not a word in Sections 169 and 170 as to the person by whom the charge is to be made. And the Sessions Judge is in this dilemma, that, if his construction that "charge" in those Sections means charge by a private prosecutor, the Sections in question would only apply to private prosecutions, and not at all to a charge made by a Magistrate upon facts coming to his knowledge.

*Secondly*, he says that the Moonsiff's giving sanction to the prosecution of the two prisoners is mere waste paper, and did not give the Magistrate jurisdiction to investigate and commit; because, if it is an order under Section 171, the particular charge must first be determined by the Moonsiff, and he had

no power under Section 171 to order generally the trial of any charge under the Penal Code which the Deputy Magistrate, and not the Moonsiff, may consider correct.

The Moonsiff in terms made his order under Sections 169 and 170, and the answer we have given to the first objection shews that, in our opinion, it was a perfectly good order under Section 170.

But we must express our dissent from the narrow construction which the Sessions Judge would put on the word "charge" in the 171st Section. The charge before the Magistrate is something very different from the *formal written instrument of charge* to be drawn up under Section 233, upon which the prisoner is to be tried before the Sessions Judge. When a prisoner is sent by the Judge of a Civil Court before the Magistrate on a charge of forgery, it is perfectly competent to the Magistrate to send him for trial on a charge either of forgery, of using the document knowing it to be forged, or of abetting forgery. In fact, for the exact offence which, on a full investigation before the Magistrate, shall appear to have been committed, we need not enquire whether the express sanction of the Civil Court to the charge as ultimately framed by the Magistrate is requisite, because such sanction was actually given in the present case.

*Thirdly*, as to the charge against Mohesh Chunder of fabricating false evidence under Section 193, the Sessions Judge raises a discussion which appears to us to be beside the question, *viz.*, whether the Petition A was a document within the meaning of that word in Section 29. It may or may not be. On that point we need at present express no opinion.

As we understand it, the petition was a document, instrument, or writing fabricated, to have evidence upon which the Court was to act to excuse or explain the non-production of the mortgage-deed at an earlier period, or to give the mortgage-deed an appearance of genuineness by shewing that it came from natural and proper custody. On trying the case, the Sessions Judge will, no doubt, be able to ascertain whether it was intended to be used as evidence. Whether or not it is a document in the sense in which that word is used in Section 29 and in the Penal Code, is probably very immaterial.

We think that there is no ground for interfering with the commitment, and that it was the duty of the Sessions Judge to have tried the prisoners in regular course.

The 9th July 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble J. P. Norman, F. B. Kemp, W. S. Seton-Karr, and G. Campbell, *Judges*.

**Evidence (of wife).**

Criminal Referred Jurisdiction.

Queen *versus* Khyroollah and others.

*This case was referred to a Full Bench by Norman and Campbell, JJ., with the following orders:—*

HELD by the majority of the Court (Norman, J., dissenting) that, upon trials in the Mofussil, a wife is competent to give evidence for or against her husband, or for or against any person tried jointly with her husband.

*Norman, J.*—I AM of opinion that there ought to be a new trial as regards the prisoners Khyroollah, Ainooddeen, and Shahabuddin.

According to the cases 1 Nizamut Adawlut Report, page 182, and Reg. *versus* Noyandee and Shodee, decided by Mr. Justice Steer and Mr. Justice L. S. Jackson in this Court, on the 9th of September 1863—the Queen *versus* Gour Chand Polie, 1 Weekly Reporter, Criminal Rulings, page 17—the evidence of a wife is not admissible for or against her husband or against a prisoner charged jointly with him.

No doubt, there are cases in the late Sudder Court in which the rule was not acted upon; and, as the question is one of very great importance, I think that the opinion of a Full Bench should be expressed on the subject.

The deposition of the witness Biroza, taken before the Magistrate, was read before the Judge. The Judge says: "She being an old woman, and reported to be dying of cholera, cannot attend to depose in Court."

But it does not appear that the Judge took any proper steps, by the examination of any witness, or by requiring the production of a medical certificate, to satisfy himself,

as required by Section 369, that her attendance could not be procured. There is a special reason why the Judge ought to have been peculiarly cautious on this point in the present case, because the witness Sumshoodeen, a little boy, the grandson of the old woman, who before the Magistrate stated that he was present and witnessed the murder, describing it almost in the same language as the witnesses Afzan and Nawabjan, when before the Judge, denied all knowledge of it, and said his mother told him about it the day after the deceased was killed. Afzan, the wife, who, according to her own account, stood by for twenty minutes while her husband was slowly dying by the hands of her paramours, is an actress whose evidence must be received with great caution.

The Police Officers have not been called, although their evidence would have been of the greatest importance.

Although the wives of the prisoners are not, according to my present impression, admissible witnesses against their husbands, or the supposed accomplices of their husbands standing on their trial at the same time, it would be a most important thing to show how and when the statements were made by them which led to the discovery of the several places in which the body of the deceased had successively been deposited.

*Campbell, J.*—As it appears that there are some expressions of some Judges which may possibly give rise to doubt respecting the admissibility of the evidence (notwithstanding all the authority on the other side), I have no objection to the reference to a Full Bench.

JUDGMENTS OF THE FULL BENCH.

*Peacock, C.J.*—Two questions have been referred in this case—

*1st.* Whether, upon a trial in the Mofussil of a person charged with an offence, his wife is competent to give evidence for or against him.

*2nd.* Whether, upon a trial in the Mofussil of several persons charged jointly with an offence, the wife of one of them is competent to give evidence for or against the others.

I am of opinion that both of these questions must be answered in the affirmative.

It is a general rule of English Law, subject to certain exceptions, that in criminal cases a husband and wife are not competent to give evidence for or against each other. But the English Law is not the law of the Mofussil.

At the date of the grant of the Dewanny to the East India Company in 1765, when the Civil Government of the Provinces of Bengal, Behar, and Orissa was vested in the East India Company, the Mahomedan Law was the Criminal Law of the country. That law was not abrogated on the accession of the British Government, and for some years afterwards the administration of justice in criminal cases was left to the Nazim. Even after the Criminal Law was administered by the Courts of the East India Company without reference to the Nazim, the Mahomedan Law, as modified by the Regulations and Acts of Government, continued to be the general Criminal Law of the country. The proceedings of the Criminal Courts were regulated by the Futwas or opinions of their Mahomedan Law Officers, and it was expressly enacted by Section 4, Regulation IX. of 1793, that the sentences of the Nizamut Adawlut should be regulated by the Mahomedan Law, excepting in cases in which a deviation from it was expressly directed by any Regulation passed by the Governor General in Council.

In some cases, provision was made with reference to the Futwas to be given by the Law Officers in cases in which the evidence given on a trial would be deemed incompetent by the Mahomedan Law. For example, Section 56, Regulation IX. of 1793, enacted that "the religious persuasions of witnesses "shall not be considered as a bar to the con-"viction or condemnation of a prisoner: but "in cases in which the evidence given on a "trial would be deemed incompetent by the "Mahomedan Law, solely on the ground of "the persons giving such evidence not pro-"fessing the Mahomedan religion, the Law "Officers of the Courts of Circuit are requir-"ed to declare what would have been their "Futwa, supposing such witnesses had "been Mahomedans. The Courts of Circuit "are not to pass sentence in such cases, but "shall transmit the record of the trial, with "the Futwa directed to be required from "the Law Officers, to the Nizamut Adaw-"lut, which Court, provided they approve "of the proceedings held on the trial, shall "pass such sentence as they would have "passed had the witnesses whose testimony "may be so deemed incompetent been of "the Mahomedan persuasion."

Further, by Regulation III. of 1810, which authorized the Government to dispense with the attendance and Futwa of the Law Officers whenever there might appear to be sufficient cause, it was enacted that, "in the event of any question of "Mahomedan Law arising upon such trials, "the same should be recorded upon the "proceedings for the information and deci-"sion of the Court of Nizamut Adawlut; "but, if the question should refer to the "competency of a witness, such witness "should be examined, leaving the admission "or ultimate rejection of the testimony so "given to the consideration of the Nizamut "Adawlut."

Other modifications of the Mahomedan Criminal Law were made, and in some instances particular offences, such as perjury and forgery, &c., were defined, and the punishment for them declared by Regulations of Government (*see* Regulation II., 1807, and Regulation XVII., 1817).

In 1832, by Regulation VI., Section 5, it was enacted that any person not professing the Mahomedan faith, when brought to trial or commitment for an offence cognizable under the general regulations, might claim to be exempted from trial under the provisions of the Mahomedan Criminal Code; and in such cases the prisoner was to be tried with the assistance of a Punchait, Assessors, or a Jury, and the Futwa of the Law Officer was to be dispensed with.

It is clear that the English Criminal Law was not the Criminal Law of the Mofussil, and that the English Law of Evidence was never extended by any Regulation of Government to criminal trials there.

Section 3, Act XV. of 1852, did not render a husband or wife incompetent for or against the other in criminal cases. It merely declared that nothing in the Act should render them competent.

Act II. of 1855 did not affect the matter now under consideration. It is clear that Section 14 did not render a wife competent to give evidence against her husband in a criminal case. It declared that the persons therein mentioned only should be incompetent to give evidence. It rendered them incompetent in all cases, but it did not render any person competent or incompetent with reference to particular persons or particular cases. Section 20 applied to civil proceedings only, and Section 58 declared that the Act was not to be so construed as to render inadmissible in any Court any evidence which, but for the passing of the Act, would have been admissible in such Court.

It should be observed that, at the time when Acts XV. of 1852 and II. of 1855 were passed, the Mahomedan Criminal Law, as modified by the Regulations, was the general Criminal Law of the country. As a general rule, women were incompetent witnesses under the Mahomedan Law in criminal cases (2 Hedaya, page 667).

Mr. Beaufort, in his Digest, Volume I., page 118, para. 629, limits the rule which excludes the evidence of women to cases inducing Hudd or Kisas; but he does not cite any authority for that position.

Zibra says: "In the time of the Prophet "and his two immeditate successors, it was "an invariable rule to exclude the evidence "of women in all cases inducing punish-"ment or retaliation" (2 Hedaya, 667). In Hurrah's case, 1 Macnaghten's Nizamut Adawlut Cases, it was held that the evidence of a wife or son was insufficient for a sentence of Kisas, but sufficient for conviction on strong presumption and a sentence by seasut.

In Mussamut Mughnee *versus* Ohariya, 1 Nizamut Adawlut Reports, 144, the evidence of the prisoner's wife was admitted in corroboration of other evidence against him to support a sentence of death or other punishment by seasut.

In 2 Nizamut Adawlut Reports for 1852, page 156, Mr. Mills, in a case of culpable homicide, says: "Though the testimony "of a wife against her husband may be "received in our Courts, yet the practice of "summoning a wife to give evidence against "her husband has been always held to be "objectionable, and it is one which should "on no account be encouraged."

In 2 Macnaghten's Nizamut Adawlut Reports, 150, the Court observed: "The wife "of the prisoner was called to give evidence "against him though her evidence was wholly "unnecessary; the practice of summon-"ing such a near relation to the prisoner "as a witness for the prosecution, *excepting* "*in cases of urgent necessity, was consider-*"*ed highly objectionable;* and the Court "directed that such a practice should be "discouraged."

In 3 Macnaghten's Reports, it was held, contrary to the Futwas of all the Law Officers, that the evidence of a son was admissible against his father in a criminal case.

But it is not necessary to allude further to these cases except to show that it was

the practice of the Nizamut Adawlut to admit the evidence of a wife against her husband, or a son against his father, in criminal cases in which the sentence was by seasut. I do not, however, place much reliance on those cases, as they were decided under a very different system of law from that which now exists. Still they show that, at that time, the evidence of a wife was legally admissible. The Mahomedan Criminal Law, including the Mahomedan Law of Evidence, is no longer the law of the country. It has been superseded by the Penal Code and the Code of Criminal Procedure so far as they go; but they do not touch upon the rules of evidence. After the passing of the Penal Code and the Code of Criminal Procedure, Regulation IX. of 1793, by which the Mahomedan Law, as modified by the Regulations, was established as the general Criminal Law of the country, and many other Regulations bearing upon the same subject, were repealed by Act XVII. of 1862. A Code of Evidence has not yet been passed, and we have no express rule laid down by the Legislature in any existing laws upon the subject now under consideration.

By the abolition of the Mahomedan Law, the Law of England was not established in its place.

I know, therefore, of no law which renders a husband or wife incompetent to give evidence against the other, or which excludes the evidence of others who are bound by the closest ties of relationship.

It has, however, been held by a Division Court that the evidence of a wife is not admissible against her husband in a criminal case, even in corroboration of other evidence given (Gour Chand Polie and Dwarkee Polie, 1 Weekly Reporter, Rulings in Criminal Cases, 17).

In that case, the Judges say: "We think "that the evidence of the wife against her "husband should not have been recorded. "It is true that there are cases published in "the earlier Reports of the Nizamut Adawlut "in which the evidence of the wife has been "received against the husband in *corroborat-* "*ion* of other evidence; but this practice "has been reprobated by later decisions of "the same Court, and is certainly opposed to "the general principle of all criminal law. "The Judge has quoted Section 20, Act II. "of 1855; but this Section refers to civil "proceedings. The Judge would hardly "condemn a wife who committed perjury "for her husband, and, on the other hand, he "would most likely discredit her if she "appeared too willing a witness against "her husband."

With reference to that part of the judgment in which it is said that the practice had been reprobated in later decisions, I would remark that it was merely the practice of compelling a wife to give evidence against her husband when her evidence was not necessary, that was reprobated, and that it is to be inferred that the evidence is admissible although the attendance of a wife against her husband ought not to be compelled when not necessary. In this I entirely concur.

It is our duty to declare what the law is, not to make the law—or, as Lord Bacon expresses it, "*jus dicre*," not "*jus dare*." If Judges were at liberty to decide what the law is according to their notions of public policy, the greatest confusion and uncertainty would necessarily be caused. It is not for us to say whether the rule of English Law is founded upon sound principles or not, although there are many eminent jurists who consider that it is not. But I may say that I cannot concur in the proposition enunciated in the case last cited, that it is contrary to the general principle of all Criminal Law to admit the evidence of a wife in corroboration of other evidence against her husband.

When the Judges of the Nizamut Adawlut spoke of a wife giving evidence in corroboration of other testimony against her husband, they no doubt had reference to the Mahomedan Law, which did not allow a conviction upon the evidence of only one witness; and, I presume, the Judges of the Division Bench, who in the case last cited rejected the evidence of a wife in corroboration, would also reject it where the wife's evidence is uncorroborated. They do not allude to the exception in the English Law by which a wife is competent to give evidence against her husband upon a charge of personal violence committed by him upon her, but I presume that they would admit of that exception.

Bentham, speaking of the rule of English Law which excludes the evidence of a wife against her husband, says:—

"A law which should exclude the evidence "of the wife in the case of a prosecution "against her husband for ill-usage done to "the wife, would be tantamouut to author- "izing the husband to inflict on the wife "all imaginable cruelties so long as nobody "else was present—a condition which, hav- "ing by law the command in and over his

"own house, it would in general be in his "power to fulfil.

"A law which excludes the testimony of "the wife in the case of a prosecution against "the husband for mischief done to any other "individual or to the State is, in like manner, "in other words, a law authorizing him to do, "in the presence and with the assistance of "the wife, every kind of mischief, that except-"ed by which she would be a sufferer. The "law which in the former case affords its pro-"tection to the wife—with what consistency "can it, in the latter case, refuse its protection "to every human creature besides?" *See* Bentham's Works by Bowring, Volume VII., page 484.

"Two men both married are guilty of "errors of exactly the same sort, pun-"ishable with exactly the same punish-"ment. In one of the two instances (so "it happens), evidence sufficient for con-"viction is obtainable, without having re-"course to the testimony of the wife; in the "other instance, not without having recourse "to the testimony of the wife. While the "one suffers—capitally, if such be the "punishment—to what use, with what con-"sistency, is the other to be permitted to triumph in impunity?" *Idem.*

If these arguments are not sufficient to shew that the rule of exclusion in England is merely a rule of positive law, and not one depending upon the fundamental principles of natural justice, I would adopt the arguments of the eminent and highly distinguished jurist, Mr. Livingstone. In his Introductory Report to the Code of Evidence, prepared by him for the State of Louisiana, he says: "The exclusion of in-"terested testimony having been examined "and found to be injurious to the investi-"gation of truth, and its admission to be "attended with no inconvenience which "may not be reduced to one of a quantity "that has no assignable value, it, of course, "finds no place in the proposed Code; and "with it disappears one of the most fruitful "sources of uncertainty, expense, delay, and "inconvenience in the law.

"If the search after truth requires that "interested witnesses, and even the parties "themselves, should be interrogated to dis-"cover it, are there any relations in which "the offered witness may stand to the parties "that exclude his testimony? By the Eng-"lish Law—and, of course, in the several "cases which have been noticed by ours—"there are several: husband and wife, &c.

"1. The Code now offered does not con-"tain the exclusion of husband or wife, as "witnesses, for or against each other; be-"cause the reporter does not find any one "sufficient among the reasons by which it is "supported in the English Decisions or Com-"mentaries. The first of these alleged rea-"sons is that their 'interests are identical.'

*2 Starkie 706.
1 Bl. 443.

"But in a system "which discards in-"terest as an object-"tion to competency, this reason falls of course. "The second is said by the same authority to "be '*on grounds of public policy*' *to pre-"vent distrust and dissension between them, "and to guard against perjury.* * * *

"In the case before us, the public evils "are designated: *first*, the danger of domes-"tic dissension: *secondly*, the danger of "perjury. The first, if the evidence should "be against the party connected with the "witness; the second, if it should go to ex-"onerate him. The argument supposes that "if the husband or wife be called as a wit-"ness in a suit to which the other is a party, "one of two things must happen; either "unfavorable truths will be told, which it is "said will disturb the family peace; or per-"jury will be committed to preserve it. Now, "these are two opposite and contradictory "reasons. If the danger be that family dis-"sensions will grow out of the testimony, "then that of perjury is avoided; if the "danger be perjury, then that of family dis-"cord need not be apprehended. But legis-"lation must be founded on the general ap-"plication of its reasons—not on the tend-"ency of its measures to good or evil in par-"ticular instances. If the connection by "marriage be so close as to make the parties "incur the danger and disgrace of giving "false testimony for the other, then let the "case be examined solely with a view to the "evil of placing the witness in a situation "where strong motives are offered to him to "commit a crime. If the predominant risk "be that of destroying domestic harmony, let "that be assigned as the reason; but to al-"lege both, when they are contradictory, is "a strong presumption that neither can safely "be relied upon. Both, however, will be "examined, and both contrasted with the "evils which attended the exclusion.

"First, let us suppose that domestic dis-"sension is the danger—that is to say, that "one spouse will quarrel with the other for "telling the truth in a Court of Justice when "it makes against the interest of the other. "But, in most cases, the interest is common

"between them; therefore, there is little "probability that any ill-will can be "created in the mind of the one against the "other for not committing perjury, in "order to protect a common interest. The "supposition that a domestic broil may "ensue from a cause like this, is to suppose "the party raising it, corrupt in expecting "falsehood from his or her spouse, and "malevolent in resenting his disappoint-"ment; and the law cannot reasonably be "required to make any great sacrifice for "preserving the harmony of so ill-assorted "a union as that which such a case sup-"poses. The dissension arises from the "performance of a duty—bearing open "testimony of the truth, and avoiding a crime "—the commission of perjury; and because "a brutal, corrupt, or passionate husband "may quarrel with his wife for avoiding "the crime, shall the law declare that the "wife shall not perform the duty? It "will watch over domestic peace by punish-"ing those that disturb it, and for proper "causes, by dissolving the bond of an ill-"assorted connexion; but it ought never "to say, the one party shall be exempted "from the performance of an important "public duty, because the other is tyrannical "and unjust. The argument supposes, too, "that there is greater danger to domestic "happiness from this than from any other "source; but is there any foundation for "the belief? Not one case in a thousand, "it is believed, will occur in practice where "any improper excitement will be created "by an adherence to the truth, although it "should militate against the wife or the hus-"band of the party who states it. Why "should it more in this case than in that of "any other witnesses? Mutual affection, the "knowledge that it was the performance "of a duty required by law, and that it "could only be avoided by a crime, are so "many and such cogent reasons to prevent "ill-will on the occasion, that it is astonish-"ing how this reason could find favor with "the great lawyers who have assigned it "as an argument in favor of their rule; "more especially when they themselves "most explicitly discard this reason by "declaring that the wife shall not be allow-"ed to appear as a witness against the hus-"band, even if he consents, or after a divorce, "nor against the interest of his heirs after "his death.* How con-"nubial happiness can "be disturbed by a "compliance on the part of the wife with "her husband's request while united, or by "any act after the connexion has been dis-"solved by death or divorce, these learned "Doctors of the law alone can explain.

"Examine the opposite reason—the dan-"ger of perjury; that is to say, the matri-"monial union is so strict that the one "party to it will incur all the dangers of "punishment and infamy rather than tell the "truth when it is injurious to the other; "and the law, it is said, holds out this ir-"resistible temptation to the witness when "it permits him to be examined. Yet, by "the preceding argument, the temptation "is easily resisted, the truth will be told, "and this strong connexion is so weak "that it is broken merely on that account.

"But the arguments must be destroyed, "not by opposing the one to the other, "but both of them to the truth. There "is no doubt that in this, as in many other "cases, minds may be found that will "waver between the declaration of a truth "that may hurt their interests or their "feelings, and the assertion of a falsehood "that in their opinion may secure "both from injury; but can the law "be said to hold out a temptation to perjury "when it orders a party under those circum-"stances to tell the truth? If there were no "temptations to conceal the truth or assert a "falsehood, there would be no need of oaths. "Oaths, and the penalties for breaking "them, were made for the purpose of coun-"teracting that disposition. If they were to "be dispensed with in cases where that dis-"position exists, there would be no need for "them in any others. In every such case, "then, it may, with equal reason, be said "that the law holds out a temptation to "perjury, because it exacts the oath to tell "the truth, when there is an inclination "to conceal it; and the argument would "extend with equal reason to the abolition "of oaths, and the penalties for the breach "of them. This exclusion is at variance, "too, with other provisions of the law as "they already exist. The party himself "may be interrogated in Chancery in Eng-"land, and in all cases at law here. The "wife may be interrogated to support an "accusation made by herself against her "husband for a personal injury, in some "cases affecting his life; yet she is not "permitted to prove a fact that would save "him from an ignominious death on a "charge brought against him by another. "Now, in all these cases, the danger of per-"jury is equally great, or greater, unless we

* 2 Stark 706.
6 East. 192.

"suppose the attachment of a wife to her "husband's interest superior to his own, "or her desire to make good her own charge "less intense than that which she would "feel to support the accusation brought by "another. The danger of perjury is no "greater in this than in other cases in "which it is incurred without scruple in "the dearest connexions of nature—father "and son, mother and child, brother and "sister, friendships of the most intimate "kind, habits of intimacy during a long "life—the parties to all these are every "day arrayed for and against each other "as witnesses, and the law interposes no "other safeguard to their consciences than "its penalties and the danger of infamy "by detection. No rule of exclusion pro-"tects the witness against the influence of "his affections or his interests. He is "heard, and the degree of connexion is "weighed against his character and the "probability of his story; the Counsel "cross-examine; the public inspect; the "Jury interrogate, and calculate, and deter-"mine; and no inconvenience is felt in "those cases. Why should there be in "this?

"Having stated the general principle "that every party to a suit has a right to "all the information in relation to his "cause, of which he ought not to be "deprived but for reasons of great public or "private inconvenience, and examined, by "discussing the reasons for exclusion in this "case, whether it offers any such inconveni-"ence, let us now examine the particular "evils attached to the rule as it now stands.

"In criminal cases, the evil is most "apparent. Suppose the husband, accused "by positive, but perjured testimony, of "a crime affecting his life, and the wife "the only witness of a fact that would "prove his innocence, no matter what "circumstances she could adduce to corro-"borate her testimony; no matter what "intrinsic evidence it contained; no matter "what perfect conviction it would produce "of its truth, it is sternly excluded; and "the innocent husband is executed because "'*public policy requires that the peace of* "*families should not be disturbed, and* "*that no temptations should be held out* "*to perjury.*' In this case—by no means "an improbable one—there is positive evil, "cruel injustice, heart-rending distress; in "the case which the law attempts to guard "against, inconvenience only, if it occurs— "but an inconvenience highly improbable "to happen, inasmuch as it is supposed to "affect domestic union, and, as it is believed "to be a temptation to perjury, not one "strong enough to produce the effect, or "should it be yielded to, would be capable of "detection by the usual means. But even "without supposing the extreme case of life "or death, *the suppression of testimony is* "*in all cases an evil; and the law deprives* "*a party of a certain right to avoid a* "*problematical inconvenience.*

"On the other hand, suppose the testi-"mony of the wife necessary to procure "the conviction of the husband; she "is the only witness to a murder he has "committed. This I consider the strongest "ground for the exclusion; it enlists the "feelings, and they are most frequently "found on the right side. Shall a wife be "forced to give testimony that will condemn "her husband, the father of her children, "to infamy and death, or take refuge in "the crime of perjury to avoid it? I con-"fess that, if the alternative could be avoid-"ed, a humane lawgiver would not enjoin "it; but if sympathy for individual distress "should not be entirely rejected, it ought "never to be entertained when its indulgence "would lead to more extensive injuries to "the community. A wise and provident "legislator must have the consequences of "every legal provision as present to his "mind as its immediate operation is to "his senses; and in applying this rule to "the subject under consideration, he should "not, in tenderness to the feelings of conju-"gal affection, permit the husband or wife "to escape punishment for a crime, or de-"fraud another of his right, by declaring "that the only witness of the offence or "the wrong shall not be heard. Some "crimes cannot be perpetrated without the "aid of an accomplice. The accomplice "may betray the principals. The fear of "this treachery, in many instances, may pre-"vent the crime; or a person may not be "found willing to engage in the enterprise. "But, by the rule of exclusion, the law fur-"nishes an assistant who can never betray, "and one who is always at hand; and thus "gives a facility to the commission of offences "which no other circumstance could pos-"sibly offer. Besides, public justice requires, "and common sense would seem to point "out, that those persons who are the most "likely to be acquainted with the fact "should be first called on to prove it. But "who so probable to know the guilt or inno-"cence of the party accused as the compa-

"nion of all his hours, the depositary of his "most secret thoughts; and what better cal-"culated to prevent an intended crime, than "the knowledge that those from whom it "is so difficult to conceal it may be "made the unwilling witness of its dis-"closure? Precisely in the proportion that "a man would be encouraged to commit a "crime by the knowledge that the person "to whom he finds it necessary to confide "it cannot become a witness against him, "will be his fear of committing it, when "he knows that there is no person in whom "he may confide, that may not be forced or "be willing to betray him.

"So sensible of this have been the judi-"cial lawgivers of England, that they have "imposed no bar to the receiving the testi-"mony of father and son, mother and "daughter, brother and sister, and all the "other relations of consanguinity or affin-"ity. They have had no regard to the con-"fidences of friendship, and have thought "that the affections of nature, as well as "those of habit and sympathetic feeling, "should afford no obstacle to the attain-"ment of the ends of public justice. They "have gone farther, and made an excep-"tion to the rule which they laid down as "one inviolable, even by consent,* in the case of husband and wife; and, as we have seen, have al-"lowed the wife to be produced as a wit-"ness against the husband on a prosecution "for an injury done to herself. Now, "mark the reason! It is a convenient and "a ready one; from the '*necessity of the "case;*' which must mean, if it mean, any-"thing, that there is a necessity that crimes "should be punished, and that, unless the "testimony of the wife were admitted, they "would, in those instances, be unpunished. "Now, admit this reasoning, and see whe-"ther it does not go to the utter destruc-"tion of the rule to which it is offered as "an exception. There is no greater neces-"sity for punishing a crime committed by "the husband against his wife, than there "is for punishing the same crime committed "by him against another; and if the wife is "the only witness that can convict in the "last case, her testimony is as necessary "as it is in the first, and, being necessary "in both, it should not be admitted in one, "and excluded in the other. But, in truth, "the enquiry is never made, and in this, "and in all the other cases founded on "the convenient argument of necessity, "although there may have been twenty "other witnesses present, the pretended "necessary witness it admitted; and al-"though there may be none but him con-"versant of the fact, he is rejected where "it has not yet been deemed convenient "to admit the argument of necessity.

* 2 Starkies 706. Rep. Temp. Hard. 264.

"The advantages of receiving testimony "from this source so greatly overbalance "its evils and the inconveniences, and the "injustice of rejecting it are so manifest, "that I have not hesitated to give this ex-"clusion no place in the Code." (Page 271).

In France, according to Art. 322 of the Code D'Instruction Criminelle, a husband and wife, and other specified relations, if objected to by the accused or by the Procureur-General, cannot be a witness for or against one another, but the President may summon and examine any person, whether such person is comprised in Art. 322 or not. (*See* Art. 269.) The witness in that case is not examined on oath. These are matters of detail to be provided for, if at all, by an express law, and not by rules to be laid down by Judges.

But even if the rule of English Law is founded upon sound and just principles with reference to the state of society in England, it appears to me to be wholly inapplicable to the natives of this country, and to their social institutions and relations. A law which may be politic and just in a Christian country in which a man is prohibited from having more than one wife, and a woman from having more than one husband, may be wholly inapplicable to a country in which polygamy is allowed. Can the legal fiction that a man and his wife are one person, apply to a Koolin Brahmin and his 50 wives, or to a woman in Malabar and her several husbands. Or, should the evidence of one of 50 wives against her husband be excluded lest it should cause dissension in the family? A law which should allow a wife to give evidence against her husband in a case of personal injury committed upon her, and would not allow her evidence to be either corroborated or contradicted by other wives who were present at the time, would appear to me not to be founded upon the soundest principles either of policy or justice. It would be obligatory upon the Judges to allow a wife to give evidence against her husband upon a charge of an assault committed by him upon her, and to exclude her from testifying a charge against him of murdering their infant child when no one

was present but themselves. Or, would it be just to allow from necessity a wife to give evidence against her husband upon a charge of personal violence committed by him upon her, and to refuse the evidence of another wife on his behalf? If we had to decide this case upon our own notions of policy, I should admit the evidence of the wife, and leave the Court to judge of her credibility as in all other cases; but even if my own opinion were against the policy of admitting such evidence, I should not feel justified in rejecting the evidence of a wife who was the only witness to the murder of her child by her husband, or in rejecting the evidence of a wife as a witness for her husband on a charge of a capital crime preferred against him by one who admits that no one was present when the alleged crime was committed except the accuser, the husband, and his wife.

In the case of European British subjects who are governed by the law of England, we must administer that law. But in the Mofussil, where the law of England is not the law of the country, I consider that I should not be justified in excluding any witness who was not clearly incompetent by law. *Primâ facie* every one is competent and bound to give evidence, and every one who is charged with a crime is entitled to adduce on his behalf the evidence of any witness who can throw light upon the facts in dispute, and who is not expressly declared by the law to be incompetent. Would any Judge, unless bound by the clearest and most indisputable rule of law, condemn a prisoner to death for murder upon the evidence of the wife of another man, and, upon his own notion of public policy, reject the testimony of the prisoner's own wife in his favor? Would he do so, if it were proved that the three persons in question were the only persons present at the alleged murder, or that the husband of the witness was also present, and that he had fled? We cannot import one portion of the English Law and reject the remainder without taking upon ourselves the duty of legislators. I think that the evidence of the wife is admissible in both cases, because I do not find any law of this country which expressly provides against it. The degree of weight to be attached to the evidence in such cases must, as in every other case, be determined by those who have to decide upon it.

It appears from a late edition of Mr. Norton's book upon Evidence, that the Court of Fouzdaree at Madras sentenced a man to death who was found guilty of murder upon the sole evidence of his own wife. (5 Ed., page 41).

There is also, I believe, a ruling of the Nizamut Adawlut at Agra to the same effect. The case in Madras appears to have arisen in Malabar, where a woman has a plurality of husbands. I have not been able to refer to either of the two cases.

The case should go back to the Division Bench by which it was referred, with the expression of our opinion.

*Norman, J.*—I regret that I am compelled to differ from the rest of the Court

In order to explain my views, it is necessary that I should go into the history of this question.

Regulation IX. of 1793 made provision for the trial of persons charged with crimes or misdemeanors. Section 47 enacts —"The charge against the prisoner, his "confession (which is always to be re-"ceived with circumspection and tender-"ness) if he plead guilty, or, if he plead not "guilty, the evidence on the part of the "prosecutor, the prisoner's defence, and any "evidence which he may have to adduce, "being all heard before him, the Cazee and "Mufti (who are to be present during the "whole of the trial) are to write at the end "of the record of their proceedings the "futwa or law as applicable to the cir-"cumstances of the case, and to attest it "with their seals and signatures. The "Court shall attentively consider such "futwa, and if it shall appear to them con-"sonant to natural justice, and also con-"formable to Mahomedan Law, they are to "pass sentence in terms of the futwa," &c.

By Section 54 it is enacted—"The Judges "of the Court of Circuit are to refer to the "Cazee and Mufti of their respective Courts "all questions on points of law that may "arise during the course of any trial, and "respecting which no specific rules shall "have been enacted by the Governor-Gene-"ral in Council, and shall regulate their "proceedings by the opinions which may be "delivered by those officers. If such opi-"nions shall appear to the Judges contrary "to the principles of natural justice, *or to* "*the Mahomedan Law*, they are neverthe-"less to be guided by them, and after com-"pleting the trial, and obtaining the futwa "of the law officers upon the case, they "shall, without passing sentence upon it, "transmit the proceedings and futwa to the "Nizamut Adawlut, with a separate letter

"stating their objections to such opinions "or futwa, and wait the sentence of the "Court."

By Section 56: "In cases in which the "evidence given on a trial would be deemed "incompetent by the Mahomedan Law, "*solely on the ground of the persons giving* "*such evidence not professing the Maho-* "*medan religion*, the law officers of the "Courts of Circuit are to be required to "declare what would have been their futwa, "supposing such witnesses had been Maho-"medans. The Courts of Circuit are not to "pass sentence in such cases, but shall trans-"mit the record of the trial, with the futwa "directed to be required from the law of-"ficers, to the Nizamut Adawlut, which "Court, provided they approve of the pro-"ceedings held on the trial, shall pass such "sentence as they would have passed had "the witnesses, whose testimony may be so "deemed incompetent, been of the Maho-"medan persuasion."

By Section 74: "The sentences of the "Court of Nizamut Adawlut are to be re-"gulated by the Mahomedan Law, except-"ing in cases in which a deviation from it "may be expressly directed by any Regula-"tion passed by the Governor-General in "Council."

Under this Regulation, the Criminal Courts were bound by the Mahomedan Law of Evidence, except in the cases provided for by Section 56 or other Special Regulation of the Governor-General in Council.

The religion of the State in Hindoostan was according to the tenets of the Soonnees. Amongst the Soonnees the testimony of the wife was not admissible concerning her husband, or of a husband concerning his wife (*see* Hedaya, Vol. II., p. 685). This is a rule of evidence entirely apart and distinct from that by which the testimony of women was excluded in cases inducing punishment or retaliation, as to which *see* Hedaya Vol. II., p. 667.

The rule is clearly and shortly stated in Harington's Sketch of the Mahomedan Criminal Law taken chiefly from the Hedaya and Futawa-i-Alumgiri (*see* Analysis, Vol. I., page 278): "The testimony of near connec-"tions, such as father and son, grandfather "and grandson, *husband* and *wife*, master "and slave, in favor of each other, is not "*admissible* in consideration of their rela-"tive interest."

In 1809, in the case of Buncharam *vs.* Govindo Sahoo and Ram Sahoo, charged with the murder of Ramnarain, the wife of the prisoner, Ram Sahoo, was considered to be not admissible as a witness for the prisoner to prove that Ramnarain was committing adultery with her. (1 Select Reports, page 183.) The probability is that in this case the prosecutor objected to the evidence adduced by the prisoner, and that the point was distinctly decided in the presence of Mr. Harington and Mr. Fombelle.

By the English Law, as a general rule, husbands and wives cannot be witnesses for or against each other in criminal proceedings.

In Staundforde's Pleas of the Crown, first published in 1557, p. 26. b., quoted in Dalton's Justice of the Peace, p. 377, it is said: "The "wife is not to be bound to give evidence nor "to be examined against her husband, for by "the laws of God and of this land she ought "not to discover his counsel, or his offence "in case of theft, or other felony."

I may observe that it is well established that, under the English Law, a wife is not bound to disclose even her husband's treason.

Sir Edward Coke, in Co. Litt. 6. b., says that husband and wife are two souls in one flesh, and it might be the means of implacable discord and dissension between them, and cause great inconvenience, if such testimony were admitted.

Mr. Justice Buller says, if a wife were a witness for her husband, it would be a strong temptation to commit perjury, and if against the husband, it would be contrary to the policy of the marriage, and would create much domestic dissension and unhappiness. (Buller's Nisi Prius, 286. *See* also Blackstone's Commentaries, p. 443. Best on Evidence 226, 694).

Cases of injuries done to the wife by the husband, on the reverse, form an exception to the general rule.

The law prevailing in the United States on this subject is similar to that of England. (*See* Kent's Commentaries, Vol. II., page 184; Taylor on Evidence, 1062; Greenleaf on Evidence, S. 254.) In America it has been held that the evidence of a wife cannot be given against a husband even by his own consent, on the ground that the public have an interest in the peace of families.

The rule of law which excludes the evidence of a wife in favor of or against her husband is no exceptional or arbitrary rule of Mahomedan and English Law. I believe it will be found to exist in the jurisprudence of all the most enlightened and civilized nations of the world. It is to be found in the Roman Law, Digest, Book 22, Tit. 5, which treats husband and wife as one per-

son for this purpose. So in the French Law, Code d' Instruction Criminelle, Arts. 156 and 322. By Article 322 it is provided that such testimony may be received before the Court of Assize if no objection is taken to its admission by the opposite party. Further, Article 269 of the Code empowers the President to summon any persons whose evidence is not admissible, and question them for the purpose of obtaining information. But he cannot *administer an oath to them.* He does not, and cannot, make them witnesses.

By the Law of Scotland, persons are rejected as witnesses in the causes of certain near relatives. Wives and children cannot be compelled to give testimony against their husbands and parents *ab reverentiam personarum et metum perjurii. (See* Erskine's Institutes of the Law of Scotland, Book 4, Tit. 2, S. 24, Vol. 2, page 979 of the edition of 1828.) It appears, however, that there are some exceptions from the laws of exclusion "introduced from necessity to the "effect of reducing the objection from dis-"qualification to credibility." Such is the case of *penuria testium.* This is confined chiefly to criminal acts where secrecy is studied; *2ndly,* to domestic occurrences which necessarily exclude the presence of strangers; or, *3rdly,* to the case of witnesses necessary to the act in question. (*See* Bell's Principles of the Law of Scotland, S. 2256).

Erskine gives an instance: "Children "have been admitted as witnesses in an ac-"tion brought by the mother against her "husband for separation and maintenance on "account of his harsh treatment of her, "there having been no servants at the time "in the family by whom the fact might "have been proved." A witness is rejected upon his propinquity of blood to him who produces him, though he stands in as near a relation to the party who makes the objection, in so much that his testimony is not received even *cum notâ.*

If the rule of exclusion be established, and partial exceptions either created by express legislation as in this country and in England, or established by careful judicial decision as in England and Scotland, or compensations provided by legislation as in France, the benefits of the rule may be preserved, and all inconvenience arising from any deviations from the rule may be either entirely avoided, or incurred only in cases of absolute necessity, or reduced to a minimum.

It has been well said that marriage is an institution of natural law antecedent to all forms of Government, and even to the organization of civil society. The rule excluding the testimony of married persons against each other is one which maintains the inviolable sanctity of the confidence of married life. The rule has its foundation in the deepest and purest instincts of human nature. We can trace it in the laws of almost all civilized nations, differently expressed in the laws of different countries—sometimes laid down in distinct and formal propositions, with reasons given for them, as in the Law of England—sometimes as part of a larger and wider rule of exclusion. It seems no unnatural inference that it has existed from a period prior to all legislation as one of those

> "Unwritten laws by all men recognized;
> They are not of to-day or yesterday
> But live for ever, nor can man declare
> From whom or whence they sprang."
> *See Sophocles Antigone, line 450.*

Such was the character of the rule which was law in this country in 1809, and it appears to me to be one which could only be abrogated by an act of the Legislature, and ought not to be lightly set aside by judicial decision.

I proceed to examine the cases which have, or are supposed to have, infringed on the rule. In Hurrah's case in 1805, Select Reports, 7, the prisoner was charged with murder, and the question was whether the *widow* of the deceased was a competent witness to sustain a claim for *kisas or retaliation* in which she as an heir was supposed to be interested. The Mahomedan law officer declared her to be incompetent for that purpose, and his opinion is confirmed by that of the Editor, apparently Mr. J. H. Harington (*see* Preface), in a note.

The case, therefore, does not touch the present question, but supports the proposition that, by the Mahomedan Law, an interested witness is inadmissible.

In Mussamut Mughnee *vs.* Ohariya, 1 Select Reports, 144, two wives of the prisoner gave evidence against him. It does not appear that the question of the admissibility of the evidence was raised. The case is reported by Mr. Dorin, who, in a note, appears to have misunderstood Hurrah's case, and it is contrary to that reported at page 182 of the same book.

Regulation I. of 1810 provided for dispensing with the attendance and futwa of the law officers in the Courts of Circuit, and by Section 4 enacted "that, in the event of any "question of Mahomedan Law arising upon

"such trials, the same shall be recorded upon "the proceedings for the information and "decision of the Court of Nizamut Adaw-"lut. But if the question refer to the "competency of a witness, such witness "shall be examined, leaving the admission "or ultimate rejection of the testimony "so given to the consideration of the Niza-"mut Adawlut."

The result of this enactment would naturally be that, in all doubtful cases, the evidence, whether admissible or inadmissible, would be recorded, and would have to be dealt with by the Nizamut Adawlut.

Regulation XVII. of 1817 recites that the Mahomedan Law of Evidence in some cases, especially those of Zina, including adultery, rape, and incest, is such as to render a legal conviction almost impossible, &c., *and its exceptions to the competency or credit of witnesses are in some instances inconsistent with the ends of public justice*, and enacts (Section 5)—"If the evidence of a witness "on a criminal trial before a Court of Circuit "be declared by the Mahomedan law officer "inadmissible on the ground of the witness "being a public officer, &c., or any other "ground of exception in the Mahomedan rules "of evidence which may appear to the Judge "unreasonable, the Judge shall cause the "examination of the witness to be taken not-"withstanding the exception stated by the "law officer, and shall require the latter, on "the completion of the trial, to declare in his "futwa the sentence to which the prisoner "would have been liable if the evidence of "the witness objected to had been admissible "under Mahomedan Law."

If the conviction of the prisoner depended wholly or exclusively on the evidence objected to by the law officer, the Judge was not to pass any sentence, but to refer the trial to the Nizamut Adawlut.

By Section 4, if two or more Judges of that Court, on a deliberate consideration of the evidence and circumstances of the case, *concurred in opinion that the proof against the prisoner was sufficient to convict, and that he was in every respect a proper object of punishment*, the Judges were declared competent to convict and pass sentence upon him as if he had been convicted by the futwa of the law officer.

This Regulation, as long as it remained in force, gave to the Courts a discretionary power to act on the evidence of interested and other witnesses whose testimony was excluded by Mahomedan Law, and, amongst others, of the husband or wife of an accused party.

In 1820, in Lurrye Chung's case, 2 Nizamut Adawlut Rep., p. 149, the Court found that the wife of the prisoner had been called to give evidence against him, though her testimony was wholly unnecessary. The Court say that the practice of summoning such a near relation of the prisoner as a witness for the prosecution, excepting in the case of urgent necessity, was highly objectionable.

In 3 Nizamut Adawlut Rep., p. 309, the Court acted on the evidence of the son of the prosecutor, against the opinion of the Mahomedan law officer. In the Nizamut Adawlut Reports for 1852, Part 1, page 156, Mr. Mills says: "Though the testimony of a wife against her husband may be received in our Courts, yet the practice of summoning a wife to give evidence against her husband has always been held to be objectionable, and is one which should on no account be encouraged." In the Nizamut Adawlut Reports of 1857, page 474, Messrs. Loch and Bayley expressed themselves in similar terms, and on that ground considered it unnecessary to refer to the evidence of the prisoner's wife. In the Nizamut Adawlut Reports, 1855, page 213, the wife of the prisoner was admitted as evidence against him.

The Nizamut Adawlut of the North-Western Provinces, acting on the authority of the cases in the Select Reports, Vol. I., page 144, Vol. II., page 149, while allowing that the evidence of a wife was admissible, stated that the summoning of the wife as a witness for the prosecution was highly objectionable.

I lay wholly out of consideration the authority of Mr. Bentham and Mr. Livingstone, and attribute no special value to their opinions as to what should or should not be enacted as the law on this subject. Their views and opinions have been long and familiarly known to those employed in the business of legislation in this country. With full knowledge of those opinions and of what had been done under Regulation XVII. of 1817, the Government, by Act XV. of 1852, in legislating for Her Majesty's Courts, declared that nothing in that Act contained should in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband.

Again, Act II. of 1855 (an Act to improve the Law of Evidence in all Courts of Jus-

tice), by Sections 14, 18, and 19, provided a remedy for the evils alluded to in Regulation XVII. of 1817. By Section 20, it rendered husbands and wives competent to give evidence for or against each other in *Civil proceedings*, subject to a proviso that any *communication made by the one to the other during the marriage should be deemed a privileged communication, and should not be disclosed without the consent of the person making the same.*

It is clear that the Legislature deliberately refused to sanction the admission of wives and husbands as witnesses for or against each other in criminal cases. Regulations I. of 1810 and XVII. of 1817 were repealed by Act XVII. of 1862, and by that repeal an end was put to any special and exceptional powers of the Zillah Courts to admit, at their own discretion, evidence whether admissible or not under Mahomedan Law. But Regulation IX. of 1793, which made the Mahomedan Law the Law of the Criminal Courts, was repealed at the same time.

What then remained? If the ancient law, as it prevailed in the conquered and ceded territories, except so far as it is altered by the subsequent legislation of the conquerors, is to remain, the evidence is excluded because it would be excluded by Mahomedan Law. If the repeal of Regulation IX. of 1793 is to be taken as a declaration that the Courts are no longer to be guided by Mahomedan Law in any respect (and there is no doubt much to be said in favor of that view of the case), then, I think, where we have no positive law to guide us, we must act upon those universal principles of right which are recognized by *our own law.* If the conditions of the married life of the people of the country had been in all respects similar to those which exist in our own country, there would not, in my opinion, be a doubt on the present question. I cannot accept the loose practice of Zillah Judges, under the exceptional powers of Regulation XVII. of 1817, though sanctioned by the Sudder Court, as having established by judicial decision a rule on this subject. There is no instance in which the question has been raised and formally decided by the Court after argument, on a full consideration of all that could be said on either side of the question. It seems to me that the Sudder Court always felt that, in admitting the evidence, it was on dangerous ground, and evidently saw the mischief likely to result from doing so. The Legislature, in passing Act II. of 1855, distinctly declined to sanction their practice.

I must admit, however, *first*, that Polygamy amongst the Mahomedans and Koolin Brahmins places wives in a relation to their husbands different from that occupied by a European wife towards her husband. *Secondly*, as I understand it, the ancient Criminal Law of the Hindoos allowed the wife or husband to be called on to testify the one against the other, though such evidence was not admissible in civil cases. *See* the Dharma Sastra of Yajnyawalcya by Roer and Montriou, Sloke 72, page 28; Mitacshara translated by Macnaghten (1 Macnaghten's Hindoo Law, page 246).

From these circumstances, it has no doubt been the case that in this country the admission of such testimony has not been felt to be, and is not in fact, a violation of the law of the family in the same sense that it would be in a European community.

Still the Mahomedans appreciated the wisdom of the rule as applicable to the state of their own society; and for the Hindoos, they are now living under a rule wiser, milder, and more merciful than of their own Criminal Law, and the Polygamy of Koolin Brahmins is an exceptional institution.

I believe that, in practice, the cases where a crime is committed under circumstances that it cannot be proved except by the testimony of husband or wife, are rare indeed. I do not recollect one such in the whole course of my reading. It was said, indeed, that Rush would not have been convicted had he been married to the wretched woman who lived with him. It is easy to suppose exceptional and extraordinary cases, as Mr. Livingstone and Mr. Bentham have done. The arguments of my learned brothers might have greater weight if the great object of social life was to convict criminals—if we were bound to presume that every husband, against whom a wife should be called, was guilty. I believe that, if these suggestions were adopted in European communities, the peace and confidence of hundreds of homes would be interfered with for an advantage of most doubtful character. If I were at liberty to speculate on the subject, I might say that some rule for admitting the testimony of a husband or wife in exceptional cases might be enacted by the Legislature.

There is another point on which I have not yet touched, *viz.*, the danger of perjury. Mr. Fitz-James Stephen's observations on this subject appear to me full of good sense.

He admits, as every one must, that, if considered merely with reference to the discovery of the truth, the exclusion of the testimony of husband and wife cannot be defended. At page 201 he says: "The "proposal to make a prisoner a competent "witness on his own behalf has an appear-"ance of system about it which at first "sight is extremely plausible. It would, no "doubt, harmonize with what I have called "the litigious theory of criminal trials, but "there are strong objections to it. In the "first place, the prisoner could never be a "real witness; it is not in human nature to "speak the truth under such a pressure "as would be brought to bear on the pri-"soner, and it is not a light thing to insti-"tute a system which would almost enforce "perjury on every occasion. It is a mockery "to swear a man to speak the truth who is "certain to disregard it."

At page 286 he says: "The objections, "already stated, to making the accused "competent witnesses, apply with greater "force to the case of their husbands and "wives, inasmuch as to the conjugal love "which would lead a person to screen a wife "or husband, is a better motive than the "self-love which would lead a man to lie "in his own case, and not less powerful. "It is so important that perjury should not "be committed, and especially that it should "not be committed under circumstances "which would lead the public to sympathize "with the criminal—and it is so much more "important that the administration of cri-"minal justice should harmonize with the "public feeling than that it should exhaust "all possible means of convicting criminals—"that I think the utmost modification of the "present law which would be advisable "would be to permit an accused person to "call husband or wife if he thought fit."

I may observe that, in the case before us, and in regard to which the reference was made, the wives of four prisoners were called for the prosecution, three of whom gave false evidence to save their husbands. The same result followed for calling the wife in the case from the North-Western Provinces, and in the case cited from the Nizamut Reports of 1855.

I am of opinion that there is no law in this country which makes the evidence of a wife admissible for or against her husband in criminal cases other than charges of injuries or wrongs done by the husband to the wife, and, as a consequence, that such evidence is not admissible against the husband, or for or against parties included in the same charge, and standing on their trial at the same time with her husband. As to the latter point, *see* The King *vs.* Smith before the 12 Judges, 1 Moody's Crown Cases, p. 289; Roscoe's Evidence in Criminal Cases, p. 117.

There are two decisions of the High Court in accordance with my opinion, *viz.*, that of Mr. Justice Steer and Mr. Justice L. S. Jackson, in The Queen *vs.* Noyandee and Shodai, decided in 1863; and that of Mr. Justice Kemp and Mr. Justice Glover in The Queen *vs.* Gourchand Polie, 1 Weekly Reporter, page 17.

*Campbell, J.*—I entirely concur in the judgment of the Chief Justice. Any further question on the subject has been, to my mind, cleared up by the judgment of Mr. Justice Norman.

The question before us is not whether it is under certain circumstances expedient to examine the wife, or what questions she may be properly pressed to answer, but whether she is or is not absolutely inadmissible as a witness for or against her husband, and for or against any person tried jointly with her husband, according to the strict rule of English Law.

I do not understand my brother Norman to found his objection to the admission of the wife on a broad rule which would equally exclude the son, the father, and other near relations, as interested parties. He would not, I believe, exclude these other relations: the daily practice of the Courts and the necessities of justice render that impossible. The rule which he maintains is the English rule.

That rule he looks at from two points of view—(1) that of natural justice, and (2) with reference to the law and practice of the Indian Courts.

As respects natural justice, he considers the English rule to be one of those "unwritten laws" which prevail, or ought to prevail, all over the world; and although I have no doubt that our function is in fact "*jus dicere*," not "*jus dare*," and apprehend that we can hardly at this time deliver unwritten laws of our own concoction. I notice this part of the subject merely to say that the authorities quoted by my learned brother in regard to the provisions of various laws seem to me to show that the rule maintained by him, or anything like it, has never been adopted in any country whatever except England. By none of the authorities quoted is the evidence of the wife specially

and absolutely excluded. They all, without exception, merely refer to certain cautions and restrictions in regard to the evidence of a large *class* of interested parties, including all near relations; and none of them absolutely exclude such evidence. Some old Mahomedan law-books seem to lay it down as a maxim that the evidence of parties standing in certain positions of relationship "is not to be believed" because they are interested: for instance, parties related as father and son, grandfather and grandson, husband and wife, master and slave. I doubt whether, under this rule, these parties were ever absolutely excluded. At any rate, the Mahomedan Law of Evidence has been relaxed in India. In France, again, the rule applies to a similar large class of relations, and seems to amount simply to this: They are all *primâ facie* admissible, but if either party objects, then the President is to decide at his discretion whether the witness shall or shall not be examined with reference to the circumstances of the particular case. There is no inadmissibility there. So again in Scotland, the practice, as set forth by my learned brother, is in brief this, that certain near relatives are not to be examined *except in case of necessity*, when the case cannot be proved or disproved in any other way. That it, in fact, the rule laid down by the Sudder Court in this country. I conclude, then, that no consent of nations imposes on us the English rule absolutely excluding the wife, and the wife only.

I next look to Indian Law and practice. I believe that thousands of cases might be found, in which both wives and other relations have been admitted as witnesses, but in which the point is not reported, because no one thought of objecting. That is the reason why the number of rulings on the point is comparatively small. I doubt whether the evidence of a wife was ever really excluded on the ground of Mahomedan Law. There is only one case in the early Reports —that of 1809. There the witness was in fact examined, and it seems to me that the Judges afterwards used the term "inadmissible" only in the sense that the evidence could not be admitted to full credit. But, be that as it may, my brother Norman has pointed out the important fact that, by a subsequent Regulation (XVII. of 1817), the restrictions of the Mahomedan Law of Evidence were by express enactment swept away. To use the words of my learned brother, "This Regulation gave to the "Courts a discretionary power to act on the "evidence of interested and other witnesses, "and, amongst others, of the husband or wife "of an accused party." We are, therefore. I think, all agreed that, from 1817 onwards, the evidence of the wife was admissible; and a series of cases shews that the Courts acted accordingly. What, then, has occurred to introduce a restriction? Clearly nothing, as it seems to me. I cannot imagine that any argument can be founded on Act II. of 1855 for excluding evidence which up to that time was admissible in the Company's Courts, since that Act, in the most express terms, provided that nothing contained in the Act should be construed to render inadmissible in any Court any evidence which but for the Act would have been admissible in such Court. The Act merely provided, as it were, a *minimum* of admissibility in all Courts, leaving to those Courts having more liberal rules the freedom which they before enjoyed. It was principally designed to relax the stringency of the English Law of Evidence in consequence of recent reforms in England. It did not exclude the wife in criminal cases, although it did not go beyond the reforms of English Law in respect of Courts governed by that Law so as to admit the wife in those particular Courts.

The real question seems in fact to be whether the most technical parts of the English Law of Evidence are to be introduced into our Courts. For that I think that there is not the least warrant of law. As respects the practice, I always feel that in these matters there is this difficulty, that the Law of the Mofussil Courts has been so indefinite and uncertain that there is scarcely any doctrine popularly known as English Law which, somewhere or other, in the course of a vast number of judgments extending over very many years, may not be found to have been somewhere quoted by one or two Judges for some purpose of argument, illustration, or decision. But, in my opinion, such rare mis-quotations do not establish a law. The English Law of Evidence was notoriously, till within a recent period, one of the most barbarous and artificial in the world; and though a great deal of the worst part of it has now been swept away, a good many things still remain which many people think bad in England. At best, they are only supported there by the peculiar circumstances of English laws, habits, and procedure, and are, I think, altogether inappropriate to a widely different country. I should think it a very great misfortune if, just when the English Law is, bit by bit,

approaching to complete reform, its most barbarous and technical portions could be imported into this country by the mere *dicta* of one or two Judges speaking loosely in the absence of definite law. In the present instance, however, it seems to me that Regulation XVII. of 1817 and Act II. of 1855 have settled the matter by Statute, and that there is really no decision from 1810 to 1862 which lays down the doctrine of the exclusion of the wife. Both the High Court of Madras and the Sudder Court of the North-Western Provinces have recently ruled that her evidence is admissible. The only precautionary direction in which both the consent of nations and the practice of our Courts seem to agree, is that the Court should exercise its discretion, and not *unnecessarily* force a near relative to give evidence or to answer unfair questions. That is, I think, a very proper rule, and it will probably meet the difficulties which seem to have suggested themselves to the minds of some Judges; but it is not exclusion by law. I would admit the evidence of the wife as not contrary to law, because it seems to me that there is no law to exclude it, and that, in the absence of such a law, all witnesses are admissible subject to objection to their credibility.

*Seton-Karr, J.*—We have not had the advantage of hearing Counsel on the important point submitted to us by the Divisional Bench, as none appeared on either side; but we have discussed the reference together, and I, personally, have had the advantage of perusing the elaborate judgments recorded by my learned colleagues the Chief Justice, Mr. Justice Norman, and Mr. Justice Campbell.

I lose no time in recording my own opinion, which is in unison with that of the learned Chief Justice and Mr. Justice Campbell.

*First.*—It seems to me that the Mahomedan Law can be no possible warrant for our sanctioning the exclusion of a wife from giving evidence in criminal cases as a witness for or against her husband, or for or against other persons than her husband charged jointly with him on a criminal trial. The Mahomedan Law relative to the admissibility of evidence was eminently fantastic, barbarous, unjust, and capricious. Regulations were made from our earliest days in order to remedy or annul sundry of its most patent absurdities, and of late years it has been, as a Code, entirely swept away.

It next seems to me that we can derive no warrant for the exclusion of the wife's testimony from any of the provisions contained in the well-known laws passed for the improvement of evidence, Act XV. of 1852 and Act II. of 1855.

The first of these laws, Section 3, merely enacts that nothing contained in the law shall render competent, or shall compel the wife to give evidence against the husband, and *vice versâ*, husband against the wife. As remarked by the learned Chief Justice, this Act does not render either of these parties absolutely incompetent; it merely leaves matters in this respect just as they were.

The same remark applies to the later and the more comprehensive enactment, Act II. of 1855. Section 14 of this law, in declaring what persons are incompetent to testify, expressly mentions children under 7 years of age and persons of unsound mind as incompetent, but says nothing about wives. Section 20 indeed does expressly recognize the competence of husband and wife in all Civil proceedings to give evidence for or against each other. But Section 58, the last Section of the Act, specifies that nothing in the law shall render inadmissible evidence now admitted in the Company's Courts, that is, in the Courts of the Mofussil. By this proviso, then, it seems clear to me that the Law of Evidence in criminal trials was left just where it was.

The next question, then, is whether, interpreting the law, and referring to the decisions of the late Sudder, and of our own Court, we can say that there has been such an uniform and consistent course of decisions from the commencement of this century as to warrant us in ruling that the wife has been held, and ought to be held, incompetent to give evidence against or for her husband. The decisions referred to and analysed by my learned colleagues sufficiently show that there has not been any such uniformity. It was clearly the practice of the Court to admit such evidence in cases of necessity, or when other evidence could not be procured. Opinions can, no doubt, be quoted in favor of the exclusion of the wife, but it is on account of this diversity of opinion, and possibly of practice, that we are now called on to say what is the correct rule and practice, or to lay down some rule for the future. The earlier authorities are in favor of the admission of the wife. Mr. Mills, an eminent public servant of very large experience, expressly recognises the

practice, and, certainly, my own experience is that, in practice, the testimony of the wife is constantly admitted.

But it may be said, if there has been this uncertainty of law, and this diversity of opinion, why not take the opportunity of ruling that the English Law, the offspring of great intellects, of liberal institutions, and of humanity and civilization, shall be our guide on this subject? We seem all agreed that the English Law of Evidence is not the law applicable to the Courts of the Mofussil; but still it may be contended that, in cases of doubt or difficulty, we may endeavour to arrive at a sound decision by reference to the analogies of a science based on reason and ameliorated by the labors of jurists and philanthropists of acute analytical powers, wide sympathies, and liberal views. It may be said, too, in furtherance of this view, that the experience of other countries confirms and strengthens the position of those who feel inclined to resort to, or to rest their decisions on, the English Law.

In answer to this, I would observe that, as pointed out by the Chief Justice and Mr. Justice Campbell, the laws of other countries are not absolute and uniform on this point. The English Law itself admits of deviations from the rule of exclusion. At Common Law, and even before certain enactments were passed, the rule did not apply where a personal injury had been committed by the husband against the wife, and *vice versâ* (Broom's Legal Maxims, p. 477). A difference of opinion clearly exists amongst the highest English authorities as to whether the wife can give evidence against her husband in cases of high treason (Taylor on Evidence, p. 1066); and other "necessary exceptions," says the same authority, have been engrafted on the Law of England, so as to admit of the wife having a remedy against personal injury. In short, it seems quite clear that the Law of England, positive as it is in many respects on this important doctrine, does admit of exceptions and qualifications, while the opinion of several eminent jurists tends directly to controvert the soundness of the principles on which the exception is based, and to enforce, as desirable in the interests of justice, the admissibility of the wife's evidence.

The long extract from Mr. Livingstone's writings quoted by the learned Chief Justice sets forth the arguments for the admission of such evidence with a logical force, with a breadth of view, and with a power of language, which I should think it would be difficult to refute or weaken. This is a task which I certainly shall not think of attempting.

On this particular point, then, I may be warranted in at least concluding that the soundness of the English doctrine is fairly open to some question.

I have always understood that the basis of the English Law in this respect is the maxim that husband and wife are "*duæ animæ in carne unâ*," and that the admission of the evidence of either would be against public policy, as leading to interminable discord, and to the disunion of families.

Then admitting, for the sake of argument, that much may be said in support of the exclusion of the wife from a purely European point of view, we may fairly ask whether the circumstances which distinguish the marriage tie, and which regulate social life in this country, are on a strict parallel with those of civilised Europe. Our learned colleague, Mr. Justice Norman, has quoted some excellent lines from an ancient poet and moralist relative to those "unwritten laws" which are an emanation from the Deity himself, and to which no human intellect ever gave birth. I admit their force in some instances, and as the foundation of all law, but, for the matter before us, I would venture to quote the language of another ancient author, the most eminent jurist of his time, who tells us: "*Accommodabimus, hoc tempore, leges ad illum quem probamus civitatis statum* (Cic. de Leg. Lib. III., Cap. 2). And again—"*Constat profecto ad salutem civium civitatumque incolumitatem vitamque hominum quietam et beatam, inventas esse leges*" (Lib. II., Cap. 5). We must interpret laws in conformity to the temper and constitution of the people with whom we are dealing, and we must not lose sight of the great object of all criminal legislation.

Now, polygamy, we all know, is admitted and sanctioned by both the Hindoo and the Mahomedan creeds, and is daily practised in India. Let us take a few of the dilemmas which may any day arise if we give sanction to the prevalence of the English rule on this subject. A Koolin Brahmin may have 70, 80, or 100 wives. Are we prepared to say that not one of these women is, under any circumstances, to give evidence for or against her husband in a criminal trial involving the most serious consequences? It is true that it is not usual for such a husband to live with all the 70, 80,

or 100 wives at one and the same time and place, and that, therefore, it is not competent for us to base an argument on the supposition that all, or a majority, or half-a dozen of the wives may be witnesses of the same crime, or of a series of crimes, on the part of the husband, and that all the mouths of all these wives, of necessity, will be shut if the rule of exclusion is to guide the Courts. But it is common for a Hindoo husband to live with more than one wife at one and the same time, and in the same household or place. We hear of the wife and of the co-wife, and of the elder Ranee and the younger Ranees, living together with the husband in numerous cases. Suppose a Hindoo or Mahomedan, in the secret privacy of his household, actuated by a fit of passion, or jealousy, or pique, to kill one wife or slay a daughter, after barring the doors and carefully excluding every other competent witness; are the mouths of the remaining wives to be closed, and is justice to be evaded? Or, suppose the converse. In a family, where there are 3 wives, one is assassinated or poisoned by one of the others. Suspicion, owing to circumstances which will suggest themselves to any mind, falls on the husband. Of the two remaining wives, one knows that the other committed the crime, and her testimony may have the corroboration of the most important circumstantial evidence. But she is not allowed to tender the deposition which would clear her husband, and would convict the murderess, because she is the only witness, and her evidence is not admissible by law. It would be very easy to go on and imagine scores of such probable and possible cases marked by every variety and shade of difficulty. Again, we have the custom of Polyandry in the hills and some parts of the plains. Are we prepared to lay down this rule of exception, and to push it to its farthest and remotest conclusion, by saying that when seven husbands commit a crime in succession, or labor unjustly under the suspicion of having committed various sorts of crimes, the ends of justice are to be defeated, or the innocent are to suffer, because the wife of the seven may not be put into the witness-box to inculpate or exculpate any one of those seven, to whom she stands in the position, not of the half which is more than the whole, but of a seventh portion of a domestic partner?

But it will be said, we increase the temptation to commit perjury, under which temptation would lie the wife who gave evidence against the husband whom she either loved or hated, and whom she might wish to save or to ruin. I confess that this is a danger which I am prepared to meet at all times, in order to do justice, and I cannot admit that the consideration is paramount to all others, or that the temptation would be of greater force in the case of wife *versus* or for the husband, than it would be, or is daily, in any case where passions are excited or sympathies are strongly enlisted on one side or the other. Is it not fair to conceive that the tie which binds a son to a father, a disciple to a Brahmin, a *Shagird* to his *Pir* and *Murshid*, a retainer to a chief, might, in this country and climate, prove at least as strong against the truth as the tie which binds a wife to a husband who has one, two, or a dozen other wives, and who, according to his Eastern notions, does not assign to any of them that high place in the affections or in the social circle which is conceded to women in all Western countries?

At any rate, looking to the admitted prevalence of perjury in the Courts of this country, this appears to me a danger which we cannot get rid of, but which we must face boldly, and endeavour to expose by strict judicial enquiry in the case of a wife, just as we do in the case of any other person interested, connected, or influenced by peculiar motives and ties, personal and feudal, secular, social, or religious.

On the whole, then, admitting the seriousness and importance of this subject, as well as the possibility of a fair and reasonable opposition of judicial opinions, I have come to the conclusion that, looking to the law and practice, as well as to the ends of justice and to grounds of public policy, the questions referred to us by the Divisional Bench should be answered by us in the affirmative. My reasons I would sum up as follows:—

1. The Mahomedan Law, besides being barbarous and uncivilized, no longer rules or influences the decisions of our Courts on points of evidence.

2. The evidence of a wife is not rendered inadmissible by any enactment of the Anglo-Indian Legislature.

3. There exists no such consistent and uniform current of decisions of the highest Courts in the country, as would exclude the wife; but, on the contrary, in spite of some diversity of opinion, the practice has been to take such evidence.

4. Granting that we may have recourse to the principles and analogies of English

Law in cases of difficulty and doubt, there is some reason to think the state of the English Law on this head not wholly unassailable, and there is every reason to conclude that it would be highly inapplicable to the peculiar circumstances of this country, as well as that it might tend to defeat the ends of justice and to encourage secret and violent crime.

*Kemp, J.*—These papers have come to me after my learned colleagues have recorded their elaborate judgments. The last word generally is an advantage. But in this instance so much has been said, and so well said, on both sides of the question, that I feel that, whether I agreed or differed with the majority, I could only give my simple concurrence with one or the other. Whether the evidence of a wife for or against her husband, and, *vice versâ*, that of a husband, is properly excluded in Courts which have to administer the Law of England, is a question upon which I feel that I am not competent to give any opinion worth having. My own feelings and impressions are that it is properly excluded; and when I find such eminent Judges as Lord Hardwicke, Lord Kenyon, Justice Buller, and others of the like stamp, holding the same opinion, I am content to err in such company. But that is not the question before us. Our Courts are not bound to administer the Law of England. Is there, then, any Regulation or Act of Government which enacts that such evidence is not admissible in our Courts, and has such evidence been admitted, or not, in our Courts?

The judgments of the learned Chief Justice, Mr. Justice Seton-Karr, and Mr. Justice Campbell, have fully convinced me that such evidence is not excluded by any Regulation or Act, and that the current of decisions in our Courts is, on the whole, in favor of its admission. It would be presumptuous in me to attempt to add anything to the able and elaborate arguments of those learned Judges, and I content myself with expressing my concurrence in the opinions expressed by them. I have held a different opinion hitherto, but I yield to the new light which has been thrown on the subject, and frankly admit that I have hitherto taken a more impulsive than sound view of this question.

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The 9th July 1866.

*Present:*

The Hon'ble *Sir* Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble J. P. Norman, F. B. Kemp, W. S. Seton-Karr, and G. Campbell, *Judges*.

**Splitting (of an aggravated offence into separate minor offences)—Lurking House-Trespass in order to commit Theft.**

*Criminal Reference.*

Queen *versus* Ram Churn Kairee.

The splitting up of one aggravated offence into separate minor offences (*e. g.*, a conviction for lurking house-trespass and theft under Sections 456 and 380 of the Penal Code, instead of for lurking house-trespass in order to commit theft under Section 457) prohibited.

Where a Magistrate convicted under Sections 456 and 380, it was held that the Judge on appeal, instead of setting aside the conviction and sending the case back to the Magistrate for re-trial under Sections 457 and 380, ought only to have set aside the conviction under Section 380, and allowed the conviction under Section 456 to stand (Norman, J., *dubitante*).

*Peacock, C. J., and Kemp, Seton-Karr, and Campbell, J. J.*—In this case, the prisoner was convicted by the Magistrate of lurking house-trespass by night and also of theft as two separate offences, and sentenced for both.

On appeal to the Sessions Judge, he found that the prisoner was not guilty of two offences, but of the offence of lurking house-trespass by night with intent to commit theft. The Judge set aside the conviction, and returned the case to the Magistrate to frame charges under Sections 457 and 380, with a direction that the prisoner ought to be re-tried. The Sessions Judge has since sent up his own order in order that it may be quashed by this Court as a Court of Revision, having since found that it was erroneous.

We think that the Sessions Judge was wrong in sending the case back to be re-tried on the two charges mentioned in his order. The prisoner clearly could not be re-tried under Section 380, as he had already been tried, convicted, and sentenced under that Section, as the Sessions Judge says, and properly says, under the facts found by him, erroneously.

We think that the Sessions Judge was wrong in ordering the prisoner to be re-tried under Section 457, the prisoner having been already convicted and sentenced under Section 456.

We think that the Sessions Judge ought to have set aside the conviction and sentence under Section 380; the conviction and sentence under Section 456 would then have remained.

The prisoner appealed upon the ground that he was not guilty of an offence under Section 456. Upon that appeal, the Judge could not set aside the conviction under Section 456 upon the ground that he was guilty under Section 457.

If he was guilty of lurking house-trespass by night with intent to commit theft under Section 457, he was guilty of lurking house-trespass by night. Having been tried and convicted of the minor offence, the Judge could not, upon the appeal of the prisoner, set aside the conviction in order that he might be tried and punished for the aggravated offence under Section 457. The Judge's order should be altered accordingly, the effect of which will be that the sentence under Section 456 will stand, and the conviction and sentence under Section 380 will be reversed.

The Magistrate should be cautioned to be more careful in future, and not to split up one single aggravated offence into separate minor offences.

As regards the prisoner who has not appealed, he may have the benefit of a similar order by this Court as a Court of Revision.

The case will go back to the Division Bench.

*Norman, J.*—I concur, though not without some doubts whether the Judge's order directing that the prisoner should be tried under Section 457 is not correct, and whether we might have treated the splitting the charge as an error in law justifying the Judge in reversing the whole sentence of the Magistrate.

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The 9th July 1866.

*Present:*

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

**Use of Musical Instruments for the purpose of annoyance (Order of Magistrate prohibiting).**

*Criminal Jurisdiction.*

Miscellaneous Case.

Ram Chunder Geer Gossain and another. *Petitioners.*

A Magistrate cannot, under Section 62, Code of Criminal Procedure, in general terms forbid two parties to use any musical instrument in the neighbourhood of each other's house, though he may forbid their doing so for the purpose of mutual annoyance.

We think that the order of the Officiating Magistrate passed in this case is greatly too general and sweeping in its terms. It appears that a complaint had been made that the petitioner (who is a Gossain) had gone abroad to pay a visit, accompanied by a body of retainers and Chobdars, and also by persons carrying horns, which horns were blown for the glorification of the petitioner and to the annoyance of the other party to these proceedings. The Deputy Magistrate, it seems, had separately convicted the prisoner and several of his attendants for an unlawful assembly. The proceedings were then referred to the Officiating Magistrate for further orders, and the Officiating Magistrate directed each party to enter into recognizance for 5,000 rupees to keep the peace for one year; also that neither party should use any musical instrument in the neighbourhood of one another's houses, and that their license to carry arms should be withdrawn. This order is said, in the Magistrate's letter of explanation, to be lawful under the terms of Section 62 of the Code of Criminal Procedure. If the order were lawful, the petitioner, upon what might appear to be a breach of it, if such disobedience tended to cause annoyance to any person, might be punished, under the 188th Section of the Indian Penal Code, with simple imprisonment or with fine, or both.

If the Magistrate had contented himself with saying that the parties were respectively forbidden to use musical instruments, such as horns, for the purpose of mutual annoyance, the order might have been reasonable enough. As it is, the order he has passed is one, disobedience to which might be possibly inferred from the most harmless and innocent acts of the petitioner.

We think, therefore, that the order should be modified, and that the parties should be directed to abstain from the use of horns or other musical instruments "*for the purpose of mutual offence*" in the neighbourhood of each other's house.

The 9th July 1866.

*Present:*

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

**Using forged document—Copies—Evidence.**

Queen *versus* Nujum Ali, *Appellant.*

*Committed by the Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of using as genuine a forged document with guilty knowledge.*

A person may be convicted of using as genuine a document which he knew to be forged, though he in the first instance produced only a copy of a copy of it.

When a Civil Court authorising a criminal prosecution in case of offences against public justice, instead of completing the investigation itself, and committing the parties for trial before the Court of Session, simply refers the proceedings, and leaves it to the Magistrate to commit or not as he thinks proper, the depositions taken before the Civil Court are not admissible in evidence, as depositions taken before the Magistrate are in certain cases under Section 369, Code of Criminal Procedure. But by Section 57, Act II. of 1855, the improper admission of such evidence is not of itself ground for the reversal of the Sessions Judge's sentence, when, independently of that evidence, there is sufficient evidence to justify the decision.

We think that no valid ground whatever has been adduced for disturbing the judgment and sentence of the Court below. Mr. Twidale, who appears for the prisoner, has raised the question of whether or not the prisoner can rightly be convicted, under the circumstances, of using a document which he knew to be forged. It appears that the document was, for the first time, produced in a Civil suit before the Moonsiff in 1861. Subsequently, upon this circumstance being brought to the notice of the party by whom it was said to be executed, she instituted proceedings in the Court of the Principal Sudder Ameen in 1863, with the view of having that document brought into Court and declared spurious. In the first instance, it seems that only a copy of it, taken from another copy, was produced: but subsequently, by direction of the Principal Sudder Ameen, the original instrument was brought into Court. That happened some time, apparently, in December 1863, and he gave judgment, finally deciding against the authenticity of the document, on the 29th of December 1863. Now, it appears that the prisoner set up that document: whether he produced a copy or the original, seems of little consequence. What he was charged with in these proceedings was, that he made use of such a document knowing it to have been forged. It may be that, in the description of this offence in the charge, there was some little inaccuracy or ambiguity, but it cannot be supposed that by this the prisoner was prejudiced. He quite knew the issue he had to defend, namely, that he used, upon the proceedings before the Principal Sudder Ameen, a document which he knew to be forged, and we have no doubt that the facts proved amount to such using.

Then an objection is made to the credibility of the witnesses in the case. It appears to us that the testimony of these witnesses is wholly unimpeached. They had, it is true, a certain interest in the result of the trial—that is to say, that if the deed of gift was not made out, they would be entitled, in greater proportions, to inherit the property. But we see no sufficient reason in this inducement for attributing to them the gross perjury which they would be guilty of, if their statements are false.

There is a circumstance which has not been alluded to by the vakeel for the prisoner, which it is perhaps right to notice here, that is to say, that the Sessions Judge has made use, upon the trial, of the depositions of the deceased lady, Mussamut Tahoorun, given by her before the Principal Sudder Ameen, previous to the case coming into the hands of the Magistrate. Now, Section 369 of the Act of Criminal Procedure authorizes the Sessions Judge to allow the use, at the trial, of the examination of a witness *taken and attested by the Magistrate in the presence of the accused person* under certain circumstances. In this case, it does not appear that the Principal Sudder Ameen availed himself of the power given him in Section 173 of the said Act, to complete the investigation himself, and to commit the parties for trial before the Court of Session. He simply referred the proceedings, and left it to the Magistrate to commit or not, as he thought proper. Under these circumstances, the depositions taken before the Principal Sudder Ameen do not appear to be properly admissible under Section 369. But by Section 57 of Act II. of 1855, the improper admission of evidence is not, of itself, ground for the reversal of any decision in any case, if it appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there is sufficient evidence to justify the decision. As in this case there was abundant, and superabundant, evidence to justify the prisoner's conviction, that defect does not, of

itself, form a ground for interfering with the Sessions Judge's sentence.

Then as to the sentence which was passed, the prisoner's vakeel contends that the sentence is very severe. On the contrary, it appears to us that this is a case of aggravated criminality. The prisoner endeavoured, by forging an instrument, and by other proceedings in connection with that instrument, to deprive Mussamut Tahoorun, and also her heirs, of property which she possessed. It appears to us that the sentence is, in no way, too severe, and that, therefore, it must be affirmed.

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The 9th July 1866.

*Present:*

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

**Jurisdiction (of High Court)—Conviction (Reversal of—on extraneous evidence derived from another case).**

*Criminal Jurisdiction.*

*Referred under Section 434 of the Code of Criminal Procedure.*

Nussur Ali *versus* Mr. G. Hart.

Prisoner was convicted by one Court of criminal intimidation on a charge by *A*, the conviction being confirmed on appeal by the Judicial Commissioner; but was acquitted by another Court of assault and robbery alleged to have been committed on the same day on a charge by *B*. The latter Court pointed out to the Judicial Commissioner that the facts proved in *B's* case raised a strong presumption that *A's* case was a false one, the result of a conspiracy against the prisoner; and the Judicial Commissioner proposed to set aside the conviction of the prisoner in *A's* case, not on the evidence in that case, but on extraneous evidence derived from *B's* case. HELD that the High Court had no jurisdiction in the matter; but that the Judicial Commissioner could apply to the Government for a pardon on the ground stated by him.

MR. GEORGE HART was convicted by Mr. Carnegy, the Extra Assistant Commissioner of Kamroop, Assam, of a charge made by one Nussur Ali of criminal intimidation, and sentenced to six months' imprisonment. The conviction and sentence were confirmed on appeal by the Officiating Judicial Commissioner.

Hart was also charged by Bukut Ram with assault and robbery on the same day. This case was tried before Captain Sherer, and he was of opinion that Nussur Ali had attempted to suborn the prosecutor as a witness in his own case. After a careful trial, the charge of robbery was dismissed, and Captain Sherer pointed out that the facts proved in that case raise a strong presumption that Nussur Ali's case was a false one, the result of a conspiracy against Hart.

The Judicial Commissioner, in a letter to this Court, adopting that view, suggests that the Assistant Commissioner's decision should be reversed, and that Hart should be acquitted.

The ground on which the Judicial Commissioner proposes to set aside the conviction of Hart is not on evidence apparent on the record of the case, in which Hart was punished, nor on any other ground cognizable by this Court under Sections 404 and 405 of the Criminal Procedure Code. The Judicial Commissioner would release the prisoner on extraneous evidence derived from another suit. We do not think that we can properly take any action in the matter; but the Judicial Commissioner can apply to the Lieutenant-Governor for a pardon on the ground stated by him.

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The 10th July 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Murder—Culpable homicide not amounting to murder—Dishonoring a wife.**

Queen *versus* Maithya Gazee and Esoff.

*Committed by the Magistrate, and tried by the Sessions Judge of Tipperah, on a charge of Murder.*

Where a man was murdered by his brother and nephew while in the act of dishonoring the brother's wife,—HELD that there was grave and sudden provocation, within the meaning of Exception 1, Section 300 of the Penal Code, which would have justified the murder, if only such force had been used as was necessary to protect the wife from the outrage to which she was being subjected; but that, as the deceased had been beaten in a cruel and vindictive manner, the prisoners were guilty of culpable homicide not amounting to murder.

IN the appeal of the prisoners Maithya Gazee and Esoff, we have perused the proceedings in the Lower Court, and we think that the finding and the sentence of the Sessions Judge should be altered in both cases.

It appears that the deceased Nurrah Gazee was the elder brother to the prisoner Maithya Gazee, and uncle of the prisoner Esoff.

The prisoners are convicted of the murder of the deceased Nurrah Gazee, and the

circumstances out of which the conviction arose occurred at night in the house of Maithya, when the only persons present were the two prisoners, the deceased, and one Saya, the wife of the prisoner Maithya.

The woman's evidence was taken, and we think that, as she was the only available witness, we are justified in looking at her evidence for the purpose of estimating the guilt of the prisoners.

It appears that, above two hours after dark on the night in question, the two prisoners were in bed, that the woman Saya was sitting smoking at the door, and that the deceased was in the house; but whether he had been to bed or not does not appear. The woman's account of the matter then is that the deceased Nurrah came to her and took hold of her hand, upon which she said, "This is improper; my husband is inside;" but that the deceased, notwithstanding, kept dragging her away; that she then called out, when her husband and Esoff came, and that the two together beat the deceased with their feet and elbows till he ceased to breathe; and that then they carried him to his own house.

The prisoner Maithya has never denied his guilt, and his account of the transaction is substantially the same as that of his wife. The prisoner Esoff gives pretty nearly the same account, but denies that he struck the deceased.

We agree with the Sessions Judge in thinking that the outrage by the deceased upon the woman Saya had gone much farther than merely taking hold of her hand. According to the husband's statement, he charged the deceased with having dishonored him, and the deceased admitted it in an ironical manner. And both prisoners state, and the woman admits, that when the prisoner Maithya was first aroused by the cries of his wife, she was on the ground under the deceased.

The Sessions Judge seems to have had no doubt that the crime was murder, and that the only question was whether the sentence of death ought to be inflicted; but we think that the first question to be considered is whether there was not such grave and sudden provocation as may well have deprived the prisoner Maithya of the power of self-control within the meaning of Exception 1 to Section 300 of the Penal Code. It is difficult to imagine circumstances of graver provocation. If the prisoner Maithya had only used such force as was necessary to protect his wife from the outrage to which she was being subjected, he would have been justified; and had he, while using such force, unintentionally caused the death of the deceased, the homicide would have been justifiable. He went, however, according to his own confession, much farther than this; and from the evidence of the Surgeon it appears that 15 ribs of the deceased were broken, each into several pieces. The deceased must, therefore, have been subjected to very great and long-continued violence, much more than could have legally been exercised by the prisoner Maithya in defence of his wife.

But as no weapon was used, as all the blows appear to have been struck while this prisoner was still under the influence of passion, and as there is nothing in his conduct, either previous or subsequent, which would lead us to suppose that this prisoner acted from any other motive than that of anger provoked in the manner above mentioned, we think that the homicide, though culpable, does not amount to murder; that it falls within the Exception 1 to Section 300 of the Penal Code; and that this prisoner ought to have been convicted accordingly.

With regard to the prisoner Esoff, the evidence is extremely meagre. He denies that he took any share in the attack on the deceased. But there seems no reason for discrediting the woman's statement; besides which, the extent of the injuries inflicted upon the deceased, and the fact that he is not alleged to have made any resistance, also lead to the conclusion that he must have been attacked and overpowered by more than one person.

On the other hand, there is no ground for supposing that the prisoner Esoff had any such criminal intention as would render him liable to be convicted of an independent crime of murder; and we think, therefore, that he also ought to be convicted of culpable homicide not amounting to murder.

With regard to the amount of punishment, we think the prisoners ought both to be sentenced to rigorous imprisonment for seven years. The prisoner Maithya received, no doubt, great provocation. But, on the other hand, he beat the deceased in a cruel and vindictive manner, which merits severe punishment. The prisoner Esoff had not the same provocation, but he is much younger. His age is only 18 years, and he probably acted to a considerable degree under the influence of the elder prisoner.

We therefore alter the finding and sentence of the Court below.

We direct that the prisoners be acquitted of the charge of murder, and found guilty on the charge of culpable homicide not amounting to murder, under Section 304 of the Penal Code; and we sentence each of them to rigorous imprisonment for seven years.

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The 24th July 1866.

*Present:*

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

**Murder—Evidence of accomplice—Corroboration—Misdirection.**

The Queen *versus* Karoo, Rumnee, and Nundoo Khuttree.

*Committed by the Deputy Magistrate of Behar, and tried by the Sessions Judge of Patna, on a charge of murder.*

Held, in a case of murder, that the Judge had not given a proper direction to the Jury in telling them that it was for them to consider whether the evidence of the accomplice was strictly corroborated as to the prisoners; that it was not enough that the evidence should disclose a state of facts consistent with the possibility of the truth of the accomplice's story; and that the Judge ought to have gone through the history of the crime as detailed by the accomplice, to point out any independent evidence proving facts showing that the prisoners were or must have been present at, or cognizant of, the murder.

THE prisoners have been found guilty, at a trial before the Sessions Judge of Patna and a Jury, of the murder of a boy of twelve years old named Gopal. They have been sentenced to death, and the case comes before us for confirmation of the sentence.

Considering the youth of the prisoner Karoo, and the uncertainty we feel as to the circumstances under which the crime was committed, we think that a sentence of transportation for life will be a sufficient punishment for him.

We entertain very grave doubts as to the guilt of Rumnee and Nundoo.

We think it is proved that the murder took place in the deserted house adjoining that which is described as the house of Rumnee; that the deceased was killed by having his skull smashed, probably with the stone found there; and that the body was afterwards removed and put into a well in the little court-yard close to the door of Rumnee's house. That well is close to the verandah in which the prisoner Karoo and his mother Jhoomiza resided. Karoo enticed the deceased from his uncle's house. His own admission, and the statement of his mother Jhoomiza, who was admitted as Queen's Evidence, prove, beyond any doubt, that Karoo was guilty of, or abetted, the murder. His mother Jhoomiza, by her own evidence, was an accomplice. Both Jhoomiza and Karoo fled after the murder.

But, as it appears to us, there is nothing really to corroborate the evidence of Jhoomiza as to the participation of Rumnee and Nundoo in the crime.

Her evidence does not suggest any intelligible motive on their parts for the commission of the murder. Their object could not have been plunder, because the murdered boy's jewels were found upon his body in the well. It was apparently not revenge, for Byejnauth, the uncle of the deceased, says he had no quarrel with the prisoners. Their conduct after the date of the murder does not appear to be that of persons conscious of guilt. Rumnee, at any rate, from all that appears, was about his usual business, although, with the usual neglect of police officers in this country, no distinct evidence is adduced on that subject.

We cannot make out, from the evidence recorded, that Nundoo had fled or concealed himself. If Rumnee and Nundoo had committed the crime, it is almost inconceivable that Rumnee should have placed the body in a dry well at his own door, half covered with earth, so that the stench of the putrefying remains might have been expected to induce every dog in the neighbourhood to testify against him. Two men capable of such a crime would have had no difficulty in carrying the body off to a distance and concealing it.

If Karoo and Jhoomiza committed the murder alone, it may well be that a boy either of 12 or 15, and a woman, might not have had strength or nerve to carry it off through a public road, and may have dropped it where it was found, from inability to remove it to a greater distance.

The imperfect manner in which the body was covered with earth appears more like the work of a woman or boy than of determined criminals, such as Rumnee and Nundoo must be, if the theory of the prosecution is well founded. The story, therefore, of Jhoomiza appears, on the face of it, in a high degree improbable. We may add that,

as to the immediate circumstances of the crime as described by her, the story is inconsistent with itself. Whether she desired to avenge an old grudge on her former paramour, or to escape, by charging other people with the crime which she had committed, it may be difficult to say. But it must be borne in mind that either or both of these motives may have been present to her mind. What is there, then, to corroborate her story?

The Judge says that Ghunnoo, the oilman, saw Rumnee and Nundoo enter what he calls Rumnee's house, immediately after Karoo and Gopal.

Now, according to the evidence of Jhoomiza, Karoo took Gopal to the house of Rumnee, and led him over the wall into Gouree's house. She says, "Rumnee and Karoo followed immediately into that house." Ghunnoo says, "I saw Karoo come, and Gopal following him. They went inside Rumnee's house. When I got up to go in, I saw Rumnee and Nundoo go into the house."

Now, here is the point in the case—a point at which the prisoners' guilt or innocence—their lives, in short—depend on accuracy as to *seconds*. And yet the Judge did not put a single question to the witness to ascertain on what day of the month or week it was that he saw Rumnee and Nundoo following Karoo and Gopal, or at what time of the day. He leaves it utterly uncertain, what was the interval after which Rumnee and Nundoo followed—whether it was five seconds or twenty minutes. The loose and evidently inaccurate language of the witness, "it was immediately after," is not sufficient to satisfy *our minds* on this most important point. No question is put as to whether these men were within sight of the boys, or apparently watching them.

It must be remembered that, if the house was Rumnee's house, for all that appears, it was perfectly natural that he might have been seen on any morning going towards the door of his own house with Nundoo, his fellow-workman; and there is nothing to lead to the inference that the day of the murder was the only time on which the two boys Karoo and Gopal had gone together to the house of Rumnee.

Upon the evidence, as it stands, it cannot be said to be proved that Rumnee and Nundoo followed Gopal and Karoo at so short an interval that we must *necessarily* infer that they were all together. The simple fact that the prisoners followed the boys into the house cannot, under all the circumstances of this case, fairly be said to be a corroboration of Jhoomiza's story, because, though consistent with the statement that they were present at the murder, it is not inconsistent with the possibility that the boys may have gone over the wall into the deserted house, where the murder was committed, before Rumnee and Nundoo got into Rumnee's house; and more especially so, since, as we have shown, the facts afford a presumption that the murder was more likely to have been committed by the boy Karoo, or the woman and boy, than by two men such as the prisoners.

Next, the Judge says that, as regards Rumnee, the body was found in the well on his premises, and that the spot where the murder was committed has no communication with that well except by a public road, unless through his premises. The well is outside the door of his house, inside a little open courtyard open to the street in front of it.

We cannot conceive how any one could suppose that this is a corroboration. We find it simply impossible to imagine any set of circumstances under which the prisoners could be induced to place the body in such a position, though we can imagine that it might have been placed there by one who desired to fix a charge upon them. So far from being a corroboration, we think it tends to throw doubt on the story of the accomplice.

It appears to us that the Judge has not given a proper direction to the jury. To tell a body of seven native jurymen, as he did, that it was for them to consider whether the evidence of the accomplice was strongly corroborated as to the prisoners, was simply to ask them to consider a question which it was perfectly certain that native jurymen in the Mofussil would not understand. It was the duty of the Judge to go through the history of the crime as detailed by the accomplice, to point out any independent evidence proving facts showing that the prisoners were, or must have been, present at, or cognizant of, the murder. If such facts are proved, they would corroborate the story of the accomplice. But it would not be enough that the evidence should disclose a state of facts consistent with the possibility of the truth of the accomplice's story. If the state of the facts proved is *equally consistent with*, and capable of receiving, a reasonable and natural explanation on the hypothesis of the prisoners' innocence, *those facts, standing alone, would be no evidence*

of the *truth* of the accomplice's story. The same principle would apply even in civil suits. It was acted on by the Court of Common Pleas in England, in the Midland Railway Company *vs.* Bromley, 25 Law Journal Common Pleas 94, and the Court of Exchequer, in Doe dem. Welsh *vs.* Langfield, 16 Meeson and Welsby 497 : much more, then, would such proof be insufficient as *corroborative evidence* in a criminal case, where the legal presumption of the innocence of every man till he is convicted has to be put in the scale against the construction which supposes the guilt of the prisoner. Of course, such evidence may be of great importance as a link in the chain of proof against a prisoner.

The case against Rumnee and Nundoo must go back for a new trial with reference to these observations.

The Judge appears to have wholly overlooked the inconsistency and self-contradiction of Jhoomiza's relation of the circumstances under which the prisoners appeared on the scene of the murder.

She first says, "Karoo *took Gopal* through Rumnee's house and *over the wall* into Gouree's. Rumnee and Nundoo followed immediately into that house. I was at the time in Rumnee's verandah, and saw them. I went to the house about a *ghurree* after : *then Rumnee and Nundoo put Karoo over the wall.* I got over the wall ; I there found Gopal struggling on the ground. I saw Rumnee beating him on the head with a stone. Nundoo was holding him by the throat ; *my son Karoo, by the feet.*"

This story, as detailed in evidence, is simply impossible. If Rumnee put Karoo over from the outside into Gouree's house, Karoo did not go with Gopal. If from Gouree's house they put him over the wall back into Rumnee's, Karoo could not have been present, holding Gopal's feet while Rumnee was murdering him.

We may observe, as regards the way in which the case has been tried, that the Judge has not attempted to elicit from the several witnesses the facts in that minute detail which might have been expected, considering the importance and difficulty of the case. Much evidence which would have been of great importance is wholly wanting. No account is given of the arrest of the several prisoners—of the discovery of the body by the Gorait—of the bloody cap—of the basket in which the remains are found. It is even left doubtful whether Rumnee lived in the house which is styled his, or not. The Police seem to have been careless. The Deputy Magistrate seems to have been more ready to give a credulous assent to the tale of her who was probably the chief criminal, than to insist in following up all clues which might lead to a discovery of the truth —all indications which could throw light on the enquiry.

The Sessions Judge seems to have taken the leading facts mentioned in the abstract of the evidence as given by the Deputy Magistrate, and scarcely enquired beyond these, instead of going fully into and through the case, with the desire to get at all the facts throwing doubt on the prisoners' guilt, with as much care as at those which tend to convict them.

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The 26th July 1866.

*Present :*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Murder—Punishment.**

Queen *versus* Tonoo and another.

*Committed by the Magistrate, and tried by the Sessions Judge of Rajshahye, on a charge of murder.*

The sentence of death reduced to transportation for life in a case of murder committed rather by way of retaliation for injury, than under the influence of any worse passion.

THE prisoners in this case have both been convicted of murder. On one has been passed the sentence of death, subject to the confirmation of this Court ; the other has been sentenced to transportation for life.

Both prisoners have appealed against their conviction and sentence, so that the whole case against both of them must be considered.

It appears that, in the village of Khoorshal, in the district of Rajshahye, there lived a Mahomedan family, consisting of three brothers, Dholba, Onoor, and Jumoon, and their three wives, Piprah, Sokina, and Tonoo. The mother of the three brothers also lived in the same house. Piprah is the person whose death is the subject of enquiry in the present case. Sokina and Tonoo are the prisoners who have been convicted of murdering her. Piprah was the chief among the women, and had the general charge of the house.

On the day in question, the two elder brothers, Dholba and Onoor, went out early in the morning to plough, and their mother also left the house before the morning meal, and neither of these parties returned until after the murder had taken place. The only persons in the house, therefore, were the three sisters-in-law and the younger brother Jumoon, who was stone-blind.

Dholba, the husband of Piprah, the murdered woman, states that when he returned from ploughing, about half-past four in the afternoon, he went into the western house, and there found his wife lying on her right side, with her throat cut from ear to ear, and a bloody knife lying by her. He immediately called to his brother Onoor who was outside, and they gave the alarm, which brought several persons to the spot, and the Police were sent for. He says that the two prisoners were in the house engaged in drying paddy, and another witness states that the blind brother Jumoon was also in the house; but he does not state where, or what he was doing; nor does it appear that Jumoon was ever called as a witness, or made any statement with respect to the transaction. Upon the prisoners being asked about the occurrence, they at once confessed that they had murdered the deceased, that they had gone to her while she was asleep, and that Tonoo had held her feet, whilst Sokina had cut her throat; and this confession they repeated several times.

Several witnesses spoke to having seen a mark of blood on the edge of the cloth worn by Sokina, corresponding with the five fingers of the hand; and while the prisoners were in a room under surveillance until the Police should arrive, Sokina herself handed out her cloth that the neighbours might see that such was the case.

The prisoners were taken before the Magistrate on the following day, when they again confessed in substantially the same terms, and their confession was formally taken down a few days after.

Throughout, the reason assigned for the murder by the prisoners was that Piprah had a great aversion to them, that she did not give them sufficient food and clothing, and that she had falsely accused them of stealing a cloth.

At the trial, the prisoners withdrew their confessions, and stated that they left the house early in the day with their mother-in-law, and had gone to sift paddy in their uncle's house; that, when they left the house, Dholba was in the house quarrelling with Piprah, and that they knew nothing further until news was brought them that Piprah was murdered; but that they had been persuaded and threatened by various persons, and induced to confess the murder.

The first question is whether the prisoners are guilty. The only direct evidence against them is undoubtedly their own confession, but there is no reason whatever for discrediting it. When they withdrew it, they substituted for it a story which is plainly contradicted by the indisputable facts of the case. There can be no doubt that they were in the house when the murder took place, and if they were not the guilty parties, they would at least be able to give some account of how the deceased came by her death.

About the case of the prisoner Tonoo, there is, therefore, no further question. She has been rightly convicted of murder, and she has been sentenced to the lowest punishment which the law has awarded to that crime.

Sokina has also been rightly convicted, but it remains to be considered whether the sentence of death which has been passed upon her ought to be affirmed.

By Section 302 of the Indian Penal Code, it is provided that the crime of murder shall be punished with death or transportation for life. The Legislature has not laid down any general rules for the application of these two kinds of punishment, but has left it to the discretion of the Court which has to pass or affirm the sentence to decide which of them shall be awarded. This is the discretion we have now to exercise, and, after mature consideration, we have come to the conclusion that, looking to the whole circumstances of the case, the interests of justice do not require that the prisoner Sokina should suffer the extreme penalty of the law. We know very little of the internal history of this family, all the members of it (as was natural) having given their testimony with evident reluctance; but there seems to us fair reason to believe that a petty tyranny had been exercised by the deceased which may have become extremely irritating. The conduct of the prisoners in having taken no steps whatever to conceal their crime, strongly indicates that the act was rather retaliation for some injury inflicted on themselves, than one prompted by any worse passion. There is nothing, it is true, which could for a moment be supposed to reduce the crime from murder

to culpable homicide, but it does not appear to us to be a murder of the worst kind.

We have thought it right to state our reasons for not affirming the sentence of death passed in this case, but we are desirous not to be understood as laying down any general rules on this important subject, and particularly we do not wish to lend any support to the notion that a woman ought not to be hanged in any case. The Legislature itself, when it left this matter to the discretion of the Judge, no doubt was aware of the extreme difficulty there is in framing rules applicable to all cases, and we think that the safest course for Judges who have to administer this portion of the Criminal Law will be to act in the same spirit, and to decide each case on its own merits, without much reliance on previously decided cases which are supposed to be analogous.

For the reasons above given, the conviction of both prisoners will be affirmed. The sentence passed on prisoner No. 2 will also be affirmed: that passed on prisoner No. 1 will be reduced to trasportation for life.

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The 28th July 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Illegal Toll on public road—Act VIII. of 1851.**

*Criminal Reference by the Officiating Sessions Judge of Moorshedabad, under Section 434, Act XXV. of 1861, and Circular Order of the High Court, dated 15th July 1863, No. 18.*

Narendronarain Sing and another, *Petitioners.*

To justify a conviction under Section 6, Act VIII. of 1851, for illegal collection of a toll on a public road, the road must be a public road within the meaning of Section 2 of the Act.

*Case.*—THE case is briefly as follows. These parties are accused of collecting a toll illegally on a public road. They are respectively the zemindar and ijaradar of the estate in which the road is situated. They allege, and it is not denied, that the road was made for the convenience of the public very many years ago, and that a small toll is taken from hack-bullocks and hackeries, from the proceeds of which the road is kept in repair. It is not stated that this road leads to, or is connected with, any road on which a toll has been or can be imposed by the Government. The Deputy Magistrate has not found the defendants guilty of any specific act of extortion or illegal restraint, nor is any such charge preferred by any individual, or proved on the record.

They have been sentenced, under Section 6, Act VIII. of 1851, to pay a fine of 25 and 15 rupees respectively, or to suffer imprisonment for 15 days.

The whole order is illegal for the following reasons. That Act applies only to public roads, and is entitled "An Act to enable the Government to levy tolls on public roads and bridges." It is not shewn that this is a public road within the meaning of the Act as defined in Section 2, *viz.*, a road which has been made or repaired at the expense of the Government. The penal Clause of the Act is as special as the Act itself, and only refers to offences committed by authorized or unauthorized persons on public roads. Any illegal extortion of tolls, or prevention of persons passing along places where they have a right of way, is punishable under the Penal Code; but such offences are not proved in this case, and I, therefore, refer the case for the orders of the High Court.

*Judgment of the High Court.*—In this reference, we agree with the Sessions Judge. The road in question is clearly not a public road within the meaning of Section 6, Act VIII. of 1851; and the conviction is, therefore, illegal. The sentence of the Deputy Magistrate is reversed, and the fines, if realized, must be refunded.

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The 28th July 1865.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Splitting of Offences—House-breaking by night—Theft.**

*Criminal Reference by the Officiating Magistrate of Dinagepore, under Section 434 Act XXV. of 1861.*

Jogeen Pullee

*versus*

Nobo Pullee.

In a case of separate convictions and sentences for house-breaking by night and theft under Sections 457 and 379 of the Penal Code, the conviction and sentence under Section 379 were quashed, and those under Section 457 were upheld.

*Case.*—I have the honor to forward herewith, under Section 434, the proceedings of a case tried by Deputy Magistrate Moulvie Anwarudin, as I am of opinion that his order is an illegal one. He is a Subordinate Magistrate of the 1st grade, and is consequently not empowered to pass a severer sentence of imprisonment than six months for any *single* offence. In the present instance, the offender was caught almost in the act of house-breaking by night, and at the same time committing theft. The Deputy Magistrate charged him under Sections 457 and 379, and, convicting him under both Sections, sentenced him to a year's rigorous imprisonment. It appears to me clear that but one offence was committed, and although it could be brought under several Sections, and that it never was the intention of the law to allow cumulative punishments in cases of this sort, if the Deputy Magistrate thought six months' imprisonment inadequate, he should have forwarded the case to me under Section 277, Code of Criminal Procedure. The orders of the High Court are hereby requested on the subject.

*Judgment of the High Court.*—We agree with the Magistrate that the Deputy Magistrate had no power to convict the prisoner of these two offences, *viz.*, house-breaking by night and theft, and, in accordance with a decision of the Full Bench of this Court given on the 9th of July last, we quash the conviction and sentence passed upon the prisoner for the offence under Section 379 of the Indian Penal Code. The conviction and sentence under Section 457 will stand.

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The 30th July 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

**Jurisdiction—Theft—Dacoity.**

*Referred under Section 434, Act XXV. of 1861, and Circular Order, dated the 15th July 1863, No. 18.*

Shumbhoo Roy *vs.* Ajail Aheer and others.

A Deputy Magistrate has no jurisdiction to try and convict, as for theft, persons whose offence is in reality that of dacoity. He can only commit them to the Sessions.

THE prisoners have been convicted and sentenced to two years' imprisonment for theft by Moulvie Waris Ali, the Deputy Magistrate of Shahabad.

The Deputy Magistrate's decision shows that he finds that seven of the parties implicated, and, amongst them, the prisoners were armed with sticks, and formed a sort of body-guard to the four who were carrying off the grain. The prosecutor complained, and his witnesses proved, that these seven men attacked and compelled his party to retreat when they attempted to arrest the thieves.

The offence charged was thus within the definition of robbery in Section 390, and, as more than five persons were conjointly committing it, was dacoity as defined by Section 391. This is an offence which the Deputy Magistrate had no jurisdiction to try. He had therefore no power either to convict or acquit the prisoners, and could only commit them to the Sessions.

The conviction must be quashed. The Deputy Magistrate must again take up the case in order to see whether it should not be committed to the Sessions.

The same order is made in the case of Bhika Aheer.

The 30th July 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

**Murder—Culpable homicide not amounting to murder.**

Queen *versus* Fukeera Chamar.

*Committed by the Magistrate, and tried by the Sessions Judge of Sarun, on a charge of murder.*

Where a thief was caught house-breaking by night, with half his body and his head through the wall of a house occupied by none but women except the prisoner and his young idiot son, and where the prisoner suddenly caught up a sort of pole-axe, and with it struck the thief five times on his neck and nearly cut off his head—HELD that the offence committed by the prisoner was not murder inasmuch as it was committed in the exercise of the right of private defence; but that, as the prisoner inflicted more hurt than was necessary for the purpose of defence, he was guilty of culpable homicide not amounting to murder.

THE prisoner has been convicted of murder, and sentenced to transportation for life.

He does not appeal, but the case has been sent up by the Sessions Judge to the High Court, and we deal with it under Section 404.

The deceased, about 12 o'clock at night, made a hole in the wall of the prisoner's house. The prisoner awoke and caught up a sort of pole-axe which was near him. He ran out of doors, and stopped before the hole. The deceased then had half his body and his head outside the hole. The prisoner seized deceased by the hair, struck him five times on the neck, and, in fact, cut his head nearly off. He says he did not recognize or know the thief. There were none but women in the prisoner's house except himself and his young son, an idiot.

We are of opinion that the prisoner's offence is not murder, inasmuch as it was committed in good faith in exercise of the right of private defence, and that, therefore, the case falls within the Exception 2 in Section 300 of the Indian Penal Code.

We think that the act of the prisoner is not completely excused under Section 103, because the prisoner inflicted more harm than it was necessary to inflict for the purpose of defence. The prisoner is therefore guilty of culpable homicide.

There were houses at no great distance from that of the prisoner, the inhabitants of which did come up on his outcry, though too late to save the deceased.

But, considering that the house-breaking took place at so late an hour of the night that the prisoner might reasonably have apprehended that his own life must have been in danger if the deceased had got clear of the hole; that the prisoner had none but women with him in the house; that the dangerous weapon used was one hastily caught up and not deliberately chosen; and that the alarm and excitement produced by his determination to defend his house and his family to the very death might have, under all the circumstances, led any one to use greater violence than was absolutely necessary for defence, we think a light sentence sufficient. The prisoner has been some time in jail, and we sentence him to four months' imprisonment, to be computed from the 4th of this present month, the date of his sentence by the Sessions Court.

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The 30th July 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

**Land Disputes—Possession.**

*Criminal Jurisdiction.*

*Referred under Section 434, Act XXV. of 1861, and Circular Order No. 18, dated 15th July 1863.*

Sabhee Sing and others.

Before a Magistrate can pass any order regarding possession of disputed land, he must observe the forms prescribed by Section 318, Code of Criminal Procedure.

WE concur with the Sessions Judge. The Assistant Magistrate had no power to deal with the land at all, except under Section 318 of the Code of Criminal Procedure, and he was bound to observe the forms prescribed by that Section before he passed any order regarding possession of the land. That part of the Assistant Magistrate's order which gives possession of the land to the plaintiff, Odit Misr, is accordingly quashed.

The 30th July 1866.

*Present :*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

**Imprisonment (in default of fine)—Unlawful assembly.**

Criminal Jurisdiction.

*Referred under Section 434, Act XXV. of 1861, and Circular Order No. 18, dated 15th July 1863.*

Phoolman Tewary

*versus*

Satram Ojha and others.

A Subordinate Magistrate of the First Class has no power under Section 45 of the Code of Criminal Procedure to award any greater sentence of imprisonment in default of payment of fine than 6 weeks in the case of persons convicted of being members of an unlawful assembly.

THE prisoners in this case have been tried before Mr. Gribble, the Assistant Magistrate of Sasseram, vested with the powers of a Subordinate Magistrate of the First Class, and convicted of being members of an unlawful assembly under Section 143 of the Indian Penal Code, and they were each sentenced to 6 months' rigorous imprisonment and a fine of Rupees 200, or, in default, to suffer 6 months' further rigorous imprisonment.

Mr. Birch, the Sessions Judge of Shahabad, has sent up this case under Section 434 of the Code of Criminal Procedure in order that the legality of the proceedings may be examined by this Court, and has pointed out that Mr. Gribble, as Subordinate Magistrate of the First Class, had no power, under Section 45 of the Code of Criminal Procedure, to award any greater sentence of imprisonment, in default of payment of the fine, than one-fourth of six months, or a month and a half.

We are of opinion that the sentence is legally wrong on this ground, and we direct that it be amended by substituting 6 *weeks'* imprisonment for 6 "months," in default of payment of the fine.

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The 6th August 1866.

*Present :*

The Hon'ble W. S. Seton-Karr and Shumbhoonath Pundit, *Judges.*

**Charge (Effect of dismissal of)—Riot—Trespass—Appeal.**

Criminal Jurisdiction.

*Referred under Section 434, Act XXV. of 1861, and Circular Order, dated 15th July 1863.*

Queen *versus* Morly Sheikh.

A dismissal by one Court of a charge of riot against *A* may be a bar to *A's* trial by another Court on the same charge, but it does not extend to other persons not then before the Court which ordered the dismissal.

The dismissal by one Court of the charge of riot instituted by the Police is no bar to the trial by another Court of a charge of criminal trespass instituted by a third person, although the two charges may substantially refer to the same occurrences.

There is no right of appeal because the united sentences in three separate cases amount to more than a month's imprisonment.

WE regret much that all the various cases referred to by the Sessions Judge had not been made over for disposal to one and the same tribunal, and we think the Magistrate somewhat to blame for not having perceived the nature of the cases, and for not having referred them to one and the same tribunal in the interests of justice. But we are unable to see our way to anything beyond the quashing of the sentence passed against Morly Sheikh for riot, *viz.*, 15 days' imprisonment.

The complaint of riot having been dismissed as against this person by the Assistant Magistrate, Morly Sheikh is, we think, in all fairness, entitled to be not again tried and convicted of riot by any other Court. But the dismissal of the case as against him cannot extend to the cases of other persons not then before the Assistant Magistrate—such persons having further, it appears, been separately accused by Talib Khan. The dismissal by one Court of the charge of riot instituted by the Police can be no reason why another Court should not, on a separate charge instituted by a third person, come to a different conclusion, even though the two charges—that preferred by the Police, and that preferred by Talib Khan—may substantially refer to the same occurrences.

The charge of criminal trespass for which Morly Sheikh was sentenced to 15 days' imprisonment appears to us to have been altogether a separate offence, and we do not see that an appeal lay from this sentence, simply because, in a different case, the accused had been sentenced to a further punishment

on two counts, the three sentences altogether amounting to more than one month.

We do not think it would have been competent to the Sessions Judge to annul the sentences against Baser and Budai merely on the appeal of Morly, even if Morly had the right to an appeal. On the whole, as already observed, the only order which we think ourselves empowered legally to make is that the conviction and sentence against Morly for riot, and for *riot only*, be quashed.

All the other sentences must stand good.

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The 6th August 1866.

*Present:*

The Hon'ble W. S. Seton-Karr and Shumbhoonath Pundit, *Judges.*

**Evidence (Police Reports).**

Criminal Jurisdiction.

*Reference by Mr. W. Ainslie, Sessions Judge of Patna, under Section 434, Act XXV. of 1861, and Circular Order No. 18, dated 15th July 1863, in the case of a conviction under Sections 173 and 188 of the Indian Penal Code.*

Government *versus* Madun Dass.

Police Reports are not evidence except against the reporting Police Officer.

*Case.*—THE accused is a zemindar. He was called on to supply the place of an absconded chowkeedar; he neglected to do so, and subsequently he evaded a summons—at least, so the Police report. The Deputy Magistrate of Behar fined him Rs. 50.

No evidence was taken except the Police-reports, and consequently the conviction is bad.

A copy of my letter to the Deputy Magistrate is annexed with his explanation, which is not satisfactory.

I have repeatedly impressed upon Deputy Magistrate Syud Zainooddeen Hossein that Police reports are not evidence except against the reporting Police Officer, but I cannot get him to remember this. In fact, his explanation shows that he thinks Police reports can be received as legal evidence.

Under these circumstances, I send the case up to the High Court, in the hope that he may pay more attention to their remarks than he does to mine.

*Judgment of the High Court.*—We entirely concur with the Sessions Judge. The Police report is no evidence, and we hope the Deputy Magistrate will pay more attention to the remarks on this head repeatedly conveyed to him by the Sessions Judge.

The conviction is quashed, and the fine, if levied, is to be refunded.

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The 11th August 1866.

*Present:*

The Hon'ble G. Campbell and W. Markby, *Judges.*

**Police—Evidence.**

Queen *versus* Bheem Manjee and another.

*Committed by the Assistant Magistrate of Raneegunge, and tried by the Sessions Judge of Bancoorah, on a charge of false evidence.*

The Police are not at liberty to bind witnesses over to appear a month after date.

Remarks on the insufficiency of the evidence in this case to warrant a conviction.

THE prisoners, men of the aboriginal tribe of the Sonthals, are charged with false evidence in regard to an accusation of ill-treatment made by them against certain Police Officers.

The prisoner Bheem was apprehended by the Police on a charge of dacoity, and search was made for property of which he was supposed to be possessed. He was, according to the papers of the case, apprehended and sent in on the 14th March, but did not reach the Court of the Assistant Magistrate of Raneegunge till the 19th; and the delay of five days has not been explained. On arrival he was sent to "Hajut," and the witnesses in the case did not appear for upwards of a month. It now turns out that the Police, instead of sending the witnesses in at once, had bound them over to appear on the 15th April following—that is, a month later—a most extraordinary and unexampled proceeding, which is wholly unexplained. The case came on before the Assistant Magistrate on the 16th April, and was eventually dismissed. The prisoner Bheem had, however, at that time accused the Police of torturing him with a view to extort a confession and compel the delivery of the property; and enquiry was made by the Assistant Magistrate respecting this latter charge.

It then appeared that Bheem had certainly been brought on a cart, suffering from bruises, and apparently unable to walk;

but that no notice had been taken at the time of the circumstance. On being sent into "Hajut," he had gone into Hospital for treatment, and remained there four days. The evidence of the Native Doctor of the Hospital was taken, and though his evidence is not in such detail as it might have been, it seems to have fully supported (so far as it went) the story of Bheem. The Doctor said that the patient, when brought in, was suffering from contusions, that his shoulders and joints were swollen, and that he had pain in his whole body, and marks as of blows of a stick on his back. He added that the man said at the time that he had been tortured with pincers, and his joints had been pressed. The Sub-Inspector and other Police Officers accused were then summoned, and the case was placed for enquiry in the hands of the District Superintendent of Police, who, after enquiry, charged his subordinates with causing hurt to extort confession, &c., under Section 330 of the Penal Code. Meantime, the principal accused, the Sub-Inspector (who had formerly served in the Magistrate's office), applied to the Magistrate of Bancoorah to have the case transferred to his own file from that of the local Assistant Magistrate; and the Magistrate transferred it accordingly.

Eventually, the Magistrate, after going into the case, expressed the opinion that the charge was false. He said, "The Sub-Inspector is a good, sensible, quiet young man, who was some few months an English writer in my office, and entered the Police a short time since. He is well connected, and held in esteem by his neighbours, while the accusers," he went on to say, "were persons of no character." He "thoroughly believed the defence, and disbelieved the prosecution." He accordingly dismissed the charge, and committed the accuser and witnesses for perjury. Hence the present case.

The Sessions Judge of Bancoorah and Assessors have convicted the prisoners, and the Sessions Judge has sentenced each to 4 years' rigorous imprisonment. The Sub-Inspector and the Police Officers and Chowkeedars, formerly the accused, are now the chief witnesses for the present prosecution. They wholly deny the alleged ill-treatment of Bheem. They seem to try partially to account for the marks on his body by saying that after his apprehension he made his escape, being pursued, resisted, and was captured by the use of some necessary violence. But if there be any truth in their story, the injuries inflicted must have been comparatively trivial. They say that Bheem, after his capture, walked along perfectly well, and was sent in not materially suffering. They admit that they made no report of the escape and re-capture now related. They suggest, as a probable hypothesis, that, on the way in, another policeman who went in charge of the prisoners put them up to a false charge, and that, with that view, Bheem was brought in on a cart. The remaining evidence for the prosecution is that of three persons, residents of one of the several places in which Bheem alleges that he was maltreated, who say that, if there had been such maltreatment, they must have known of it, and they were aware of nothing of the kind. The Native Doctor gave evidence substantially the same as that which he had formerly given.

In this case, we are decidedly of opinion that the evidence does not justify the conviction of the prisoners for false evidence. We think the story of the police suspicious in the very highest degree. The whole story of the escape and the injuring of Bheem in re-capture was entirely suppressed till the accusation of torture was brought against them. But, even supposing it to be true, it would in no way account for the injuries said to have been received by Bheem. According to these witnesses, Bheem started for Raneegunge well and perfectly able to walk.

On the other side, it would appear that he was brought in on a cart severely injured. The real question, then, is, which of these stories is true? Was he really in that injured state, or was he so well as the witnesses allege, and only shamming injury in pursuance of a design to accuse the police? The former hypothesis seems to us by far the most probable. There does not seem to be the slightest reason for impugning the truth of the Native Doctor's evidence; and, if it is true, it seems to support the prisoner's statement. What was the occasion of the five days' delay in bringing Bheem? Why was nothing said of his state, or pretended state, when he came in? And above all, what was the object of the extraordinary delay caused by the police in postponing for a month the time for the appearance of the witnesses? The whole proceeding looks in every way like a design to allow time for Bheem's partial recovery before he reached the station of the Assistant Magistrate, and for his complete recovery before he should be brought before that officer.

In order to sift the case, the Magistrate might well have obtained evidence as to Bheem's state when on the way into the station. Where is the policeman who brought him in the cart, and others who might have explained where he was and what his state was from the 14th to 19th March, how and where the cart was procured, and where he was put on it? On all this part of the case there is no evidence whatever. That some policeman not before the Court induced the prisoners to make a false charge, is a suggestion which is not supported by the least tittle of evidence, or by anything which could give it the least color of probability. That Bheem, a rude and simple Sonthal, should go through this elaborate acting, in view to a future false charge, is extremely improbable, and that hypothesis seems to be, in truth, conclusively negatived by the fact that no such charge was brought forward at the time or for weeks afterwards. It was only in the course of his defence, taken after the long delay caused by the police, that Bheem told the story of his maltreatment.

On the whole case, we can see no sufficient reason for believing that the story told by the prisoners under trial, and on which the charge of false evidence was assigned against them, has been proved by any trustworthy evidence to be false. We think the prisoners are entitled to an acquittal, and, reversing the order of the Sessions Judge, we direct their release.

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The 13th August 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

**Dacoity—Punishment (fine).**

Queen *versus* Bhoja and others.

*Committed by the Assistant Commissioner, and tried by the Deputy Commissioner of Singbhoom, on a charge of dacoity.*

**A sentence of fine only is illegal in a case of dacoity.**

NINETEEN women who accompanied a body of persons engaged in a robbery of grain (under circumstances which made it dacoity), in hopes of picking up some grain, have been convicted by the Deputy Commissioner of Singbhoom of dacoity, and sentenced to fines of 4 rupees each. The sentence is illegal, because, under Section 395, the sentence for dacoity must be of transportation for life, or of rigorous imprisonment, with or without fine. If the Deputy Commissioner thought a very light sentence sufficient for this crime, he might have imposed a fine with a short imprisonment of 14 days or a month.

We reverse the sentence as illegal. We do not think it necessary to call on the Deputy Commissioner to pass fresh sentences.

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The 13th August 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

**Insanity—Procedure (by Magistrate).**

Queen *versus* Dataram.

*Referred under Section 434, Act XXV. of 1861, and Circular Order, dated 15th July 1863, No. 18.*

**Where an accused person was found after examination to be of unsound mind—HELD that the Magistrate should not have proceeded to acquit the prisoner, and directed him to be kept in custody, but should have stayed further proceedings.**

THIS is a case which has been sent up to us by Mr. Alexander, the Sessions Judge of Chittagong, under Section 434 of the Code of Criminal Procedure.

It appears that the prisoner named Dataram was brought up before Mr. Wilson, the Officiating Joint Magistrate of Chittagong, upon a charge of having attempted to commit suicide, under Section 309 of the Indian Penal Code.

The Magistrate caused the prisoner to be examined by the Civil Surgeon, who reported that, at the time of the commission of the act in question, he was of unsound mind, and incapable of knowing the nature of his act, and that he continued to be so at the time of the trial.

The Joint Magistrate proceeded to acquit the prisoner, and directed that he should be kept in custody pending the orders of the Government.

It is clear that this course is erroneous, inasmuch as, under Section 388 of the Code of Criminal Procedure, the Magistrate was bound to stay all further proceedings in the case.

We, therefore, quash the acquittal, and stay further proceedings.

The 13th August 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

**Compensation—Theft.**

Criminal Jurisdiction.

*Reference by Mr. H. C. Sutherland, Officiating Magistrate of Backergunge, under Section 454, Act XXV. of 1861, and Circular Order, dated 15th July 1863, No. 18.*

Jalil Munshi *versus* Farnan Hossein.

Compensation cannot be awarded, under Section 270 Code of Criminal Procedure, to a person charged with theft under Section 380 of the Penal Code.

*Case.*—THIS was a case of theft under Section 380 of the Penal Code.

The Deputy Magistrate in this case ordered a compensation of Rupees 25 to be paid to the accused under Section 270 of the Procedure Code.

The order of the Deputy Magistrate is clearly illegal, inasmuch as compensation can only be awarded under Section 270 of the Criminal Procedure Code in cases under Chapter XV.

This was a case under Section 380, the procedure for which is laid down in Chapters XII. and XIV. of the Code of Criminal Procedure.

As the High Court* have ruled that there is no appeal from an order awarding compensation under Section 270, I cannot interfere in the matter. But I think that the order should be quashed.

* *Vide* Sudder Dewanny Adawlut Reports, 904 of 1863. Hume's Journal, Vol. I., p. 237.

*Judgment of the High Court.*—We agree with the Magistrate. The order is illegal, and must be quashed. If the 25 rupees have been paid to the accused, this must be refunded.

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The 20th August 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

**Hurt—Abetment—Wrong conviction.**

Criminal Jurisdiction.

*Referred under Section 434, Act XXV. of 1861, and Circular Order No. 18, dated 15th July 1863.*

Gour Gobindo Thakoor and another.

Case of a man knocked down by a blow behind the ear, and then hung up to a tree where he was found dead, in which the Magistrate convicted one of the prisoners of voluntarily causing hurt, and the other of abetting the same. Conviction quashed with a view to commitment of the parties implicated before the Sessions.

*Seton-Karr, J.*—THE whole of the proceedings of the Joint Magistrate are extremely unsatisfactory and irregular. It is clear to me that Gour Gobindo and Radha Thakoor should never have been convicted of hurt by the Joint Magistrate.

If the evidence of the witness Wuzeer and of the boy Aralya is to be believed, Gour Gobindo struck the deceased, Dil Mahomed, a blow or slap which knocked him down, and then Gour Gobindo and others of the Thakoors, *without enquiry as to whether he was dead or not*, in haste hung him up to a tree, so as to make it appear that he had committed suicide. If Gour Gobindo actually killed Dil Mahomed with one blow, and then, with others, hung him up to a tree, Gour Gobindo himself would be liable to be indicted under Section 304 (latter portion) or 325 of the Penal Code; and the other Thakoors, who assisted him to hang up the corpse, would be liable to be indicted under Section 201 or 193 for "causing evidence to disappear" and "fabricating evidence."

If, however, the deceased was not actually killed by the blow, but was killed by the suspension, then Gour Gobindo himself, and also all the other Thakoors who took part in hanging him up to the tree, would be clearly liable to a charge of culpable homicide amounting to murder; for, without having ascertained that he was actually dead, and, under the impression that he was only stunned, they must have done the act with the intention of causing death, or bodily injury likely to cause death, and without the exceptions provided by the law; or they might have been committed for culpable homicide *not* amounting to murder.

The witness Wuzeer does not positively say that the deceased died at once when he

fell back with a gurgling sound, and it would be for a Judge and Assessors to say whether, on the evidence, they were satisfied that the single blow from Gour Gobindo killed Dil Mahomed at once, and that he was already dead when he was hung up; or whether they thought that his death was caused by his being hung up when he was yet alive. Of course, the difference in the view which a Court might take of the facts would greatly affect the verdict and the punishment, and as to this I give no opinion. In any view of the case, the accused, who are shewn to have taken part in the transaction, should have been committed to the Sessions either under Sections 304 and 325 *and* Sections 201 and 193, or else under Sections 302 and 304; and it is clear that, if Wuzeer and the boy were properly examined and cross-examined, and if the Sessions Judge and Assessors could rely on their evidence, a conviction might ensue under some one or other of the above Sections, even though the body was so decomposed that the Medical Officer could not ascertain the cause of death.

We ought to quash the proceedings and sentences against Gour Gobindo and Radha Thakoor, and the Magistrate should take up the case himself, with a view to a committal of the two accused, and of any other persons implicated in the affair with reference to the above.

*Norman, J.*—The prisoner Gour Gobindo Thakoor has been convicted, by the Joint Magistrate of Mymensing, of voluntarily causing hurt to one Dil Mahomed, and sentenced to one month's rigorous imprisonment; and Radha Thakoor, for abetting the same, to 14 days' rigorous imprisonment.

According to the evidence of two eye witnesses, whose testimony the Joint Magistrate thinks reliable, Dil Mahomed was returning from the house of one Osman Mir Talookdar when he was met by the prisoner Gour Gobindo and other members of the family (Thakoors) who had been called by the prisoner Radha Thakoor. Dil Mahomed made some observation as to their encroaching on his land, and threatened to complain. Gour Gobindo struck him on the left ear, and he fell down. Upon this, all the Thakoors present, including the prisoners, took up his body, and hung it on a tree, where it was found dead a few hours afterwards. The case was reported at the Thannah apparently on the same day, Wednesday, the 2nd of May.

There is nothing to shew that Dil Mahomed was dead when his body was suspended to the tree. The witnesses do not say so, and probably could not have said so if the Magistrate had asked the question. In speaking of the hanging up of the body, they use a term which the Magistrate has translated "corpse." If the Magistrate had put the question to the Civil Surgeon, he would probably have been informed that it is most unlikely that the deceased should have been killed outright by the blow on the ear, and was actually dead when suspended, though he may have been insensible.

*First*, then, assuming that Dil Mahomed was not killed by the blow. The Thakoors appear to have come out in a body with the apparent object of attacking or getting up a quarrel with the deceased. Gour Gobindo knocked him down, and then all, without waiting to see whether he was alive or dead, hung him up on a tree, and thereby killed him. They should all have been put on their trial for murder. It seems to me that a Jury or Judge, on the facts, might fairly presume that they intended to do what they actually did, *viz.*, to kill him. I may observe that the evidence does not shew that the Thakoors endeavoured to revive the deceased, or that their conduct was that of men who, having found that Gour Gobindo had accidentally killed Dil Mahomed, full of regret and alarm, hung up the body with the object *merely* of saving their comrade by producing a false impression as to the cause of his death.

Suppose, *secondly*, that the Thakoors had no intention of killing the deceased, but, finding him insensible, without enquiry whether he was dead or alive, or giving him time to recover, under an impression that he was dead, hung him to the tree, and thereby killed him. It appears to me that they might all have been put on their trial, under Section 304, for culpable homicide not amounting to murder.

I think a Jury might fairly presume against them that they must have known that they were *likely by that act to cause death*. They did not know, they could not know, and thus took no pains to ascertain, whether Dil Mahomed was dead, and they must have known that it was possible that some spark of life still remained. If they really and *bonâ fide* did enquire, and, after examination, believed him to be dead when he was not dead, and killed him by hanging him, it is clear that all the party might be convicted under the 338th Section. The

hanging him up was at the least a rash act, and wholly inexcusable.

*Lastly*, supposing that the blow on the ear of Dil Mahomed killed him on the spot, I think it certain that the Civil Surgeon would have said, if asked, that a blow capable of causing the instantaneous death of an ordinary man must have been a very violent one. To strike such a blow in such a place is a violent and rash act; it caused such hurt as endangered (in fact, it destroyed) the life of Dil Mahomed; and the striker, Gour Gobindo, might, in my opinion, have been committed for trial either under Section 325 or under the 338th Section, if he did not intend to cause grievous hurt; and in this last supposed case, all the other Thakoors, in removing the body from the place where it had fallen when struck down by Gour Gobindo, and hanging it on the tree, appear to me to have caused the disappearance of evidence of the offence committed by Gour Gobindo, and might have been committed under Section 201 for causing the disappearance of evidence, or Section 193 for fabricating false evidence.

The Joint Magistrate would have done well to restrain the flights of his imagination, and dispose of the case simply on the evidence before him.

He says, "The *post mortem* examination "gives no clue to the cause of death, and "the evidence does not either. Any number "of surmises might be hazarded. The "accused cannot be held to have caused the "death of the deceased."

Now, if the Joint Magistrate had let *surmises* alone, he would have had no difficulty in coming to the conclusion that if a man is knocked down by a blow behind the ear, is then hung, and is found dead upon the tree, that he died either from the blow or the hanging. It would be a very serious matter if an offender were to be allowed to escape because a too critical Joint Magistrate cannot determine at what precise point in the course of a series of acts of violence, each capable of producing death, an unfortunate man expired under the hands of those who were ill-using him. The Joint Magistrate should not have indulged in "*any number of surmises*" as to the cause from which death may have resulted, when there are obvious causes detailed in evidence to which the effects found to exist are referable, and from which they would have resulted in the ordinary course of nature.

The Joint Magistrate's view of the law, that the offence, *if proved*, is one of causing hurt or criminal force, is wholly erroneous; and the sentence of one month's imprisonment on Gour Gobindo, and fourteen days' imprisonment on Radha, are simply and utterly absurd as a punishment for the offence.

We quash the conviction, and direct that the case be again taken up before the Magistrate of the District, who will enquire whether all the Thakoors present ought not to be committed for trial on any or all of the charges to which I have called attention. If there is a difficulty in ascertaining the facts, the accused may be convicted on alternative charges under Section 72.

The Magistrate will, no doubt, enquire whether the deceased really was, on the morning in question, at the house of Osman Mir, and whether, when he left, he was in good health and in his right senses.

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The 25th August 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Murder (by consent)—Evidence.**

Queen *versus* Anunto Rurnagat.

*Committed by the Magistrate, and tried by the Sessions Judge of West Burdwan, on a charge of murder.*

In a case of murder by consent—HELD that evidence of consent, which would be sufficient in a civil transaction, must be equally sufficient in exculpation of a prisoner's guilt.

IN this case the prisoner has been convicted, on his own confession, of the murder of his wife, and has been sentenced to death. It appears that he is 26 years of age, and that she, at the time of her death, was about 20; and that four months before the event occurred, which is the subject of the present enquiry, they lost their only child, a boy of 5 years old. Both the prisoner and his wife bore a good character; they were not in want of money, and there was no dispute between them.

The prisoner has never attempted to conceal his guilt, or to defend himself in any way from the charge of murder.

The story he tells us is that, being overwhelmed with grief for the loss of their

child, he and his wife had determined to kill themselves; that for some weeks they wandered about the country, and that, on one occasion, he expressed his determination to kill himself, when his wife begged of him to kill her also, as she could not summon up courage to do it herself. He says that he then tested her sincerity by striking at her three times with an axe, but purposely missing her, and that as she never flinched, he was convinced she was sincere. Nevertheless, he determined not to kill her or himself then, and returned to the village from which he set out, to the house of one Nuffer, a wheelwright, at whose house Kanto the prisoner's brother was also residing. The prisoner himself, being a wheelwright, worked for Nuffer; and he says that, after being there 4 or 5 days, he and his wife saw a child so like the one they had lost, that they both began to weep, and that they then again resolved to commit suicide. He asserts that the wife repeated her request that he should kill her before killing himself, and he says that he accordingly did so by striking her three blows with an adze. After having done this, however, he did not proceed to kill himself, but called his brother who took the adze from him, and he made no subsequent attempt on his life, but requested that the Police might be sent for. This was done, and the prisoner was taken before the Magistrate, where he made a full confession, and expressed his desire to be hanged, in which desire he has ever since persisted.

The prisoner, on his trial, made substantially the same statement as he did before the Magistrate. The Sessions Judge thinks that there is a discrepancy between the statements, because before the Magistrate the prisoner stated that his wife was asleep, whereas the statement at the trial would lead to the inference that she was awake when he killed her; but all he said before the Magistrate was that his wife and others were, on the night in question, sleeping outside the house, but he does not say that his wife was asleep at the time he killed her.

Three witnesses were called by the Sessions Judge—Nuffer, in whose house the prisoner and his wife were staying; Kanto, the prisoner's brother; and the Ghatwal who was sent for. Their evidence throws but little light on the matter, but there is in it this discrepancy, that the Ghatwal says that when he had seen the prisoner, he was always grieving, whereas Nuffer says that he had never seen either the prisoner or his wife lamenting or in grief. These witnesses express their opinion, from the position in which the body was found, that the woman must have been killed in her sleep.

We do not think the prisoner's story so improbable as that we are entitled to reject it. We are at a loss to account for his conduct in any other way than that he was acting under some violent emotion such as he describes. The only doubt in our mind arises from his having aroused his brother after having killed his wife, without attempting his own life. But though his courage failed him at that moment, he never seems to have really changed his mind as to his desire to die, having ever since testified anxiety that he should be convicted and hanged.

But although the prisoner's story be true, still he is guilty of murder, unless he can be brought within the provisions of Exception 5 to Section 300 of the Indian Penal Code, which provides that "culpable homicide is not murder when the person whose death is caused, being above the age of 18 years, suffers death or takes the risk of death with his own consent."

The Sessions Judge was of opinion that this Section did not apply, because he was of opinion that the woman was killed while she was asleep.

But, admitting this to be so, still the question arises whether the prisoner had not reasonable grounds for believing that the woman was still a consenting party to her death. Assuming, as we do, that the prisoner's story is true, what possible reason could he have for thinking that she had abandoned the intention which she had once so clearly entertained, and had so long preserved, even if it were not repeated at the very time he struck her? If this had been a civil transaction, there would have been ample evidence of consent, and it can hardly be said that evidence which would be sufficient in a civil transaction is insufficient in exculpation of a prisoner's guilt.

We are of opinion, therefore, that there is sufficient evidence that the deceased suffered death with her own consent, to entitle the prisoner to the benefit of this Exception. Still, the prisoner is undoubtedly guilty of culpable homicide, and it remains to consider what punishment ought to be inflicted upon him under Section 304; and, taking all the circumstances of the case into consideration, we think a sentence of 15 years' transportation a proper punishment.

We, therefore, annul the conviction and sentence passed upon the prisoner, and in lieu thereof convict him of culpable homicide not amounting to murder, and order him to be transported for 15 years.

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The 27th August 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

**Maintenance (of wife).**

Criminal Jurisdiction.

*Referred under Section 434 of the Criminal Code of Procedure, and Circular Order No. 18, dated the 15th July 1863.*

Mussamut Jesmut

*versus*

Shoojaut Ali.

The inability of a husband and wife to agree to live together is no ground for decreeing a separate maintenance to the wife.

WE concur with the Sessions Judge, and quash the proceedings. There is no evidence of habitual cruelty, and none whatever that the husband is unwilling to support his wife. The husband himself, on the contrary, expressly says that he is willing to support the applicant, but that she went off to her mother. The Magistrate's finding merely amounts to the existence of a disagreement between the husband and wife. He says they cannot agree to live together, but this is no ground for decreeing to the wife a separate maintenance. The order for maintenance is annulled.

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The 27th August 1866.

*Present:*

The Hon'ble W. S. Seton-Karr, *Judge.*

**Rape—Punishment.**

Queen *versus* Jhantah Noshyo.

*Committed by the Officiating Magistrate, and tried by the Sessions Judge of Rungpore, on a charge of rape.*

The measure of punishment in a case of rape should not depend on the social position of the party injured, but on the greater or less atrocity of the crime, the conduct of the criminal, and the defenceless and unprotected state of the injured female.

FROM the direct evidence, and from the medical evidence, this appears, as the Judge says, to be a clear case of rape.

I see no reason to interfere with the sentence; but I cannot concur with the Judge's remarks that the social position of the party injured ought to guide a Court to the measure of punishment to be inflicted on the party committing the injury. The measure of punishment should be proportioned to the greater or less atrocity of the crime, to the conduct of the criminal, and to the defenceless and unprotected state of the injured female, whether that female were a low native or a high European.

Moreover, I am not sure as to the girl's prospects in life not being injured.

The appeal is rejected.

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The 27th August 1866.

*Present:*

The Hon'ble G. Loch and L. S. Jackson, *Judges.*

**Mischief.**

Miscellaneous Case.

Ram Golam Singh, *Petitioner.*

The authority vested in the Criminal Court of punishing persons for acts of mischief is one which must be exercised with great caution, and it must be very clear, before conviction, that the accused has brought himself within the meaning of Section 425 of the Penal Code.

AFTER an attentive consideration of this case, we are of opinion that no sufficient reason has been shown for disturbing the proceedings of the Magistrate's Court on the ground of error in law.

The conviction has been affirmed by the Sessions Judge upon considerations somewhat different from those which influenced the Joint Magistrate, and, indeed, upon a different view of the case.

We are not prepared to say that we should have drawn the same inferences from the evidence that have been drawn below, nor have the proceedings been altogether unsatisfactory. But they do not, in our opinion, exhibit any such legal defect that we should be bound to set them aside.

The authority vested in the Criminal Court of punishing persons for acts of "mischief" is one which must be exercised with great caution, and it must be very clear, before conviction, that the accused has brought himself within the true meaning of the 425th Section of the Penal Code, otherwise this provision of the law will be frequently resorted to as a trenchant mode of deciding disputed civil questions of right.

This offence involves the intent to cause, or the knowledge of the likelihood of causing, *wrongful loss.* Wrongful loss (Section 23, Indian Penal Code) is "the loss, by unlawful means, of property to which the person losing it is legally entitled."

The question is whether the act done by the petitioner (the levelling, partial filling up, and cultivating of a water-course over his lands which conveyed water to the lands of the prosecutor) came within this definition. If it did, then it was a species of mischief to which the law (Section 430) assigns a specially severe punishment.

It is explained in Section 425 (Explanation 2) that the act constituting mischief may be one which affects the property of the person who commits it.

And it is evident that "means" in themselves lawful may be "unlawful," because of their tendency to injure others. Thus, the act of rendering this channel-bed fit for bearing crops would be unlawful if, in order to the doing so, the bed was filled up or raised in such a manner as the petitioner knew would obstruct the flow of water to the prosecutor's land—if the petitioner knew or believed that the prosecutor was entitled to have the water flow in that manner.

It cannot be denied there was some evidence of that knowledge, and we are by no means satisfied (if we may express an opinion at all upon the facts) that the act complained of was not done *mala fide* with the intention of infringing upon such rights.

We do not, therefore, think it is a case in which the Court is called upon to disturb either conviction or sentence, and we reject the application.

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The 27th August 1866.

*Present:*

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

**Master (Liability of).**

Criminal Jurisdiction.

*Referred under Section 434 of the Code of Criminal Procedure, and Circular Order No. 18, dated 15th July 1863.*

Suffer Ally Khan

*versus*

Golam Hyder Khan, Newaz Ali Khan, and Beedvokee Domnee.

A master is not criminally responsible for the wrongful act of a servant, unless he can be shown to have expressly authorized it.

THE conviction must be quashed. There appears to be no evidence that the accused Golam Hyder Ali and Newaz Ali actually gave an order to the third defendant to commit the damage complained of. The statement of the third defendant is not evidence against them. No doubt, they are civilly responsible for the act of their servant, even if done without their express authority. But a master is not criminally responsible for the wrongful act of the servant, unless he can be shewn to have expressly authorized such act.

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The 27th August 1866.

*Present:*

The Hon'ble W. S. Seton-Karr, *Judge.*

**Nikah Marriage—Sections 494 and 495, Penal Code.**

Queen *versus* Judoo Mussulmanee and Beedhy Bewah.

*Committed by the Magistrate, and tried by the Officiating Sessions Judge of Nuddea, on a charge of bigamy.*

A Nikah marriage falls within the purview of Sections 494 and 495 of the Penal Code.

I HAVE sent for the papers, and have read all the evidence on account of the comparative novelty and singularity of this case.

Of the facts there can be no question, and they are rightly explained by the Sessions Judge, and were within the province of the Jury. It is clear that Beedhy and Judoo, pretending to be mother and daughter, between them deliberately and deceitfully led Shabal Sheik into a marriage with Judoo in the life-time of the complainant Hyder Sheik, whose house they left during his temporary absence. The marriage with Shabal was a "Nikah," but this does not appear to me to take the offence out of the purview of Sections 494 and 495 of the Penal Code. The Assessors, who seem to be intelligent Mahomedan gentlemen, clearly did not think so; and a Nikah certainly appears to me to fall within the definition of those Sections. The framers of the Code could scarcely have intended to prevent second marriages by the wife during the life-time of the husband, and to punish persons who concealed the fact of the first marriage, while at the same time they left a loophole to persons against whom such facts were established, by allowing them to urge that the second marriage was only a Nikah, and was no marriage at all. A Nikah is a well-known and a well-established form of marriage with the Mahomedans.

This point is not urged in the petition of appeal, but it seems to have been considered by the Sessions Judge and also by the Assessors; and I see no reason to think that the conviction is not perfectly legal. The sentences are not too severe.

The appeals are rejected.

The 27th August 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

**Land Disputes—Procedure.**

*Petition against an order of the Officiating Magistrate of Purneah, dated the 11th April 1866.*

Amrithnath Jha, *Petitioner*,

*versus*

Ahmed Reza and Enayet Hossein, *Opposite Party.*

*Messrs. G. C. Paul* and *W. E. Peacock* and *Baboo Tarucknath Sein* for Petitioner.

*Messrs. R. V. Doyne* and *C. Gregory* for Ahmed Reza.

*Mr. R. T. Allan* for Enayet Hossein.

In a case of disputed possession of land under Section 318, Code of Criminal Procedure—HELD that the Magistrate was wrong in not recording a sufficient proceeding showing the grounds upon which he was satisfied that the dispute was one likely to lead to a breach of the peace; and that, if the parties consented to waive that point by consenting to go into the whole question, the Magistrate was wrong in taking the title of one person as *primâ faice* evidence of his possession, and throwing the *onus* on the other, and precluding that other from proving his title.

*Peacock, C. J.*—IT appears to me that there is error in law in the Magistrate's proceedings in this case, and that the Magistrate's orders ought to be quashed.

Section 318 of the Code of Criminal Procedure says: "Whenever the Magistrate "of the District, or other Officer exercising "the powers of a Magistrate, shall be satisfied that a dispute, likely to induce a "breach of the peace, exists concerning "any land, premises, water, fisheries, crops, "or other produce of land, within the limits "of his jurisdiction, he shall record a proceeding stating the grounds of his being "so satisfied."

Now, the Magistrate in this case appears to me not to have stated any sufficient ground for his being satisfied that a dispute concerning land existed which was likely to produce a breach of the peace. It appears that four persons (Koonjlal Sing, who was an under-farmer, Brijolall Sing, who was alleged to be a farmer, and two others) had made complaints against Amrithnath Jha. The Magistrate recorded the following proceeding:—

"All these cases came before me on the "appearance of both parties. It appeared "that between Syed Ahmed Reza and Syed "Enayet Hossein of the first part, and Amrithnath Jha, owner of milik, of the second "part, a dispute regarding mâl proprietorship and milik is going on, and both parties are instigating their dependants in "order to harass each other, and there is no "reason to hope for any cessation or discontinuance of the disputes and affrays from a "mere enquiry into the cases above mentioned."

The Magistrate does not state why he was satisfied that this dispute regarding the land was likely to produce a breach of the peace. Now, what was the dispute with Amrithnath Jha? In all probability Amrithnath Jha was claiming to receive the rents from the ryots who were the persons in possession of the land, and the under-farmers or farmers made a similar claim. The Magistrate goes on:—

"It appeared expedient to strike off the "files all these petty cases, and to set up "and decide a case between the real disputing parties under Section 318 in "order that the actual subject of dispute "may be at once put an end to, and the "agents of both parties approved of this "proposition: therefore it is ordered that the "cases be struck off the file, and the original proceedings be considered as the "basis of the case under Section 318; and, "inasmuch as both parties are present, it "is not considered necessary to issue a "summons, but their signatures are taken."

Now, supposing the agent's assent would sufficiently get rid of the objection founded on the Magistrate's omission to record a proper proceeding, what did the parties really consent to? They consented (in order to put an end to the disputes) to proceedings being taken under Section 318. The Magistrate having passed an order for proceeding under that Section, Amrithnath Jha merely declared by his signature that he was present in Court and aware of the notice which the Magistrate had issued, and therefore no further summons would be necessary. The case might therefore proceed as if Amrithnath Jha had been summoned. This took place on the 26th February.

Then Amrithnath Jha was made the first party, and Ahmed Reza the second party. No reason was given at the time why Amrithnath Jha should be made first party, and Ahmed Reza the second party; nor was any order to that effect then made or consented to by the parties. But the Magistrate, when he gave his final decision, explained his reasons for making Amrithnath Jha the first

party, and throwing the *onus* of proof upon him.

It appears from a proceeding dated the 27th February that a number of documents were filed by the first party, and the Magistrate says: "Owing to the enormous number of "documents filed by the parties, I find it "impossible to go through them all in one "day; and as the parties state that they "have two *cart-loads* more of papers to bring, "I think it better to postpone the case for "the present." Those documents, of course, would not shew which person was in possession. They would only shew title. But the Magistrate says: "To prevent the par-"ties from flooding the Court with irrelevant "documents, I lay down the two following "issues as those to be enquired into:—

"*1st.*—What is the land in dispute, *i. e.*, in "what place is it situated, and what are its "boundaries?

"*2nd.*—Who is at present in actual pos-"session of the disputed land?"

It appears that the Magistrate never tried the first issue. He called upon Amrithnath Jha to put in the boundaries of what he claimed, but did not call on Ahmed Reza to put in the boundaries of the land which he claimed; or, if he did call on Ahmed Reza to do so, Ahmed Reza never put in the boundaries of the land which he claimed. Had he done so, it might have appeared that what he was claiming was part of Kantee.

In any case, the Magistrate has not settled what are the lands out of which the dispute has arisen which led him to believe that there would be a breach of the peace.

The second issue laid down by the Magistrate was, "Who is at present in actual possession of the disputed land?" Now, the ryots were probably the persons in actual possession of the disputed land. Probably what was meant was which of the parties is in receipt of the rents from the person in actual possession.

Now, title-deeds showing that Amrithnath Jha was entitled to hold lakheraj land in Soorjapore would not prove what lands were in dispute between the parties, and certainly would not show which party was in possession of the subject matter of dispute. The Magistrate says, he will not look at the title-deeds. But then does he deal with the case throughout on the same principle? It is quite clear that, under Section 318, the matter of title ought not to be taken as *primâ facie* evidence of possession, because, if title is to be taken as *primâ facie* evidence of possession in determining questions under Section 318, it would be necessary to enter into the question of title, and that would throw upon the Magistrate the very enquiry which it is the object of that Section to avoid, for the Section expressly enacts:—

"The Magistrate or other Officer as "aforesaid shall, without reference to the "merits of the claims of any party to a right "of possession, proceed to enquire which "party is in possession of the subject of "dispute."

The Magistrate having by his order properly shut out the evidence of title by refusing to receive any papers which did not bear upon the issues laid down, ought first to have ascertained distinctly what was the subject-matter in dispute, and then, without reference to any question of title, have determined which party was in possession of it. Instead of doing that, the Magistrate, having precluded Amrithnath Jha from proving his title, proceeds to use matter of title as presumptive evidence of possession, and upon that evidence throws upon Amrithnath Jha the *onus* of proof. He says:—

"The second party, Syed Ahmed Reza and "Enayet Hossein, are the recorded proprie-"tors of the revenue-paying estate of Soorja-"pore. The legal presumption, therefore, is "that they are in actual possession of that "estate. If any one disputes this fact, the "*onus probandi* lies on him. Amrithnath "Jha disputes the possession of the zemin-"dars as regards the estates mentioned in his "statement. To put a stop to much violence "and discord, I instituted the case under "Section 318, and, seeing that the *onus* "*probandi* lay on Amrithnath Jha, I made "him the first party. The proofs he offers of "actual present possession are worthless. He "brings forward several ryots who produce "very suspiciously correct pottahs and receipts "for the present and a few preceding years; "but whose evidence is confused and con-"tradictory in some instances, proved false, "and altogether unsatisfactory. It is clear "that the first party is one of those unscru-"pulous men who at the time of the resump-"tion proceedings obtained much milik land "by allowing mâl land to be resumed in their "name. As he has failed to prove his pos-"session of any estate except Kantee, I do "not call on the other party for any reply, "but decide in their favor."

Now, he decides in favor of the second party on the presumption arising from title without allowing Amrithnath Jha to go into the question of his title from which a contrary presumption might have been drawn. If

Amrithnath Jha had been allowed to prove his title, the *onus* of proving possession might upon the same principle have been thrown upon the opposite parties. The Magistrate was wrong, therefore, in presuming possession from evidence of title or proprietorship, because he could not go into title. What he ought to have done was to have confined himself to ascertain what was the subject of the dispute which he was satisfied was likely to produce a breach of the peace. If the Magistrate was unable to satisfy himself who was in actual possession, he ought to have proceeded under Section 319, which provides :—

"If the Magistrate or other Officer as "aforesaid shall decide that neither of the "parties is in possession, or shall be unable "to satisfy himself as to which person is in "possession of the subject of dispute, he "may attach the subject of dispute until "a competent Civil Court shall have deter-"mined the rights of the parties or who "ought to be in possession."

It appears to me that the Magistrate was wrong first in not recording a sufficient proceeding showing the grounds upon which he was satisfied that the dispute was one which would lead to a breach of the peace. If the parties consented to waive that point by consenting to go into the whole question, the Magistrate was wrong in taking the title of one person as *primâ facie* evidence of his possession, and throwing the *onus* on the other, and precluding that other from proving his title. In fact, the question of title was no part of the subject for the Magistrate's consideration, and he was wrong in going into it at all. All that he should have done was to confine himself to the question of possession.

The Magistrate has erred in law, and his orders must be quashed.

*Jackson, J.*—I also think that it would be quite impossible for us to allow the orders of the Magistrate to stand as they now stand, and I think so both by reason of the want of jurisdiction apparent in the commencement of the proceedings, of the uncertainty as to the matter to which his order relates, and also on account of the defective mode in which the matter has been investigated. We certainly are not shown that it appeared to the Magistrate that a dispute likely to occasion a breach of the peace existed in respect of all the milik lands claimed by Amrithnath Jha; and if the parties, as has been stated in the proceedings of the Magistrate, agreed to any such enquiry as he has instituted, then certainly he must be understood to have agreed to it, with the reservation that the subject of the dispute was to be ascertained, that it must be something definite, and that the enquiry was to be carried on in a lawful manner.

The Magistrate had before him certain definite questions arising out of specific complaints. Certain persons, one of them a moostagir, another a dur-moostagir, and others under various designations, alleged that, in some way or other (we do not know exactly what), they had been dispossessed or molested in connection with specific portions of land.

But the Magistrate substituted for these definite questions a very large and indefinite question relating to disputes between the parties complained against in these cases, and another altogether different person, the zemindar of the pergunnah.

The Magistrate has made this substitution for reasons of supposed convenience, but the real inconvenience resulting from the course he took will be readily apparent.

As far as I understand the matter, it would seem that Amrithnath Jha brought forward certain persons whom he alleged to be his ryots on the land in dispute. Apparently the zemindar brought forward certain other persons whom he alleged to be his under-tenants or the under-tenants of his farmers, so that really, and in point of fact, there must have been a double question of possession. There must have been a doubt who were the cultivating occupant ryots, and another as to who were the persons entitled to receive the rents. It was impossible for such questions to be disposed of in the summary way in which the Magistrate dealt with them.

I quite concur also in the observations of the Chief Justice as to the improper mode in which the *onus* has been thrown on Amrithnath Jha in this case, and of the erroneous presumption of which the opposite party has been allowed the benefit.

It appears to me that, if proceedings such as these before us were allowed to stand, the greatest inconveniences and the greatest irregularities would arise.

The 29th August 1866.

*Present :*

The Hon'ble J. P. Norman, *Judge.*

**Summing up of Judge—Irregularities.**

Queen *versus* Mohabur Singh.

*Committed by the Magistrate, and tried by the Sessions Judge of Patna, on a charge of rioting, &c.*

Remarks on certain irregularities of the Sessions Judge in his summing up.

THE prisoner has been convicted, on a trial before the Sessions Judge at Patna, sitting with a Jury, of the offence of rioting with other persons armed with deadly weapons, and abetting the voluntarily causing grievous hurt which was then and there caused in consequence of such abetment, and sentenced to 5 years' rigorous imprisonment.

On appeal many objections have been taken by the prisoner's vakeel.

*First.*—The Sessions Judge, in his summing up, says: "The prisoner's mookhtear has "alluded to the absence of the other wounded "persons who formerly appeared to give evi-"dence. To these facts you will attach what "weight you please. I must, however, "point out to you that what is said for the "prosecution, *viz.*, that the other witnesses "have been bought over, may quite possibly "be true, at least in my opinion. You can "judge for yourselves whether a lapse of "two years, when anger has cooled down "an injured man, may or may not be likely "to be bought over."

The statement was *singularly unfair* to the prisoner. The statement of the mookhtear employed for the prosecution was a wanton defamation of absent men who could not defend themselves, which should have been instantly and sternly checked by the Sessions Judge. There is not a particle of evidence to warrant it. The prosecutor was questioned by the Court, and admitted that *some of the witnesses denied the prisoner's identity with Mohabur Singh engaged in the riot.* He said that, when they did so, he replied that there were sharers in the village who could swear to him. Therefore, at an early stage of the case, the prosecutor had the fullest warning that, if these witnesses were not called, remarks would be made. Instead of allowing the prisoner the benefit of the admission made by the prosecutor, that some of the persons present did not think that the prisoner was the Mohabur, the Sessions Judge actually adopts the wanton and unfounded assertion of the mookhtear. for the prosecutor himself never said anything of the sort.

It was a perfectly legitimate topic for the defence that the other wounded persons were not called, and that the sharers in the village whom the prosecutor mentioned as being able to swear to the prisoner were also not called. Their absence made it clear that, however certain the prosecutor might be as to the prisoner's identity, many persons not only present but wounded at the riot were of opinion that the other Mohabur was the rioter. The only proper answer which the prosecution could make was that these witnesses were not called by the prisoner.

*Secondly*, it was objected that the proceedings in the Civil Court in the suit by Jaffier Ally against the prisoner and his brother Oodit Singh were not admissible in evidence. But this is a complete mistake. They are not only evidence, but evidence of the greatest possible importance. They show that the prisoner was being sued for a division of the grain at the time of the riot, when it was forcibly carried away by Oodit and his party; that judgment passed against the prisoner and Oodit jointly; that the prisoner absconded; that his properties were attached; and that his wife, or a person so describing herself, paid the amount of the decree to save the property from sale.

I must further observe that the Sessions Judge repeatedly alluded to Oodit as "previously convicted." If it was necessary to allude to the convictions of Oodit, as was no doubt the case, the Judge, instead of reiterating, and, as it were, laying stress on the fact of his conviction. should have told the Jury that they must try the present case on its own merits, and warned them not to allow the fact of the conviction of Oodit to influence their minds; that it proceeded on evidence not before the Court in the present case, and that the prisoner was not represented in Oodit's case.

As a matter of fact, there is abundant evidence in the present case to justify the conviction of the prisoner, and I entertain no doubt of his guilt; and therefore, although the irregularities alluded to have been properly brought to the notice of this Court, they do not, in my opinion, make it necessary or proper to reverse the conviction.

The 31st August 1866.

*Present :*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble J. P. Norman, F. B. Kemp, W. S. Seton-Karr, and G. Campbell, *Judges*.

**False Evidence—Alternative Finding—Section 32, Act II. of 1855.**

Criminal Appellate Jurisdiction.

*Committed by the Joint Magistrate, and tried by the Sessions Judge of Sarun, on a charge of giving false evidence.*

Queen *versus* Mussamut Zumeerun.

Where a witness intentionally gives false evidence, and it is doubtful whether the false statement was made before the Magistrate or before the Sessions Judge, the witness may be convicted of the offence of giving false evidence upon an alternative finding (Norman and Campbell, JJ., *dubitantibus*).

The deposition voluntarily given before the Sessions Judge is admissible in evidence against the witness, to show the falsehood of his deposition before the Magistrate, anything in Section 32, Act II. of 1855, notwithstanding (Campbell, J., *dissentiente*).

*This case was referred to a Full Bench by Norman and Campbell, JJ., with the following order :—*

*Referring order.*—We are disposed to think that, under Section 381 of the Code of Criminal Procedure, the Court in passing judgment must distinctly specify *the offence* of which the accused person is convicted, and that it is only when the *same facts* constitute or form a part of an offence under one or other of two Sections or under one Section, and the Court, from imperfect information, is unable to say under which head the offence falls, that it can pass judgment in the alternative. We doubt whether a finding that *A. B.* on two different days made inconsistent statements on oath, is a sufficient specification of the offence. It may be that a charge may be so framed under Section 242 in order to guard against the contingency of the Magistrate committing on one charge, and the Judge thinking the other proved, but that the Sessions Judge is bound to state which of the two he believes to be proved.

There is another point in the case on which Mr. Justice Campbell entertains a strong opinion.

As the point is of importance, and as there is a Circular Order which, we understand, is in conflict with some decisions of the Court, we would suggest the case should be heard before a Full Bench of five Judges.

*Full Bench Judgments.*

*Campbell, J.*—A case of culpable homicide occurred in the district of Sarun. Chundee Sookhul was charged with the offence, and was sent in by the Police to the Magistrate upon the charge of culpable homicide not amounting to murder. In that case, the present appellant, Mussamut Zumeerun, was sent up by the Police to the Magistrate as a witness. Before the Magistrate she deposed that she had seen the prisoner Chundee beating the deceased Beebun with his fiddle bow, and also that she had seen the marks of beating on the corpse.

After making the usual preliminary enquiry, the Magistrate committed the prisoner Chundee Sookhul for trial before the Sessions Judge. At the Sessions trial, the appellant Mussamut Zumeerun was again produced as a witness for the prosecution. On that occasion she deposed that she never saw the prisoner Chundee strike the deceased Beebun during the above time, namely, six months, or on any occasion, and that she did not see any marks of beating on the corpse. After the trial of Chundee Sookhul, the present appellant Mussamut Zumeerun was committed to the Sessions on two charges: *1st*, Intentionally giving false evidence in a judicial proceeding before the Sessions Judge of Sarun on the 18th December 1865; and, *2ndly*, Intentionally giving false evidence in a judicial proceeding before the Officiating Joint Magistrate of Sarun on the 14th October 1865. The perjuries assigned on these two charges were the statements, already noticed by me, made before the Sessions Judge and the Magistrate respectively. The only evidence which was submitted to the Sessions Court by the prosecution in support of these two charges consisted of the evidence of Doma Chupprassee, who proved the correctness of the record of the deposition of Mussamut Zumeerun made on oath before the Magistrate, and the evidence of Sadabut Hossein, Mohurir of the Sessions Court, who proved the correctness of the record of the evidence by Mussamut Zumeerun before the Sessions Judge. These two witnesses constituted the whole proof for the prosecution; but there was also some evidence for the defence, consisting of Bikarree Kahar, who says, "I know the prisoner; she gave false evidence in the Magistrate's Cutcherry;" and Sheosuhai Mallee, who says, "I know the prisoner; she gave false evidence before the Magistrate."

On this evidence, the Judge has convicted the prisoner, not of one charge or of the other, but alternatively, namely, that she either intentionally gave false evidence in a judicial proceeding before the Judge, or that she intentionally gave false evidence in a judicial

proceeding before the Magistrate. In the view of the Judge, the deposition before the Magistrate was evidence to show that the deposition before the Judge was false, and the deposition before the Judge was evidence to show that the deposition before the Magistrate was false. On this, Mussamut Zumeerun appeals to this Court.

The case came before a Division Bench consisting of my brother Norman and myself, and, having doubts regarding the case, we referred it to a Full Bench.

We had, in the first place, some doubts whether, under Section 381 of the Code of Criminal Procedure, it was not necessary for the Judge, in passing judgment, to specify the offence of which the accused person is convicted, and whether it is not only when the same facts constitute or form a part of an offence under one or other of two Sections, or under one Section, and the Court, from imperfect information, is unable to say under which head the offence falls, that it can pass judgment in the alternative. We doubted whether the law enables a Judge, in such a case as the present, to convict of either of two charges of false evidence in the alternative, when the facts constituting one of the alternative offences are wholly different from and opposed to those constituting the other alternative offence.

Another doubt was whether, with reference to the provisions of Section 32, Act II. of 1855, the evidence given by Mussamut Zumeerun before the Magistrate and before the Judge respectively could be used as evidence against her in support of a criminal charge of false evidence given upon another occasion than that on which the evidence so used was given; Mussamut Zumeerun not having put herself forward as a witness of her own accord, but having been summoned, and in a manner compelled to give evidence first before the Magistrate and then before the Judge.

With reference to the first point of doubt noticed by the Division Bench, I in some degree concur in the doubts which were suggested by my brother Norman. I am not by any means clear upon the point. I will only express some doubts, and I believe my brother Norman will more clearly express his views on that particular point.

But with regard to the second point—the construction of Section 32, Act II. of 1855—I have a strong opinion which I will now proceed to express. Section 32 is as follows: "A witness shall not be excused from answering any question relevant to the matter in issue in any suit, or in any civil or criminal proceedings, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind; provided that no such answer which a witness shall be compelled to give shall, except for the purpose of punishing such a person for wilfully giving false evidence upon such examination, subject him to arrest or prosecution, or to be used as evidence against such witness in a criminal proceeding."

In cases of false evidence formerly tried by me, I have expressed the opinion, with reference to the above provision, that, although the evidence of a witness taken before a Magistrate may be used to prove his subsequent perjury before the Judge, the evidence taken before the Judge cannot be used to prove a prior perjury before the Magistrate; that, consequently, when there is no other evidence on the record, a charge of false evidence before the Magistrate, only supported by the subsequent evidence of the same witness before the Judge, must fall to the ground. If so, an alternative conviction that the accused has committed one of two offences, of which the not-to-be-supported charge of false evidence before the Magistrate is one, cannot be sustained. Whether the conviction be on a single charge or a double charge, no charge can be supported without some evidence of some sort.

As respects the charge of giving false evidence before the Judge, although the wording of Section 32 of the Act might leave some room for doubt, I do not think it could have been intended to protect a witness against subsequent perjury; and, understanding that the other Judges of this Bench fully agree with me on the point, I may now hold, with confidence, that the evidence of a witness taken before the Magistrate may be used as *pro tanto* evidence on a charge of subsequent false evidence before the Judge.

As respects the other charge of false evidence before the Magistrate and the question of the admissibility, as evidence against the prisoner, of his subsequent evidence before the Judge, it seems to me that the policy of the law on this latter point is clear. The old English rule was that no one was compelled to criminate himself, and no man was obliged to answer a question if his answer would expose him to the risk of criminal proceedings. This system was attended with many inconveniences, and the Indian Legislature, by Act II. of 1855, adopted another rule. Section 32 enacts that no witness shall be excused from

answering any relevant question on the ground that the answer will, directly or indirectly, criminate such witness, or expose him to a penalty of any kind; but then it goes on to provide that "no such answer, which a "witness shall be compelled to give, shall, "except for the purpose of punishing such "person for wilfully giving false evidence "upon such examination, subject him to any "arrest or prosecution, or be used as evi-"dence against such witness in any criminal "proceeding." Witnesses are bound over and compelled to give evidence at a Court of Session, and, as I understand the present law, if a witness were to object, "I cannot state the truth, for that would disclose that I committed a murder, or that would disclose that I gave false evidence on a former occasion," the Judge would explain, "You need be under no apprehension: you *must* answer, but nothing that you say can be used against you in order to convict you of the murder or the false evidence on the prior occasion. You may therefore speak out without fear." If that be not the meaning of the law, I am quite unable to understand what is the meaning. It seems to me that a witness compelled to appear in a Sessions case is protected from any use against him of the evidence which he gives, and that such evidence cannot be used against him in a criminal prosecution to prove that he committed perjury on a former occasion. If it were otherwise, witnesses who had committed themselves to certain statements, when first carried by the Police before the Magistrate, would be no longer free agents. They would go into the witness-box with halters round their necks. If they venture to speak freely, they may immediately be committed on an alternative charge of this kind without further evidence. The absence of any other evidence implies that, if they stick to their original story, they are safe; but, if they say that which may be the truth, they are forthwith liable to be indicted for perjury. If they give false evidence at the Sessions, by all means prove the charge, and punish them. But to punish them on an alternative finding which necessarily implies that the evidence before the Sessions may be true, without any other evidence to the prior perjury than the privileged evidence which they are compelled to give, seems to me contrary to the letter and the policy of the law. If that be lawful, Sessions trials must become a farce—witnesses have no option but to repeat the story once told to the Police and the Magistrate. I do not think that it makes any difference that the witness did not go through the form of refusing to answer, and being told by the Judge that she must answer. She was, I think, in every sense compelled to give evidence. She was compelled to appear before the Sessions Court, and, being there, the law by penal enactments compelled her to give evidence.

Therefore, in my opinion, in this case, the evidence taken before the Judge was improperly and wrongfully used in support of the charge of false evidence given before the Magistrate, and a conviction founded upon that evidence only cannot be sustained.

The present case is somewhat complicated by this, that the prisoner has in some sort supplied what may possibly be considered evidence upon this head of the charge—that is to say, the charge of false evidence before the Magistrate—inasmuch as two of her witnesses have stated before the Court: "I know that Mussamut Zumeerun gave false evidence before the Magistrate." But it seems to me that a statement of this kind without any particulars as to which the witness pledges himself to his means of knowledge is no evidence, and certainly is totally insufficient evidence on which to convict a prisoner of giving false evidence.

In my opinion, the conviction ought to be quashed and a new trial ordered.

*Norman, J.*—I do not think that the first point in this reference is by any means clear. For myself, I still feel the doubts which are expressed in the order referring the case. Section 381 says that the Court shall *distinctly specify the offence of which and the Section of the Indian Penal Code* under which the prisoner is convicted, or if it be *doubtful under which of two Sections* the offence falls, shall distinctly express the same, and pass judgment in the alternative according to Section 72 of the Code. I should still doubt whether a finding "that a prisoner either gave false evidence before the Magistrate on the 1st of February, or else, if that evidence be true, gave false evidence before the Judge on the 1st of May," can be properly said to *specify the offence* of which the prisoner is guilty. It is very important that there should be a definite and well-understood rule on the subject, and I am quite satisfied to abide by the judgment of the majority of the Court.

On the other point raised by my brother Campbell, it appears to me perfectly obvious that one who makes a criminal charge against another cannot protect himself from a cross-examination on the direct question whether the charge was true or false, on any pretext

whatever. Even assuming, for the purpose of argument, that such a person could protect himself, still, if he answered voluntarily and without claiming protection, his answers would be admissible against him, and would not be excluded by the 32nd Section of Act II. of 1855, because it would not be "an answer which the witness had been compelled to give" within the meaning of that Section. Indeed, if the witness claimed protection in such a case, and said in substance, "I refuse to answer, because the answer, if I speak the truth, will convict me of perjury before the Magistrate," the objection would be almost as strong evidence against him as if the witness had admitted by a direct answer that his former statement was false.

If, then, evidence given in a subsequent case, in answer to cross-examination and undue pressure, would be receivable as against the witness to show that his former statement was false, much more must it be admissible when the subsequent deposition of the witness is given voluntarily and without pressure of any sort, as in the present case.

A subsequent deposition has always been received both in England and in this country as evidence upon a charge of perjury to show the falsehood of the former contrary deposition by the same witness. There are numerous cases on the point; and the propriety of admitting such evidence has never, as far as I am aware, been questioned by any one except my learned brother Campbell in this case.

*Peacock, C. J.*—I have no doubt that there may be an alternative finding as well in a case in which the evidence proves the commission of one of two offences falling within the same Section of the Penal Code, and it is doubtful which of such offences has been proved, as in one in which the evidence proves the commission of an offence following within one of two Sections of the Penal Code, and it is doubtful which of such Sections is applicable.

This appears to me to be quite clear when Section 381 of the Code of Criminal Procedure is read together with Section 242 and Clause 5, Section 382 of that Code.

*A* swears before a Magistrate that he saw the prisoner kill *B*. The prisoner is committed to the Sessions for trial for murder. *A* on the trial swears that he did not see the prisoner kill *B*, and the prisoner is acquitted. *A* is in consequence committed for trial for giving false evidence, and two charges are framed against him under Section 242, Code of Criminal Procedure—

*1st.*—That he intentionally gave false evidence before the Magistrate by swearing that he saw the prisoner kill *B*.

*2nd.*—That he intentionally gave false evidence before the Sessions Judge by swearing that he did not see the prisoner kill *B*.

The Sessions Judge finds that the prisoner intentionally gave false evidence, but that it is doubtful whether the statement made before the Magistrate or that made before the Sessions Judge was the false one. If the prisoner was innocent, and the statement before the Magistrate was false, the prisoner has in consequence been improperly committed for trial on a charge of murder, and has suffered all the degradation, annoyance, and anxiety of being committed on a false charge. If the prisoner was guilty, and the witness in consequence of bribery or other cause has sworn falsely before the Sessions Judge, the administration of justice has been defeated, and a murderer has been acquitted. It is clear that, unless the law is very defective, or we are to trifle with the administration of justice, *A* ought to be punished. It appears to me that the law is not deficient, and that the case is provided for by the Code of Criminal Procedure, whether it be read according to the strict letter or according to its spirit.

In such a case it would seem clear that the Magistrate was right in framing a charge containing two heads, under Section 242.

The Sessions Judge would also be strictly within the letter, as well as the spirit, of Sections 318 and 382, Clause 5, in finding that *A* is guilty of the offence of intentionally giving false evidence, and that he is guilty either of the offence specified in the first head or of the offence specified in the second head of the charge, and is convicted of an offence punishable under Section 193 of the Penal Code. The words in Clause 5, Section 382, which follow the word "namely," are clearly given only as an example, and it is clear that, without an example of a case falling within the latter branch of Section 242, such a case falls within the strict letter of Clause 5, Section 382.

The other point upon which Mr. Justice Campbell is stated in the reference to entertain a strong opinion is, as I understand him, that the statement made by the prisoner before the Sessions Judge was, in consequence of Section 32, Act II. of 1855, inadmissible against the prisoner in a criminal proceeding, except for the purpose of punishing her for wilfully giving false evidence upon such examination, *i. e.*, the examination before the

Judge. The witness was not compelled to give evidence before the Judge, and therefore the question does not arise whether she would be protected from a charge of giving false evidence in her examination before the Judge, if she had been compelled to give evidence. Whatever opinion may be entertained upon that point, there can be no doubt that the evidence given before the Magistrate was admissible to prove that the evidence given before the Judge was false. The prisoner could not have been excused from giving evidence before the Magistrate upon the ground that her answer might criminate her in respect of the evidence which he might afterwards give before the Judge. The prisoner is charged with giving false evidence upon her examination before the Judge, and upon that head of the charge the statement made before the Sessions Judge, as well as that made before the Magistrate, are evidence, the former to prove that the prisoner made the statement, the latter to prove that the statement was false within the knowledge of the prisoner. But the statement of the prisoner made before the Judge, when used as evidence against her, is also admissible in her favor, if the Judge believes it. The Judge, taking the two statements together and the prisoner's plea of not guilty, which in substance denies that she intentionally gave false evidence before the Judge, says: "I cannot determine which "of the statements is false. I cannot, upon "the strength of the first statement alone, "finding that it is contradicted by the second. "say that the second is false. But, giving "the prisoner the benefit of the doubt which "has been created in my mind by the fact "of the contradiction of the first statement "by the second, I cannot say that the second "is false. I can say that one or the other of "the two statements was false within the "prisoner's knowledge. Looking, therefore, "at the evidence which has been given in "support of the charge that the second "statement was false, I am doubtful under "which of the two heads of charge the "offence falls. I can only say that the prisoner has been guilty of intentionally giving "false evidence. I cannot say that she is "not guilty of intentionally giving false "evidence before the Judge, or that she is "guilty of it, and therefore I can only find "that she is guilty either of the offence "charged in the first head of the charge or "of the offence specified in the second head "of the charge, namely, that she intentionally "gave false evidence before the Judge, or "that she intentionally gave false evidence "before the Magistrate." The effect of that finding is that the prisoner is liable to be punished for the offence for which the lowest punishment is provided if the same punishment is not provided for both (*see* Penal Code, Section 72).

In the particular case referred to us, giving false evidence intending to cause a person to be convicted of culpable homicide not amounting to murder, such as the evidence given before the Magistrate, would be punishable more severely than giving false evidence to procure his acquittal. The former would fall under Section 194 of the Penal Code, and the latter under Section 193; the maximum punishment being for the former offence transportation for life or imprisonment for 10 years with fine, and for the latter offence imprisonment for 7 years with fine.

The argument of Mr. Justice Campbell would lead to the conclusion that no indictment ought to lie for giving false evidence before a Judge if it contradicts evidence previously given in the case before a Magistrate, inasmuch as the liability to be indicted if the evidence given before the Judge differs from that given before the Magistrate would be an inducement to the witness to stick to the first statement.

*Kemp, J.*—I entirely concur in the judgment of the learned Chief Justice.

*Seton-Karr, J.*—I entirely concur with the learned Chief Justice. Indeed, I had always understood that our Court and the subordinate Courts acted on the principle laid down in the judgment with which I concur, and until this reference was made, I was not aware that there existed any very serious doubts on the point. Indeed, unless Courts did and could return an alternative finding in such cases of false evidence, the most disastrous consequences to the administration of justice would ensue. Violent crime and crime of all kinds would go unpunished, and the witnesses who had been bought off to deny their statements implicating the perpetrators of such violent or other crimes would go unpunished also. I can conceive nothing more detrimental to society.

On the second point referred to us, I regret that I cannot concur with Mr. Justice Campbell if I understand him aright. I think that the examination of the prisoner before the Judge and the statement of the prisoner before the Magistrate are admissible for the reasons given by the Chief Justice, and are admissible to test the prisoner's guilt or innocence.

The 5th September 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Jurisdiction—Quashing of illegal conviction.**

Criminal Jurisdiction.

*Convicted by the Assistant Commissioner of Palamow, under Sections 379 and 429 of the Penal Code, of theft and mischief, and punished separately for each offence; and referred by the Judicial Commissioner of Chota Nagpore under Section 434, Act XXV. of 1861, and Circular Order dated 15th July 1863.*

Gunowree Bhooea and Jhandoo.

A Lower Court has no power to quash its own conviction, though illegal.

We concur in the opinion expressed by the Judicial Commissioner that the second conviction under Section 429 was improper, and we order it to be quashed accordingly.

The Court of first instance had no power to quash its own conviction though illegal.

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The 5th September 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Jurisdiction—Commitment—House Trespass.**

Pakhee Sing and Bojnauth Sing.

*Reference by Mr. Ainslie, Sessions Judge of Patna.*

Where a charge was preferred before a Deputy Magistrate against certain persons, of having come armed with swords and with a large retinue and torches, and of having entered the complainant's house by night and carried off thence a large amount of property, the Deputy Magistrate on the evidence convicted the parties of house-trespass under Section 448 of the Penal Code. The Sessions Judge thought that the offences charged, if proved, amounted to house-breaking by night or to some other offence within the jurisdiction of the Court of Session, and asked whether he could direct a commitment.

Held that the Deputy Magistrate had neither convicted nor discharged any person of an offence not triable by him, that he had jurisdiction to try the offence charged, and that the sentence passed was within his competency.

*Case.*—I have the honor to request instructions for my guidance in the following case.

A charge is preferred before a Sub-division Magistrate against certain persons (appellants in this Court) of having come armed with swords, and with a large retinue and torches, and of having entered the complainant's house by night, and of having carried off thence a large amount of property.

These offences, if proved clearly, amount to house-breaking by night, or house-trespass by night after having made preparation to cause hurt, and to commit dacoity.

The Deputy Magistrate, on the evidence, convicts of *house-trespass* under Section 448, Penal Code. This offence certainly formed a part of the offence charged, and it is an offence within the jurisdiction of the Magistrate. The provisions of Section 427, Criminal Procedure Code, therefore, do not apply to this case.

The conviction, so far as it goes, is warranted by the evidence, but the evidence goes much further, and the question is, whether it should not have been on a higher charge, and, as such higher charge is one within the jurisdiction of the Court of Session, whether I can direct a commitment.

Before directing a commitment, it is clear that I must annul the sentence of the Lower Court; otherwise there would be the probability of conflicting decisions by the Jury on one side and the Magistrate and myself on the other: but, looking to Sections 55 and 427 of the Criminal Procedure Code, I am in doubt whether I can do so. The fact of there being a proviso in Section 55 in the special case of culpable homicide for enabling a Court to try a man a second time on the same facts for a new offence, and particularly of that power being limited to cases in which the Court had, at the time of conviction of a minor offence, no knowledge that death had resulted therefrom, appears to me to indicate that, if in other cases a Court convicts of a lesser offence than the proved facts disclose, such offence being one in respect of which it has jurisdiction, there can be no second trial on those same facts, more particularly when the Court had knowledge of the nature of the offences actually committed.

Moreover, this Court cannot, under Section 419, enhance punishment on an appeal. To direct a commitment would be to act with a view to enhancing punishment; otherwise it would be mere waste of time, as I am satisfied with the conviction so far as it goes.

On the other hand, if the Sessions Court cannot direct the sentence to be set aside and the commitment to be made, any Magistrate may practically prevent the Sessions Court from acting under Section 435. Such would be the result in the case out of which this reference arises.

The questions to which I have to ask the Court to reply are :—

*1st.*—If, having before him evidence which in the opinion of the Judge discloses an offence triable before a Jury in the Court of Session, a Magistrate should convict the accused of an offence of lesser degree and within his own power to dispose of, and should reject as untrustworthy, or otherwise pay no attention to the evidence in the higher Court, can the Judge, under Section 427, set aside the conviction, and, under Section 435, direct a commitment ?

*2nd.*—Or, without setting aside the conviction, can the Judge order a commitment for the major offence, and proceed to try the prisoners again thereon ? If so, should not this power be sparingly used in extreme cases only, so as to avoid danger of conflicting decisions on the same evidence ?

*3rd.*—Is the fact of the matter having come up on appeal against the conviction by the Deputy Magistrate a bar to further proceedings against the appellants ?

I am induced to make this reference, as this is the second case of the same kind that has come before me from the Deputy Magistrate of Behar. In the former I declined to act under Section 435, contenting myself with expressing an opinion that in such cases a Magistrate would do well to send the accused before a Court competent to deal with the whole of the offences disclosed. As such cases may be of frequent occurrence, I think the point should be settled that, if I have the power to interfere, I may exercise it when necessary ; and, if not, that it may be noted, with a view to future amendment of the Criminal Procedure Code.

I do not send up the vernacular record, as the question is a general one, and is in no way affected by the particular facts of the case, out of which this reference arises.

*Judgment of the High Court.*—Upon referring to the proceedings of the Deputy Magistrate, we find that he has not convicted any person of an offence not triable by him, nor has he discharged any accused person in any case of an offence not so triable. The provisions of Sections 427 and 435 of the Code of Criminal Procedure do not apply to the case before us. The Deputy Magistrate had jurisdiction to try the offence, and the sentence passed was within his competency. We, therefore, as far as the present case is concerned, answer the questions put to us in the negative.

The 5th September 1866.

*Present :*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Security to keep the peace (Term of).**

Queen *versus* W. Don Dolloi.

*Committed by the Assistant Commissioner, and tried by the Deputy Commissioner of the Cossyah and Jynteeah Hills, on a charge of abusive language.*

The period for which a prisoner can be bound down on security to keep the peace is one year from the date of his release from imprisonment.

We see no reason to interfere with the sentence passed. It certainly appears to be *primâ facie* severe, but as it has been upheld by the Lower Appellate Court, which is necessarily better acquainted with the facts of the case and character of the prisoner than we can pretend to be, we do not think it right to disturb it.

The period for which the prisoner can be bound down on security to keep the peace is one year from the date the prisoner is released from jail. The order of the Lower Court is amended to this extent.

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The 8th September 1866.

*Present :*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Public Nuisances.**

Criminal Jurisdiction.

*Referred under Section 434 of the Code of Criminal Procedure, and Circular Order No. 18, dated 15th July 1863.*

Joynath Mundul and others

*versus*

Jamul Sheikh and another.

The omission of a person to keep his ponies from straying is not a public nuisance punishable under Section 290 of the Penal Code.

It is clear that there was no offence committed punishable under Section 290 which relates to public nuisances. Public nuisances

are defined by Section 268 as any "act or illegal omission which causes any *common* injury, danger, or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which *must* necessarily cause injury, obstruction, danger, or annoyance to persons who may have occasion to use any *public right*." But the omission of the accused to keep his ponies from straying, though illegal, was not proved to have caused any common injury, danger, or annoyance whatever; nor did it necessarily cause any injury, &c., to persons, having occasion to use any public right, within the meaning of the second branch of the Section. The only person injured was the Collector, who must resort to a civil action for the wrong (if any) which he has suffered.

The conviction must therefore be quashed, and the fine, if paid, must be returned to the defendant.

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The 8th September 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Trial by Jury—Charge of Judge.**

Queen *versus* Bolakee Koormee.

*Committed by the Magistrate, and tried by the Sessions Judge of Patna, on a charge of—*

It is the duty of a Judge to state to the Jury what are the principal points in the evidence, and how they bear for or against the prisoner—in short, to render the Jury every assistance in his power towards coming to a right conclusion.

We think that the case has not been satisfactorily laid before the Jury. By Section 379 of the Indian Code of Criminal Procedure the Judge is required to sum up the evidence on both sides, and, in doing this, it is the duty of the Judge to state to the Jury what are the principal points in the evidence, and how they bear for and against the prisoner. We gather that in this case the prisoner had, at some time or other, set up the defence that the dâk bearers had got frightened, and thought that he intended to attack them, when really he was innocent of any such intention. This defence appears to us by no means an improbable one and not inconsistent with the facts of the case, and it ought to have been laid before the Jury for their serious consideration. The evidence for the prosecution also ought to have been analysed and explained. In short, it is the duty of the Judge to render the Jury every assistance in his power towards coming to a right conclusion. In this case the Judge really delivered to the Jury no charge at all; and altogether the trial appears to have been conducted in rather a hasty manner.

The case is therefore sent back for re-trial, the present conviction being quashed.

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The 10th September 1866.

*Present:*

The Hon'ble G. Loch and J. P. Norman, *Judges.*

**Evidence—Statement of Police-officer as to prisoner's previous bad character.**

Queen *versus* Gopal Thakoor.

*Committed by the Deputy Magistrate of Bancoorah, and tried by the Sessions Judge of West Burdwan, on a charge of dacoity.*

Remarks on the improper admission, at a Sessions trial with the aid of Assessors, of a Chowkeedar's statement as to the previous bad character of the accused.

The prisoner has been convicted by the Sessions Judge of West Burdwan, concurring with the Assessors, of dacoity, and sentenced to imprisonment for ten years.

It appears that some carts containing indigo seed were being driven along the road from Raneegunge to Bancoorah, when 10 or 12 men came out of the jungle, and stopped the hindmost cart. Five bags of the seed were carried off into the jungle, where they were found cut, with some of the indigo-seed strewn on the ground. The carters told the police they could recognize two men, and they did recognize two men, one of whom was the prisoner, out of five whom the police brought before them.

Looking at the state of distress for want of food which prevails in the district; considering that the object of the offenders was evidently only to get food; that the whole of the property has been recovered, the dacoits having left the bags on the ground when they found that they did not contain rice or other edible grain; and that no violence of any sort was used, we think that the sentence is rather severe, and we reduce it to two years' rigorous imprisonment.

We must observe that a chowkeedar was most improperly permitted by the Sessions Judge to state at the trial that the prisoner had been imprisoned for seven years in a previous dacoity case, and that the neighbours were afraid of him. As a matter of fact, the evidence against the prisoner was very slight, consisting of little more than his identification by two of the carters who had never seen him before that night, and that evidence was not tested by any examination of details—as, for instance, by seeing whether the witnesses had given any description of the persons of the offenders before the prisoner was actually arrested.

The Assessor, Baboo Doorga Pershad Patuck, at once relieves himself of any doubt or responsibility by seizing upon the chowkeedar's statement. He says the prisoner is a very bad character who has undergone seven years' imprisonment already.

We have no doubt but that the prisoner has been prejudiced by the improper admission of this evidence. If he had put forward any substantial defence, we should have doubted whether the conviction ought to stand. But, on the whole case, we see no reason to think that the conclusion as to his guilt is not correct.

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The 10th September 1866.

*Present:*

The Hon'ble G. Loch, *Judge.*

**Conviction—Confession—Corroboration.**

Queen *versus* Runjeet Sontal.

*Committed by the Deputy Magistrate, and tried by the Officiating Sessions Judge of Midnapore, on a charge of dacoity.*

A prisoner may be convicted on his own uncorroborated confession.

THE conviction of the prisoner Runjeet is correct, and his appeal has been dismissed.

It is necessary to point out to the Officiating Sessions Judge that he has committed an error in law in releasing the other prisoners on the ground that there was no other evidence to corroborate their confessions. The prisoner Runjeet was knocked down and secured while carrying off the plunder. He confessed to the Deputy Magistrate, and mentioned the names of his companions who were apprehended and confessed. Neither the Sessions Judge nor the Assessors question the truth of their confessions, but because there is no corroborative evidence, such as recognition, or property found in their possession, the prisoners have been pronounced to be *not guilty.*

By Section 366 of the Code of Criminal Procedure "the examination of an accused person before the Magistrate shall be given in evidence at the trial;" and if there are no grounds for questioning the statement then made, either as regards the manner of recording it, or as to the facts stated in it, the prisoner can be convicted on that statement without other corroborative evidence.

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The 18th September 1866.

*Present:*

The Hon'ble J. P. Norman, *Judge.*

**Fugitive Offender—Proclamation—Forfeiture of property.**

Criminal Jurisdiction.

*Referred under Section 434, Act XXV. of 1861, and Circular Order, dated 15th July 1863, No. 18.*

Shewdyal Sing

*versus*

Griban Sing.

Before the passing of an order declaring the property of an accused person, who cannot be found, to be at the disposal of the Government, there must be a proclamation under Section 183, Code of Criminal Procedure, specifying a time within which such person is required to appear. But, before a Magistrate can issue such a proclamation, he must be satisfied that such person has absconded or is concealing himself for the purpose of avoiding the service of the warrant.

THIS is a case sent up by the Sessions Judge of Bhaugulpore under Section 434.

It appears that, on the 1st of June 1864, a warrant was issued for the arrest of Shewdyal.

I may observe that the warrant does not state the offence with which the accused was charged, as required by Section 76 and Form B, Appendix, Code of Criminal Procedure.

On the 11th of June, the Sub-Inspector of the Soorujgurh Station made a return that constables Asgur Ali and Bunsee Sing had

been deputed to execute it; that they had made great search and tried their utmost, but failed to find the defendant, who was concealing himself in some unknown place; and that he could not be traced.

On the 14th of June 1864, that Magistrate made an order that, "as, in reference to the return of the warrant by the Sub-Inspector, it appears that he *could not find Shewdyal* who had been ordered to appear, it was, therefore, ordered that the property should be attached, and that notice be issued under Act XXV. of 1861.

Before the Magistrate can issue the written proclamation under Section 183, and order the attachment of the property of an accused party who cannot be found, he must be *satisfied that such person is absconding or concealing himself for the purpose of avoiding the service of the warrant.*

The Magistrate should have recorded in his proceedings whether or not he was so satisfied. The mere fact which he does record, *viz.*, that the Sub-Inspector *could not find* Shewdyal, is not enough under these Sections.

It seems wholly uncertain whether any written proclamation under Section 183, requiring Shewdyal to appear within a fixed period, ever did issue from the Magistrate's Court. There appears to be no copy of any such proclamation in the proceedings. It is only by a mere conjecture that we could infer that this proclamation is what the Magistrate alludes to in his order of the 14th of June as "a notice under Act XXV. of 1861." If any such proclamation ever issued, there is, as the Judge says, nothing to shew that it was publicly read or stuck up as required by Section 183. The Joint Magistrate says, "The Nazir's return cannot be found." The entire absence of all allusion to any proclamation in the subsequent proceeding leads to the inference that none was in fact issued.

It is admitted by the Joint Magistrate that no order has been passed declaring the property to be at the disposal of the Government. Now, if there was no proclamation under Section 183, no such order could have been or can now be made. Even if any proclamation was in fact issued, there is nothing in the papers on the record to show what was the time specified as that within which Shewdyal was ordered to appear; and consequently, even if it be attempted to support the order for sale, as an irregular and informal order placing the property at the disposal of Government, as suggested in a remark by the Joint Magistrate, the Joint Magistrate had apparently no evidence before him on which he could have found that Shewdyal did not come in within the time limited by the proclamation.

As the rights of the Government and the purchaser will be affected by an order setting aside the sale, the sale ought not to be set aside without giving them an opportunity of being heard.

It is therefore ordered that the Government and the purchaser be at liberty to show cause on Friday, the 28th of September, why the order of the Joint Magistrate for the sale should not be repaid to the purchaser. Notice will be served on the Government Pleader, the Collector of Bhaugulpore, and on the purchasers Brijolal Singh and Ramdyal Singh, and their Mooktear Oojenlall.

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The 24th September 1866.

*Present:*

The Hon'ble J. P. Norman and G. Campbell.
*Judges:*

**Disputes concerning use of water—Section 320, Code of Criminal Procedure (Construction of).**

Criminal Jurisdiction.

*Referred under Section 434, Act XXV. of 1861, and Circular Order No. 18, dated 15th July 1863.*

Moonshee Hurukh Lall.

Section 320, Code of Criminal Procedure, is not intended to provide a substitute for a civil suit to declare the rights of the parties, but only empowers the Magistrate to order that possession shall not be taken by any party to the exclusion of the public, until the party claiming possession obtain a decree for exclusive possession.

It is quite clear that the order of the Magistrate is erroneous, and must be quashed. When it appears that the use of water is open to the public or to any person or class of persons, the Magistrate, under Section 320, may order that possession shall not be taken by any party to the exclusion of the public or *such* persons until the party claiming possession obtain a decree adjudging to him such exclusive possession. Here the complainant was not in possession. She was simply a zemindar who had let her lands in farm. If the farmer and the ryots who actually used the water had complained, the case might have been different. The Section in question is not intended to provide a substitute for a civil suit to declare the rights of the parties.

The 24th September 1866.

*Present:*

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

**Trial before Magistrate—Procedure on denial of complaint by accused.**

Criminal Jurisdiction.

*Referred under Section 434 of the Code of Criminal Procedure, and Circular Order No. 18, dated 15th July 1863.*

Ahlad Monee Dossee.

When an accused person denies the truth of the complaint made against him, the Magistrate ought, under Section 266, Code of Criminal Procedure, to hear the complainant and his witnesses in support of the complainant, and also the accused and his witnesses.

THE proceedings of the Joint Magistrate in this case are utterly illegal. The Road Inspector of Bauleah reported certain persons for allowing their tanks to be in a filthy state. Gumany Chuprassy appeared in support of the complaint on the 28th of June of the present year, and stated that in Gurrukparah *Lall Bahari Baboo's two tanks were* in a very filthy state.

On this a summons issued directed to *Ahlad Monee, the wife of Lall Bahari.*

On the 13th of July Radha Soonder Raie, Mooktear Agent for Ahlad Monee, appeared and made defence, stating that she had *one* ditch in Gurrukparah, that it was clean, that it was cleaned two months ago, that she was fined 3 rupees, for not cleaning it before, by the Deputy Magistrate, and that she had no other tank in Gurrukparah.

On this it was the Magistrate's place duly to hear the complainant and his witnesses in support of his complaint, and also hear the accused and her witnesses under Section 266, Code of Criminal Procedure.

But, without hearing any witness at all, without even having given to the accused any opportunity of cross-examining or contradicting Gumany, who had been examined in her absence, he writes: "Defendant No. 4 (that is, Ahlad Monee) not being present this day, I fine her *32 Rupees, being 16 Rupees on account of each tank.*"

The Sessions Judge suggests that the accused could not be convicted under Section 269 of the Penal Code. In this he is probably right. But we are disposed to think that, if the offence was proved, she might have been fined under Section 290 (*see* Section 32). The conviction must be quashed, and the fine repaid.

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The 26th September 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Evidence—Dying declarations—Rape.**

Queen *versus* Bissorunjun Mookerjee.

*Revised under Section 405, Code of Criminal Procedure.*

The dying declaration of a deceased person is admissible in evidence on a charge of rape.

THE question put to us in this case relates to the admissibility of the dying declaration of a deceased person.

The prisoner was indicted on a charge of murder and rape. The general evidence against the prisoner was that he enticed the deceased girl into his house, from which she returned shortly afterwards, having suffered such great violence to her person that she died shortly afterwards.

The Sessions Judge was of opinion that the deceased made the statement in question under the apprehension of impending death. The effect of the statement was that the prisoner was the person who committed the outrage.

The Sessions Judge told the Jury that the evidence was admissible on the charge of murder, but that, on the charge of rape, it was not so; and that, when considering this charge, they were to attach no weight to this evidence.

The prisoner was acquitted of murder, and convicted of rape; and as, with respect to this offence, the evidence was rejected, the conviction is in no way invalidated if the Sessions Judge was, in our opinion, wrong in his direction. But, as the question has been put to us, we are willing to state our opinion on the point.

We admit that the Sessions Judge's ruling is in perfect accordance with the English law of evidence as applicable to criminal cases, the admissibility of dying declara-

tions being there confined to cases of homicide, where the death of the party making the declaration is the subject of enquiry; but, for the reasons we are about to state, we do not consider so narrow a rule to exist in this country, not because of any difference between Europeans and Orientals, but because we do not consider that the English rule rests on any sound principles.

For the reasons stated by the Chief Justice in the judgment of the Full Bench in Reg. *vs.* Kyroollah, Weekly Reporter, Criminal Rulings, Vol. VI., page 21, we feel ourselves at liberty to examine any rule of evidence applicable to criminal cases for which English authority alone is quoted, and which has not been established here by Legislative enactment, or by the long practice of the Courts recognized by the superior Courts of Appeal.

The only Legislative enactment upon the subject in this country is the provision contained in Section 29 of Act II. of 1855, which provides that, where dying declarations are evidence, they shall be received, if it be proved that the deceased was at the time of making the declaration, and then thought himself to be, in danger of impending death, though he entertained, at the time of making it, hope of recovery. This provision, though it modifies the English law on this point in an important particular, does not affect the present question.

It seems pretty certain that the law in England on this subject has been much narrowed of late years. There are instances in the older books in which dying declarations have been admitted in civil cases, and in no case earlier than Rex *vs.* Hutchinson, in 1822 (*see* vol. 2, page 608), does the rule appear to have been laid down that dying declarations are only admissible where the death of the declarant is the subject of enquiry. The existence of this rule of exclusion is asserted in R. *vs.* Mead, page 608; but Mr. Justice Coltman and Mr. Baron Parke, in R. *vs.* Baker, Moody and Robinsons' Reports, vol. 2, page 53, did not act upon it. In R. *vs.* Hind, 29 Law Journal, Magistrates' Cases, 148, the rule, as laid down in R. *vs.* Mead, was again enunciated and acted on. Neither in R. *vs.* Mead nor in R. *vs.* Hind is a single argument given or authority quoted in support of the rule.

It cannot, therefore, be said that the authority of English decisions is very strong in support of the exclusion.

With regard to the English treatises, Best, Phillips, and Taylor, all recognise the exclusion of the evidence in such cases: they all treat the admissibility of dying declarations as itself exceptional, and place this limitation on the exception, that the declaration must relate to the death of the person making the declaration, and is only evidence when that is the subject of enquiry; but there is little force in their reasoning.

Our reason for thinking that this evidence ought to have been admitted is that no possible reason can be given for its admission in the case where the death of the party making the statement is the subject of the enquiry, which does not apply with equal force to its admissibility in the present case. The ground on which dying declarations are admissible is that, when they are made, the declarant is in a condition in which, according to the experience of mankind, it is not less likely that what he says is true than if it had been said before a Magistrate under the sanction of an oath and in presence of the prisoner. It is therefore, put on a level with a *deposition*, technically so called, which is admissible in case of the deponent's death or absence from illness. But this has nothing to do with the nature of the crime to which the evidence relates; it is just as applicable to one crime as another.

It has been said that Courts have been driven to accept this evidence by the necessity of the case; the necessity arising from this, that the injured person, who might be the principal witness against the prisoner, is dead. We may remark that such necessity, as it is called, is not a ground for receiving evidence which ought, on other grounds, to be excluded, nor is it the reason why this evidence is admitted; but, even if it were so, that necessity is just as likely to exist where the deceased person has been robbed, or raped, or assaulted, as where he has been murdered.

Considering, therefore, as we do, that dying declarations are a species of evidence, which, on the whole, are likely to be useful in leading Juries and Courts of Law to a right conclusion on the facts before them, and that the principle on which they are admissible in cases of murder is applicable to their admissibility in other cases, we think that the Sessions Judge was wrong in his direction to the Jury, and that the evidence in question was admissible on the charge of rape.

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The 26th September 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Evidence (of offenders).**

Queen *versus* Reaz Ali *alias* Dulloo Khan.

*Committed by the Joint Magistrate of Monghyr, and tried by the Sessions Judge of Bhaugulpore, on a charge of dacoity.*

**The evidence of persons who are themselves liable to punishment should be carefully sifted and tested before they can be relied on in a Court of Law.**

In this case we are not satisfied with the evidence on which the prisoner has been convicted. No one can doubt that the testimony of persons in the position of witnesses Nos. 2, 3, and 7, however useful it may be in assisting the detection of crime, requires to be very carefully sifted, before reliance can be placed on it in a Court of Law. There always will exist in the minds of persons, who are themselves liable to punishment, a notion that they will obtain benefit by procuring the conviction of others. In the present case the evidence of these witnesses appears to have been in no way tested, and the only circumstance which is mentioned as confirming the truth of their statements is that the prisoner's name was mentioned on a former occasion as one of the dacoits. But this circumstance is, we think, too slight to add such weight to the evidence of the informers. It does not appear that it was by these persons that the name was mentioned, and no steps appear to have been taken upon the information.

It is true that the witnesses 1, 4, and 5, profess to identify the prisoner as one of the dacoits, but we cannot attach any importance to their statements. The dacoity occurred four or five years ago, and none of these persons had ever seen the prisoner before or since. Identification under such circumstances, except in very rare cases, appears to us to be quite out of the question.

We regret that the Sessions Judge has not furnished us at greater length with his reasons for convicting the prisoner, without which it is extremely difficult for a Court of Appeal to come to a conclusion on evidence not taken before them. But on the whole we feel bound to say that a conviction on this evidence cannot be supported. We, therefore, order it to be quashed, and the prisoner to be acquitted and released.

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The 27th September 1866.

*Present:*

The Hon'ble W. Markby, *Judge.*

**License (for carrying on Slaughter-house under Act VII. of 1865, B. C.)—Notice of revocation.**

*Petition of Mr. E. Vere Haldane, Vice-Chairman of the Municipal Commissioners for the Suburbs of Calcutta.*

**The length of notice to be given to persons holding licenses for carrying on slaughter-houses under Act VII. of 1865, B. C., must be determined in each case according to its own particular circumstances.**

"That a license was granted on the 24th June 1865 to Rohametoollah to use a place for a slaughter-house within the Suburban Municipality, and was to last until 'further orders.' That, with a view to register all licenses and to make temporary ones permanent, and for other municipal purposes, a notice was issued on the 9th July 1866 on Rohametoollah, informing him that it was necessary for him to take out a fresh license within seven days, on failure of which the temporary license he already held should be considered forfeited. That, by a letter signed by Messrs. Dignam and Carruthers, his attorneys, Rohametoollah declined to attend to this requisition, and went on slaughtering without a fresh license, although the old one was no more in existence. That Golam Hossein, who alleged himself to be a servant of Rohametoollah, was, on a personal inspection made by the Vice-Chairman, found to have been continuing the slaughter-house without a license, and he was accordingly charged under Section 1, Act VII. of 1865, B. C., with having a place as a slaughter-house without a license. The sitting Commissioner convicted him on the 31st August last, and fined him Rs. 200.

"The defendant, Golam Hossein, being dissatisfied with this order, appealed to the Sessions Judge of the 24-Pergunnahs, who, on the 8th instant, overruled the conviction, and remitted the fine, on the ground, as stated in his judgment, that the seven days'

notice was not sufficient, and therefore the withdrawal of the license and the infliction of the fine were not justifiable.

"Your petitioner is not aware as to the extent of relief he can expect from your Lordship's hands in connection with the question of fine which has been remitted in this case by the Sessions Judge; but he has no doubt that, under Sections 404 and 405 of the Code of Criminal Procedure, this Honorable Court possesses full powers to correct any mistake committed by any subordinate Court on a point of law; your Lordships will, therefore, be pleased to settle authoritatively as to whether the Sessions Judge was legally correct in saying that the words 'until further orders' entitled any person to supply a time or a license with such words subjected to be cancelled at any time after the holder of it was duly warned.

"When Rohametoollah refused through his attorney to take out a fresh license, and relied entirely on his former one, which was void, it cannot be said that the old license was sufficient to protect him or his servants from the punishment which the law inflicts, for carrying on a slaughter-house without a license. Your petitioner, therefore, craves that your Lordship will be pleased to set aside the opinion expressed by the Sessions Judge, and your petitioner, as in duty bound, shall ever pray."

*Judgment of the High Court.*—I do not think it necessary to send for the record in this case, because I think there is nothing in Mr. Beaufort's decision upon which any restriction upon the jurisdiction of the Commissioners can be founded. The right of the Commissioners, to revoke licenses granted "until further orders," is clearly recognised, as well as their right to proceed against persons holding such licenses, and who carry on their slaughter-houses after the licenses have been revoked. The remarks of Mr. Beaufort as to the length of notice which ought to be given to the person holding such a license before it is revoked, I consider to apply only to the particular case before him. All that the Commissioners are bound to do is to give a reasonable notice to the party who holds the license, in order that he may apply to renew it, or make other arrangements for carrying on his business. There is no general rule applicable to all cases as to when notice ought to be given, which will have to be determined in every case as it arises, according to its own particular circumstances.

The 27th September 1866.

*Present:*

The Hon'ble William Markby, *Judge.*

**Forgery.**

Queen *versus* Gyanee Ram.

*Committed by the Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of fraudulent execution in signing a document, &c.*

**The signing of a vakalutnamah in the name of co-decree-holders without their authority to do so, and delivering it to a vakeel with instructions to file a petition stating that the debt had been satisfied, and praying that the case may be struck off the file, is forgery within the meaning of Section 463 of the Penal Code.**

THE prisoner in this case has been convicted of the offence of forgery under Section 463 of the Indian Penal Code. The case, which was very clearly proved, was that the prisoner, being one of several joint-decree-holders, made a collusive arrangement with the judgment-debtor that a certain sum of money should be paid to himself in satisfaction of the decree, and that he should stop proceedings upon the decree. Upon this the prisoner signed a vakalutnamah in the name of Golab Ram and others, his fellow decree-holders, and delivered it to a vakeel with instructions to file a petition stating that the debt had been satisfied, and praying that the case might be struck off the file, which was accordingly done. Subsequently a petition was filed by Golab Ram, denying that the prisoner had any right to use his name; and the Judge, being satisfied that this was so, directed these proceedings to be taken against the prisoner.

The vakalutnamah was signed in this form: "Golab Ram by the pen (bukalam) of Gyanee Ram (the prisoner)."

The only question is, whether this is a forgery within the meaning of Section 463 above referred to? and I think that it is. Section 463 declares the making a false document with intent to commit fraud to be forgery, and Section 464 declares that a person who signs a document, with the intention of causing it to be believed that such document was signed by the authority of a person by whose authority he knows that it was not signed, makes a false document.

These words clearly include the present case.

I only reserved my decision in this case, because I wished to look at the case of Regina *versus* White, reported in Volume I. of Denison's Crown Cases, in which the Court of Criminal Appeal in England unanimously held that the unauthorized use of another person's name professedly as agent was not forgery. But I find that that case turned entirely on the English definition of forgery under the then existing Statutes, and has no effect whatever upon the interpretation of the Section of the Indian Penal Code now under consideration.

The appeal of the prisoner is, therefore, dismissed, and the conviction affirmed.

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The 28th September 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Theft.**

Queen *versus* Nobin Chunder Holdar.

Criminal Appellate Jurisdiction.

Miscellaneous Case.

The prisoner, acting *bonâ fide* in the interest of his employers, and finding a party of fishermen poaching on his masters' fisheries, took charge of the nets, and retained possession of them, pending the orders of his employers.

HELD that the prisoner was not guilty of theft.

ON the 21st instant we issued an order for the immediate release of this prisoner. We now proceed to give our reasons for such order.

This appeal was submitted on a point of law, and was referred to this Bench by the Judge sitting in the Miscellaneous Department.

The prisoner was convicted of theft, Section 379 of the Indian Penal Code, and was sentenced to simple imprisonment for the period of one month, and a fine of Rs. 20, in default of payment further imprisonment for one week.

It appears that a party of fishermen were poaching on the fisheries belonging to the Port Canning Company, their nets were seized, and the prisoner, who is a servant in the employ of that Company, took charge of the nets, and refused to give them up to the Police, without the orders of his immediate employers. The gist of the offence of theft consists in the dishonest intention of the party taking the property. In the present case it is very clear that there was no dishonest intention. The prisoner, acting *bonâ fide* in the interest of his employers, and finding the fishermen poaching on his masters' fisheries, took charge of the nets, and retained possession of them, pending the orders of his employers. The taking not being criminal when the possession was charged, there was no theft, and the conviction is illegal, and must be quashed.

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The 29th September 1866.

*Present:*

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

**Absconded Offender—Forfeiture of property of.**

Criminal Jurisdiction.

Sheodoyal Singh *versus* Girban Sing.

*Referred under Section 434, Code of Criminal Procedure.*

Procedure by Magistrate before declaring a forfeiture of the property of an absconded offender.

IN this case it is quite clear that there is nothing to show that the steps which are necessary to entitle the Magistrate to declare the property at the disposal of the Government, under Section 184 of the Code of Criminal Procedure, were ever taken, and, in fact, no such confiscation ever took place. When the defendant came in, he was not asked whether he had really absconded and concealed; and, as his property was not confiscated, he did not tender any explanation to the Judge, and, in fact, he was not called upon to do so under Section 185. The proceedings are irregular, and must be quashed, the property to be restored to Sheodoyal, and the purchaser will get back his purchase-money.

The 3rd October 1866.

*Present:*

The Hon'ble F. B. Kemp and Shumbhoonath Pundit, *Judges.*

**Breach of contract (to convey Indigo from the field to the vats)—Section 490, Penal Code.**

Criminal Jurisdiction.

*Referred under Section 490 of the Civil Procedure Code.*

Nowa Tewaree and Mullen Jha.

An agreement for personal service in conveying indigo from the field to the vats is not a contract, the breach of which is punishable by Section 490 of the Penal Code.

*Remarks by the Assistant Magistrate.*—An agreement for personal service in conveying indigo from the field to the vats is not a contract, the breach of which is, and was, intended to be made punishable by Section 490 of the Penal Code. The words "voyage or journey" apply to, and must be read with, the whole of the Section; and indigo, on its way from the fields to the vats, can scarcely be said to be either on "voyage" or "journey." It is true these words do not occur in Illustration (C), but they are necessarily implied. The illustrations "make nothing law which would not be law without them." "They are not intended to supply any omission in the written law, or to put a strain on it." Besides, it seems clear from the remarks of the Indian Law Commissioners that this Section was enacted to protect travellers, and the goods of travellers, against the rascality of a class of men who would be able to render them no adequate compensation for a serious wrong, and whose "whole property would probably not cover the expenses of prosecuting them civilly," and not to apply to contracts like the contract in this case, where, whatever may be the inconvenience and delay in prosecuting the offenders civilly, damages can generally be recovered. Again, the description of the property to be conveyed is not sufficiently explicit. The goods must be most clearly specified.

*Remarks by the Magistrate.*—In the few instances which have come before me of such cases as this, I have always refused to take them up in the Criminal Court, believing that the Section of the Penal Code is not applicable. I therefore agree with the Assistant Magistrate; but, as it appears that cases similar to this have been allowed by some Magistrates in this district, and convictions sustained under this Section, it is advisable, I think, in this diversity of opinion, to have an authoritative ruling.

*Judgment of the High Court.*—Read the proceedings connected with this reference. The Court are of opinion that Section 490 of the Indian Penal Code is not applicable to the case submitted to their consideration, and they agree in the remarks recorded by the Assistant Magistrate and Magistrate of Sarun.

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The 4th October 1866.

*Present:*

The Hon'ble G. Loch and Shumbhoonath Pundit, *Judges.*

**Abetment of murder—Disappearance of evidence of a crime.**

Queen *versus* Goburdhun Bera.

*Committed by the Deputy Magistrate, and tried by the Officiating Sessions Judge of Midnapore, on a charge of murder.*

Prisoner was present at a murder without being aware that such an act was to be committed. Through fear he not only did not interfere to prevent the commission of the crime, but joined the murderers in concealing the body. HELD that he was guilty, not of abetment of murder, but of causing the disappearance of evidence of a crime under Section 201 of the Penal Code.

*Loch, J.*—I THINK that the finding of the Sessions Judge is opposed to the evidence, and that the prisoner cannot be convicted of abetment. The prisoner was present when the murder took place. He was not aware that such an act was to be committed, but he did not interfere to prevent the commission of the crime, being apparently too much frightened to do so. He joined the murderers in concealing the body, being frightened into compliance by their threats. This is the substance of the evidence given by Bhurut Gorayen, the only eye-witness. The substance of the prisoner's verbal confession to the Deputy Magistrate, as deposed to by that officer and the Deputy Inspector of Police, is to the same effect; and, from this evidence, it cannot be said that the murder was committed in consequence of this prisoner's abetment. The prisoner appears to me guilty of an offence under Section 201, and liable under that Section to imprisonment, and I would sentence him to five years' rigorous imprisonment.

*Shumbhoonath Pundit, J.*—I concur.

The 5th October 1866.

*Present:*

The Hon'ble F. B. Kemp, *Judge.*

**Evidence—Confession of prisoner.**

Queen *versus* Sreemutty Mongola.

*Committed by the Magistrate, and tried by the Officiating Sessions Judge of Midnapore.*

The confession of a prisoner before a Magistrate, though retracted before the Judge, is admissible in evidence against the prisoner, provided the Judge be satisfied that it was voluntarily made.

I CANNOT interfere with the sentence in this case, though, I think, the prisoner ought to have been convicted of the graver charge.

The Sessions Judge is clearly wrong in stating that the confession of the prisoner, Mongola, before the Deputy Magistrate, is not evidence against her, simply because she retracted it in his Court. In almost every case, the confession before the Magistrate is retracted before the Sessions Judge. It is, however, admissible as evidence, provided the Sessions Judge be satisfied that it was voluntarily made. The Court cannot but express their surprise that the Sessions Judge should entertain such an erroneous opinion.

Appeal rejected.

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The 5th October 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**False evidence—Criminal Prosecution under Registration Act XX. of 1866.**

Queen *versus* Juggut Chunder Dutt.

Criminal Referred-Jurisdiction.

A Sub-Registrar is competent, for any purpose contemplated by Act XX. of 1866, to examine any person; and any statement made by such person before an Officer in any proceedings or enquiries under the Act, if intentionally false, renders such person liable to a criminal prosecution.

THIS is a reference made by the Sessions Judge of Jessore, moving this Court to express an opinion upon a point which has arisen in a case coming under the new Registration Act XX. of 1866.

It appears to us that Juggut Chunder Dutt, acting on behalf of Ram Dyal Ghose, presented a document to the Sub-Registrar of Narail, which purported to be a dur-mourosee pottah from Doorga Churn Bose, for the purpose of having it registered.

At the instance of Juggut Chunder, the alleged grantor of the lease, Doorga Churn Bose, was summoned. He appeared, and denied the execution of the deed. At this stage of the case, it appears to us that the Sub-Registrar, under Section 36 of the Act, would have done well had he simply recorded his reasons for refusing registry on the document, as directed in Section 82, leaving the investigation of the facts to the tribunals regularly constituted for that purpose. But he went further, and examined the grantor and the attesting witnesses, and, having apparently satisfied himself that the grantor had intentionally made a false statement in stating that he had not executed the deed, he instituted proceedings under Section 92 of the Act, having first obtained the sanction of his immediate superior under Section 95. These proceedings may have been indiscreet, but they are clearly not illegal. The Sub-Registrar was competent for any purpose contemplated by the Act to examine any person, and any statement made by such person before an officer in any proceedings or enquiries under the Act, if intentionlly false, renders such person liable to a criminal prosecution. Copy of these remarks will be forwarded to the Judge.

The 5th October 1866.

*Present :*

The Hon'ble F. B. Kemp and W. Markby,

*Judges.*

**Murder (of supposed wizard).**

Queen *versus* Ooram Sungra.

*Committed by the Assistant Commissioner, and tried by the Judicial Commissioner of Chota Nagpore, on a charge of murder.*

A sentence of death was commuted into one of transportation for life in the case of a prisoner who committed murder in the belief that the deceased was a wizard and the cause of his child's illness, and that, by killing the deceased, the child's life might be saved.

In this case the prisoner has been convicted of murder. It appears that his child was dangerously ill, and that this ignorant man had been told by a person, calling himself a "Diviner," that the spirit of one Mitta was abroad, and that, until it was appeased, the child would not recover. The prisoner accordingly went to Mitta, and called upon him to take measures to appease his spirit. He at first refused, saying he had not the means ; but, after being threatened by the prisoner, he sacrificed a sheep, a pig, and three fowls. As, however, the child did not get better, the prisoner, two days afterwards, went again to Mitta, abused him and his wife, accused them of witchcraft, and said openly that, if his child died, he would kill Mitta. On the next morning, Mitta was found dead in the prisoner's house with five severe wounds in the head, which were undoubtedly the cause of his death. The child was not then dead, but died two or three days afterwards.

These are the facts as stated by the Judicial Commissioner of Chota Nagpore, who tried the case, and, there being no direct evidence as to how the murder took place, he proceeds in his judgment to shew very clearly that the story told by the prisoner and his wife as to how Mitta came by his death is untrue, and to give his reasons for coming to the conclusion that the prisoner murdered him.

The Assessors expressed their opinion that the prisoner killed the deceased in the belief that he was a wizard.

We adopt entirely the conclusions of the Court below, and we have no hesitation in saying that, both in fact and law, the prisoner is guilty of murder.

It remains to consider whether the sentence of death passed upon the prisoner by the Judicial Commissioner ought to be affirmed, or whether we ought to exercise the power which we possess of reducing the punishment to transportation for life.

We have hesitated a good deal upon this point. There can be no doubt that the murder was deliberate and intentional, and, in that view, merits the severest punishment which the law can inflict. On the other hand, the prisoner was undoubtedly acting under the influence of the belief that the deceased man was the cause of his child's illness, and, probably, thought that, by the act of killing Mitta, the child's life might be saved. Absurd and unfounded as that belief was, we think that we are bound to take it into consideration, and make some distinction between such a case as this and cases in which deliberate murder has been committed from baser motives. We, in no way, countenance the supposition that the existence of such a motive as existed here in any way changes the *nature* of the crime: but we think that, as the law has prescribed two different degrees of punishment for the crime of murder, this is a case which, under all the circumstances, may be considered not to merit the severer penalty.

We, therefore, affirm the conviction, but annul the sentence of death passed upon the prisoner, and, in lieu thereof, direct that he be transported for life.

The 21st September 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Murder—Confession.**

Criminal Referred Jurisdiction.

Queen *versus* Hyder Jolaha.

A person may be convicted of murder on his own confession.

Where a master accompanies a servant knowing the latter's intention to commit murder, and is present at the commission of the murder, although he struck no blow, still he is guilty as a principal, the only reasonable presumption being that both were acting with a common intent.

*Markby, J.*—In this case the prisoner Hyder has been convicted of murder on his own confession, which, there is no reason whatever to doubt, is a true one, and we affirm the conviction and sentence of death passed upon him.

We are at a loss to conceive why the prisoner Pritto was not convicted. He is the prisoner Hyder's master, and is, no doubt, greatly his superior in rank and intelligence. The weapon with which the woman was murdered was his, and he admits that he was present when the murder took place, having accompanied Hyder, of whose intention to commit murder he says he was aware. Even though it be true, as he alleges, that he struck no blow, still he was guilty as a principal, the only reasonable inference being that he and Hyder were acting with a common intent. We think the opinion of the Assessors was right, but the Code of Criminal Procedure gives no power to interfere where a prisoner has been acquitted.

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The 20th October 1866.

*Present:*

The Hon'ble G. Loch and Markby, *Judges.*

**Robbery—Separate trials—Irregularities.**

Queen *versus* Itwaree Dome and others.

*Committed by the Assistant Magistrate, and tried by the Sessions Judge of Bhaugulpore, on a charge of lurking house-trespass by night in order to commit theft, &c.*

Where persons are committed on three separate and distinct charges for three separate and distinct robberies committed on the same night in three different houses, they must be tried separately on each of the three charges.

Remarks on the irregularities in the investigation of the present case.

*Markby, J.*—The prisoners in this case were committed on three separate and distinct charges, for three separate and distinct robberies committed on the same night in three different houses. The prisoners must be tried separately on each of three charges, and the present trial upon all three charges at once is illegal.

The verdict and sentence of the Sessions Judge are quashed as against all the prisoners, and a new trial is ordered.

We think it also necessary to call the attention of the Sessions Judge to one or two points in the case which seem to have escaped his attention.

The evidence against the prisoners consists entirely of the presumption which arises from stolen property having (as alleged) been found in their possession. But it appears that no part of the property was found in the actual manual possession of any of the prisoners; it was found in various parts of a house or houses and premises said to be occupied by the prisoners and (as we gather) several other persons. But, whether each prisoner had a separate house, or whether they lived in common having separate apartments, and, in the latter case, whether any portion of the premises was common to all—on all these points which are most important in arriving at a right conclusion in this case, there is great confusion in the evidence, and, as far as we can see, no attempt to clear it up.

The deposition of witness No. 3 does not agree with the evidence of the Police Inspector. The former says he pointed out some Domes' houses and Nathoo Pasee's house to the jemadar, and that there were four Domes, the residents of the houses, and five Domes their visitors, besides four or five females. The Police Inspector, on the other hand, says that the four Domes lived in one house, and he takes no notice of the visitors at all.

Again, it does not appear what enquiries were made, and what evidence was given as to whether a sufficient cause existed why the attendance of witness No. 3 could not be procured. Unless the presence of the witness cannot, by any reasonable efforts, be procured, his deposition is inadmissible. The evidence on this point should be taken and recorded in the same way as the evidence on any other part of the case.

Moreover, we remark that a good deal of the evidence of the Police Inspector is mere hearsay, and ought not to have been received upon the important point as to where the things were found; and he was not examined with the accuracy which the case

required. He gave his evidence in great detail before the Committing Magistrate, as also did witnesses Nos. 1 and 2, and the same ground should have been gone over by the Sessions Judge.

Had it been necessary to dispose of this appeal on the merits, this Court would have found the utmost difficulty in doing so. The evidence throughout is very shortly taken, and is not very easy to understand; the prisoners, the witnesses, and the articles stolen, being generally referred to by numbers, and in many cases without any distinction. And, upon the real difficulty in the case, the possession of the stolen property, there are scarcely any observations at all in the judgment of the Sessions Judge, though, from the little that is said, it seems as if the evidence were treated as if all bore with equal force against all the prisoners, which is very far from being the case.

It is with great reluctance that we so frequently make observations similar to the above upon the mode in which crimes have been investigated in the Courts below; but the paramount importance of the subject, which is no less than the due administration of the Criminal Law throughout the country, renders it incumbent upon us to point out what we consider to be irregularities in the investigation of cases which are brought to our notice.

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The 20th November 1866.

*Present:*

The Hon'ble G. Loch, *Judge.*

**Evidence—Confession.**

Queen *versus* Kally Churn Lohar and others.

*Committed by the Magistrate, and tried by the Officiating Sessions Judge of Hooghly, on a charge of dacoity, &c.*

The confession of an accused person is only evidence against himself.

I SEE no grounds for interfering with the sentence passed upon the prisoners, and I reject their appeal. In the copy of the charge, made by the Judge to the Jury, I find the following remark: "At the same "time you will recollect that the confessions "made by Kally and Sreekant must be "accepted as evidence both against them-"selves and those that they implicate." And throughout the charge I find that the Judge refers to these confessions; and, in drawing the attention of the Jury to the evidence against each prisoner, he remarks this man was implicated on the confession of Sreekant, and recognized by such and such witnesses. Now, the Judge must be aware of this first principle of law that the confession of an accused person is only evidence against himself, and therefore the Judge was wrong in referring to the confession of Sreekant as implicating other parties, and instructing the Jury that Sreekant's confession was good, not only against himself, but against others. The error made by the Judge in this case is not of consequence, as the parties convicted by the Jury confessed to the Magistrate, and those confessions were evidence against them. In summing up the evidence to the Jury, the Judge should have distinctly told them that the confessions of accused parties are only evidence against themselves, and should have instructed the Jury to put away from their minds whatever the confessing prisoners had said regarding their accomplices.

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The 20th November 1866.

*Present:*

The Hon'ble G. Loch, *Judge.*

**False Evidence—Charge (of Judge).**

Queen *versus* Parbutty Churn Sircar.

*Committed by the Magistrate, and tried by the Officiating Sessions Judge of Hooghly, on a charge of false evidence.*

In a case of false evidence, it is not necessary for the Judge in his charge to show how the false statements, even if made intentionally, are material in the case.

THE prisoner has been convicted by the Jury of giving false evidence on various points, but the Sessions Judge does not, in his charge, show how these statements, even if made intentionally, were material in the case. Section 191, however, of the Penal Code defines false evidence to be any statement which is false, and which the party making it either knows or believes to be false, or does not believe to be true. The prisoner comes under this definition. I, therefore, reject the appeal.

The 22nd November 1866.

*Present:*

The Hon'ble G. Loch, *Judge.*

**Evidence—Statements in grounds of commitment.**

Queen *versus* Hurry Pershaud and others.

*Committed by the Joint Magistrate, and tried by the Sessions Judge of Rungpore, on a charge of voluntarily causing grievous hurt.*

Where a Committing Officer in his grounds of commitment makes statements tending to criminate the prisoners, they cannot be used as evidence against the prisoners, if they were not reduced to writing, and without the examination on oath of the Committing Officer in the presence of the prisoners.

In the grounds of commitment, the Joint Magistrate states that the prisoners stated to the Police, and repeated before him, on the first day of trial, that they had caught the deceased stealing jack fruit, and had beaten and chased him away, and further on the Joint Magistrate makes further statements, all tending to criminate the prisoners, but which cannot be used as evidence against them, as their statements were not reduced to writing, and the Judge has not examined the Joint Magistrate on oath. As the evidence against the prisoners, especially Chuteeram and Obhoy Churn, is very weak, I think the record should be returned to the Judge under the provisions of Section 422, and that he be directed to examine the Joint Magistrate in the presence of the prisoners, and certify the result of such additional evidence to the Court.

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The 27th November 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Murder—Transportation.**

Queen *versus* Bhootoo Mullick.

*Committed by the Magistrate, and tried by the Officiating Sessions Judge of Hooghly, on a charge of murder.*

A sentence of transportation other than *for life* is illegal in the case of a prisoner convicted of murder.

*Loch, J.*—The Sessions Judge's sentence is illegal. The Jury convict the prisoner of wilful murder, but recommend him to mercy, but do not state any grounds for their recommendation. The Sessions Judge, listening to their recommendation, has sentenced the prisoner to transportation for 10 years. Under Section 302, the punishment for murder is either death or transportation *for life.* The Sessions Judge has no authority to pass a sentence of transportation for 10 years. As this sentence is contrary to law, we, under the provisions of Section 405 of Code of Criminal Procedure, revise it, and direct that the prisoner be transported for life.

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The 27th November 1866.

*Present:*

The Hon'ble G. Loch, *Judge.*

**Robbery—Theft.**

Queen *versus* Hushrut Sheikh.

*Committed by the Magistrate, and tried by the Sessions Judge of Dinagepore, on a charge of culpable homicide not amounting to murder.*

By the infliction of grievous hurt, theft becomes robbery, and all parties concerned in the offence are liable to punishment.

The prisoner has been convicted under a Section of the Penal Code which does not cover the offence committed. The prisoners Hushrut and Rai Bux went to steal mangoes. One was on the tree, and the other was on guard below, when they were surprised by the owner of the orchard. The man below attacked the owner, and beat him with a lattee, and knocked him down senseless; and the thieves escaped before he had recovered his senses. The owner of the orchard, Kassim, died from the effect of the blows he had received, his skull having been fractured. Rai Bux was admitted to give evidence, and he stated that he and the prisoner Hushrut went to gather mangoes; that he was up the tree, and Hushrut below; that on Kassim interfering, Hushrut knocked him down; and, before he recovered his senses, they effected their escape.

The Sessions Judge accepts the evidence of Rai Bux to the extent that he and Hushrut went to steal; but, as there is no evi-

dence to corroborate the rest of his statement that Hushrut inflicted the blows on Kassim, his evidence on this point, the Sessions Judge holds, cannot be relied on.

Admitting this to be the case, yet, as violence was used by one or other of the thieves, the offence becomes robbery, and not theft, and the Sessions Judge was wrong in convicting the prisoner under Section 382, *viz.*, of theft after having made preparation for causing death or hurt, &c. The illustration (*A*) under this Section clearly shews what is the offence spoken of. Had *A* in the illustration fired the loaded pistol and hurt *Z*, the offence would no longer have been confined to Section 382, but would have been robbery as defined in Section 390. Theft is robbery if, in order to the committing of the theft, or in committing theft, the offender for that end voluntarily causes to any person death or hurt, &c., and Section 394 provides that, if any person committing or in attempting to commit robbery voluntarily causes hurt, such person or any other person jointly concerned in committing or attempting to commit such robbery shall be punished with transportation for life, or with rigorous imprisonment up to ten years. Under these circumstances, therefore, it is clear that, by the infliction of grievous hurt, theft had become robbery, and that all parties concerned in the offence were liable to punishment, and therefore it was not very material, for the purpose of convicting the prisoner, whether Rai Bux or Hushrut were below the tree. Had it been proved that Hushrut was the one who struck the blow, the sentence upon him must, under Section 397, have been nothing under seven years' imprisonment. As it is, though I think the punishment inadequate to the offence, it is a legal one, and therefore I confirm it.

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The 28th November 1866.

*Present :*

The Hon'ble G. Loch, *Judge.*

**Murder—Culpable Homicide not amounting to Murder—Grievous Hurt.**

Queen *versus* Hurry Dass Paul and others.

*Committed by the Magistrate, and tried by the Sessions Judge of Mymensing, on a charge of culpable homicide not amounting to murder.*

**Explanation of the difference between murder, culpable homicide not amounting to murder, and grievous hurt.**

It appears to me that the Sessions Judge is wrong in convicting the prisoners of culpable homicide not amounting to murder under Section 304, and that they should have been convicted of grievous hurt under Section 320.

All culpable homicide is murder, unless it be accompanied with one or other of the exceptions given in Section 300, Penal Code. That Section distinctly describes the offence of murder as follows: Culpable homicide is murder—*1st*, if the act by which death was caused was done with the intention of causing death; *2nd*, if done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom harm is caused; *3rd*, if done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; *4th*, if the person committing the act knows that it is so immediately dangerous that it must, in all probability, cause such bodily injury as is likely to cause death, and commits such act without excuse for incurring the risk of causing death or such injury as aforesaid.

The punishment for culpable homicide not amounting to murder is set forth in Section 302.

Culpable homicide is not murder when the offender is deprived of self-control by grave and sudden provocation; *2nd*, when committed in the exercise in good faith of the right of self-defence; *3rd*, when the offender is a public servant, or aiding a public servant acting for the advancement of public justice; *4th*, when committed without premeditation in a sudden fight in the heat of passion; and, *5th*, where the person whose death is caused, being above eighteen years, suffers death, or takes the risk of death, with his own consent.

Section 304 provides for the punishment of persons convicted of culpable homicide not amounting to murder as described above.

It is to be observed that, in both classes of culpable homicide, intention or knowledge is included, and that it is only by reason of the existence of one or other of the exceptions mentioned in Section 300 that culpable homicide is taken out of the category of murder.

In the present case, there is no justification for the brutal conduct of the prisoners towards the thief, whom they had caught and bound. They must have known that, if a man is pounded and kicked till ten of his ribs are broken, and he be otherwise maltreated, they commit an injury sufficient in the ordinary course of nature to cause death; and, as none of the exceptions in Section 300 are pleaded, it is very questionable whether they should not have been convicted of murder.

If it be said that there was no intention to kill or to do such injury as was sufficient in the ordinary course of nature to cause death, then it appears to me that the conviction of culpable homicide not amounting to murder is incorrect, for that offence comprises intention, but the act is extenuated by one or other of the exceptional circumstances mentioned in Section 300. If, then, the offence of which the prisoners are guilty does not fall under the head of "culpable homicide not amounting to murder," and, from absence of intention to kill or to do such bodily injury as is sufficient to cause death, does not amount to murder, the only offence, of which the prisoners can be convicted, is that of grievous hurt.

Looking at the circumstances of the case, though the treatment of the captured thief by the prisoners was brutal, I do not think that they, Haradhun Paul and Ramjoy Paul, had any intention of killing him; but, in the excitement of the capture, they, with several others, were unsparing of their blows and kicks. The conduct of Cheeroo *alias* Sreenarayun, the next morning, was still more brutal, for he dragged the dying wretch about the compound by the rope with which he was tied, and, as it were, took away the least chance he might have had of getting over the effects of the severe beating he had endured on the previous night. No proof is adduced that the deceased was caught in the act of committing theft. Sushiram, in whose house the theft is said to have taken place, and who is reported to have captured the thief, has not been examined; and it is only stated generally in the evidence that Sushiram had caught a thief whom they were beating.

For the reasons given above, I think the prisoners should be convicted of committing grievous hurt under Section 320, Clause 8, and sentenced under Section 325. I, therefore, confirm the sentence passed upon them, and reject the appeal.

The 3rd December 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Evidence—Receiving stolen property.**

Queen *versus* Doyal Shilydar and another.

*Committed by the Assistant Magistrate, and tried by the Sessions Judge of West Burdwan, on a charge of dishonestly retaining stolen property.*

Evidence of guilty knowledge is necessary to a conviction on a charge of dishonestly retaining stolen property.

*Loch, J.*—I THINK that the conviction in this case cannot be sustained. The prisoners were not charged with having committed the dacoity; but, on the suspicion of the party robbed, their houses were searched, and certain articles, a gold nuth, two silver haslies (necklaces), and some brass untensils, were found, and were claimed and identified by the complainants. There is no satisfactory evidence to shew that this property was concealed. The prisoners, to judge from their caste, are in a social position to warrant the belief that articles of this kind would be found in their houses. The identification of the property by the complainant and his witnesses is of the most general kind, while the prisoners claim it as belonging to them, and produce witnesses in support of their assertion. Now, though much reliance may not be put on the evidence of these witnesses, yet a conviction of a serious offence on a mere general allegation of identification of the property by one or two witnesses for the prosecution cannot be supported, and further it is to be observed that there is no evidence of the guilty knowledge which is necessary to constitute the offence of which the prisoners have been convicted. I would reverse the sentence passed by the Sessions Judge, and direct that the prisoners, appellants, be released.

*Macpherson, J.*—I also am of opinion that these prisoners ought to be acquitted and discharged, the offence with which they are charged not being proved against them with sufficient certainty. The evidence, as

to the articles in question being the prosecutor's property, appears to me very unsatisfactory and unreliable: while, beyond the fact that at the trial the prisoners claimed the articles as their own, there is no evidence whatever of any guilty knowledge. The prisoners are acquitted, and must be released.

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The 3rd December 1866.

*Present:*

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

**Practice—Section 36, Letters Patent.**

Queen *versus* Sheikh Soobhanee and others.

*Committed by the Magistrate, and tried by the Sessions Judge of Sylhet, on a charge of bringing false criminal charge with intent to injure, &c.*

In the Sessions Court the prisoners were convicted and sentenced. On appeal to the High Court, the senior Judge held that the case against the prisoners was not proved, and the junior Judge held that there was sufficient evidence to support the conviction. As the two Judges differed in opinion, the conviction was, with reference to Section 36 of the Letters Patent, set aside, and the prisoners released.

*Loch, J. (after going in detail through the evidence which is quite devoid of matter of general interest).*—I THINK the charge of bringing a false accusation against Punnoo must be considered as not proven, and I would release the prisoners, reversing the order of the Judge.

*Macpherson, J.*—I am of opinion that, although the case is a somewhat doubtful one, there is sufficient evidence to support the conviction. I therefore would dismiss the appeal.

But, as Mr. Justice Loch takes a different view of the matter, the conviction must, with reference to the provisions of Section 36 of the Letters Patent, be set aside, and the prisoners must be released.

The 3rd December 1866.

*Present:*

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

**Dacoity—Transportation.**

Queen *versus* Ramchand Punjah.

*Committed by the Magistrate, and tried by the Officiating Sessions Judge of Hooghly, on a charge of dacoity.*

In a case of dacoity, a sentence of 14 years' transportation was held illegal, and reduced to 10 years' transportation under Section 395 of the Penal Code.

*Seton-Karr, J.*—I CAN discern no reason for sending for the papers, as there is nothing as to which the Court's interference could be legally exercised, which cannot be settled at once.

The case was properly put to the Jury; and, if they believed on the evidence, as they clearly did believe, that there was a dacoity, that the prisoner was engaged in it, and that he fell into a tank and was captured on the spot, the conviction would be good, and could not possibly be touched.

Nothing worthy of any notice is mentioned in the appeal, but the sentence of 14 years' transportation is illegal; it must be reduced to 10 years' transportation under Section 395 of the Penal Code.

*Kemp, J.*—I concur.

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The 10th December 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Wrongful Confinement—Section 152, Code of Criminal Procedure.**

Queen *versus* Suprosunno Ghosaul.

*Committed by the Magistrate, and tried by the Sessions Judge of Nuddea, on a charge of wrongful confinement.*

The time during which a party is kept in wrongful confinement is immaterial, except with reference to the extent of punishment.

In no case is a Police Officer justified by Section 152, Code of Criminal Procedure, in detaining a person for a single hour except upon some reasonable ground justified by all the circumstances of the case.

*Kemp, J.*—THE point now taken by the pleader was not urged below.

There appears to us to have been no misdirection to the Jury.

The whole evidence was submitted to their consideration; and they were told that, if they believed the evidence, it was sufficient to support the charge of wrongful confinement.

The time during which a party is kept in wrongful confinement is immaterial, except with reference to the extent of punishment; the longer the period, the more severe being the punishment.

The pleader for the prisoner lays stress upon Section 152 of the Code of Criminal Procedure, as giving a Police Officer power to detain an accused person for a period not exceeding twenty-four hours without question.

But we read the Section very different. We are of opinion that in no case is a Police Officer justified by that Section in detaining a person for one single hour, except upon some reasonable ground justified by all the circumstances of the case. It is for the prisoner to shew that he had reasonable grounds, and he failed to do so; whereas it is clear he could have sent the accused party before the Magistrate at once. We confirm the sentence, and reject the appeal with the amendment that the sentence, in default of payment of the fine, be reduced to 3 months, which is the longest term which the law admits of.

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The 10th December 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**False Evidence.**

Queen *vsrsus* Nagbunsee Lall.

*Committed by the Principal Sudder Ameen, and tried by the Sessions Judge of Tirhoot, on a charge of giving false evidence.*

A conviction on a charge of giving false evidence was set aside, the alleged conflicting statements having been made after a lapse of 4 years, and there being no proof of deliberate intention to give false evidence, which was held to be the gist of the offence.

*Kemp, J.*—We acquit this prisoner. The statements said to be conflicting were made after a lapse of four years. We have not been shewn what the nature of the questions was which were put to the prisoner, and whether his attention was drawn to his former statement and to any discrepancy between that and his statement made after an interval of four years.

After all it appears that he stated in 1862 that Bakur was alone in possession; whereas in 1866 he associates other parties with Bakur. We cannot say that he was particularly questioned as to who were the co-proprietors, or as to the nature of Bakur's possession in 1862, which may have been that of a trustee as senior member of the family, or in any other similar capacity.

There is an absence of proof of deliberate intention to give false evidence, which is the gist of the offence.

The prisoner must be released at once.

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The 13th December 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Culpable Homicide not amounting to murder—Right of private defence.**

Queen *versus* Fuzza Meeah *alias* Fuzza Mahomed.

*Committed by the Assistant Commissioner, and tried by the Officiating Deputy Commissioner of Cachar, on a charge of culpable homicide not amounting to murder.*

In a case of culpable homicide not amounting to murder, it was held that, though the occasion might have been one in which the prisoner was justified in meeting force by force, still, as he inflicted a blow which he must have known was likely to cause death, he had exceeded his right of private defence with reference to Clause 4, Section 99 of the Penal Code.

*Markby, J.*—In this case the prisoner has been convicted of culpable homicide not amounting to murder.

It appears that the prisoner was the uncle of the deceased person, Golam Hossein, and that they were joint owners of certain land upon which they dwelt in separate houses within the same enclosure. The uncle was considerably older than the deceased, and had stood, to some extent, in the relation of father towards him, and had brought him up. The uncle wished to construct a path near to the house on the joint land, and the deceased was opposed to this. On the occasion in question, the uncle took his *kodal*, and commenced cutting a trench for the purpose of making the path, whereupon the nephew went up to prevent him. Some hot words passed, and ultimately the nephew with some violence seized the *kodal*, and attempted to wrest it from his uncle. The uncle thereupon recovered possession of the *kodal*, and with it struck his nephew a violent blow on the temple, driving the sharp edge of the *kodal* right through the skull into the brain of the deceased. This wound produced death in 18 days after it was inflicted. These facts are established by very clear

evidence; but only two witnesses actually saw the affray, and they were at some distance, so that we have only a somewhat meagre account of what actually occurred. But there is no doubt that the deceased was the aggressive party, and that he assumed an attitude which would justify the prisoner in using *some* violence towards him. The Sessions Judge has found that the prisoner is not guilty of murder, because of the provocation; but we are not sure how far he considered the question, whether or not the prisoner was justified in inflicting the blow in the right of private defence within the meaning of Section 96 of the Indian Penal Code. We have considered this question, and upon the whole we have come to the conclusion that, though the occasion was one in which the prisoner was justified in meeting force by force, and might therefore have used some violence, still that he was not justified in inflicting a blow which the prisoner must have known was likely to cause death. We think that, in so doing, he exceeded his right of private defence, and therefore by Clause 4 of Section 99 of the Code this plea fails him. But, although we consider that the prisoner has rightly been found guilty of culpable homicide not amounting to murder, we think the sentence of 3 years' rigorous imprisonment passed upon him, under all the circumstances, somewhat too severe. We, therefore, order it to be annulled, and, in lieu thereof, pass upon the prisoner a sentence of one year's rigorous imprisonment.

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The 13th December 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Sentence (by Magistrate).**

*Referred under Section 434, Act XXV. of 1861, and Circular, Order dated 15th January 1863, No. 18.*

Jhoomuck Chamar.

A sentence of 4 years' imprisonment by a Magistrate is illegal as beyond his competency.

*Kemp, J.*—THE view taken by the Sessions Judge is correct. Section 75 of the Penal Code does not apply to this case at all.

The offences were committed at one and the same time, and the Magistrate, under Section 46 of the Code of Criminal Procedure, could sentence the prisoner within his competency.

The sentence of 4 years in the case in which Nadir Ally is prosecutor is therefore illegal, as beyond the competency of the Magistrate. It is, therefore, quashed, and the papers are returned in order that the Magistrate may pass a legal sentence, or commit the case to the Sessions, if he considers that the sentence he is competent to pass is inadequate.

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The 13th December 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Jurisdiction—Bribery (to screen offender)—Conviction.**

*Reference by the Officiating Deputy Commissioner of Cachar, under Section 434 Act XXV. of 1861, and Circular Order, dated 15th July 1863.*

Omrit Ram *versus* Nonao Ram and others.

A Subordinate Magistrate of the second class is not competent to initiate a charge, under Section 213 of the Penal Code, of accepting an illegal gratification to screen an offender.

Persons not formally charged or put on their defence cannot legally be convicted.

*Case.*—I HAVE the honor to forward, under Section 434 of the Code of Criminal Procedure, for the orders of the Court, the criminal records of certain cases in which the sentences passed by the Deputy Magistrate are in my opinion illegal.

2. The complaints made in these cases were, it will be observed, for the offence of assault under Section 352 in Cases Nos. 321, 352, 299, 296, 256, and 186, and for that of grievious hurt under Section 326 of the Penal Code in Case No. 8. Before the

final hearing of these cases, the complainants in them desired to withdraw their complaints, and filed petitions to that effect. The Deputy Magistrate refused to allow the cases to be compromised, and dismissed them, at the same time fining each complainant under Section 213 of the Penal Code for accepting illegal gratification in consideration of his screening an offender.

3. As the Deputy Magistrate is a subordinate Magistrate of the second class, and is not vested with powers under Section 1 of Act X. of 1854, he was acting beyond his jurisdiction when he initiated the cases under Section 213.

In addition to this, it seems that no evidence was taken to prove that the parties accused had taken any gratification in order to screen the offenders. No charge was framed, and the defence of the accused does not seem to have been taken in a single instance.

*The judgment of the High Court was delivered as follows by—*

*Kemp, J.*—We concur with the Officiating Deputy Commissioner of Cachar. The proceedings of the Deputy Magistrate are illegal, and are quashed. He is not competent to initiate a charge, and he has convicted parties of an offence of which they have not been formally charged or put on their defence.

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The 17th December 1866.

*Present:*

The Hon'ble F. A. Glover,

*Judge.*

**Evidence (of co-defendants).**

Queen *versus* Ashruff Sheik and others.

*Committed by the Magistrate, and tried by the Officiating Sessions Judge of Moorshedabad, on a charge of dacoity.*

**Where there is no community of interest, any one of a number of prisoners jointly indicted may be called as a witness either for or against his co-defendants.**

THE prisoners in this case (one tried with the assistance of a Jury) have filed a long petition of appeal, in which they take various exceptions to the Sessions Judge's estimate of the evidence; they do not, however, raise any point of law.

Before, however, considering the appeal as it stands, it may be as well to remark on the Sessions Judge's proceedings in respect of the defence-witnesses called by the prisoner Afsur Ali. This prisoner, it appears, wished to have the evidence of three of his fellow-prisoners taken—of two of them, to prove that the offence which he and they had jointly committed, was simple theft, and not dacoity; and of the third to establish a plea of enmity between himself and the prosecutor. The Sessions Judge held that these witnesses could not legally give evidence in the case.

This appears to me much too broad an assertion. With regard to the two prisoners, who were to prove that the crime committed was theft, and not gang-robbery, the Sessions Judge was, I consider, right, as the prisoners so cited as witnesses were in precisely the same category as Afsur himself, and had a direct interest in procuring his discharge, whilst, as the crime charged against all the prisoners could only have been effected by the guilty concurrence of five or more individuals, the acquittal of Afsur would have led directly to the acquittal of the witness prisoners themselves, whilst his conviction would have been a material step in establishing their own guilt, *vide* Taylor on Evidence, 1223, Part 3, Chapter II.

But in ordinary cases, where there is no such community of interest, any one of a number of prisoners jointly indicted may be called as a witness, either for or against his co-defendants (Reg. *versus* Coulton and Stevenson), and I note the point for the Sessions Judge's future information and guidance. The only witness who could have been called in the present case was the prisoner Baluk Biswas; but, as his evidence was under the circumstances perfectly immaterial to the issue, the prisoner has not been in any way prejudiced by the omission.

For the rest the conviction of dacoity was based mainly upon the evidence of two approver-witnesses; but this evidence was, in accordance with the Full Bench ruling of this Court in the case of Elahee Buksh, legally sufficient for conviction, although uncorroborated, and the Sessions Judge in drawing the particular attention of the Jury to the nature of that evidence, and in advising them to accept it with great caution, did all that the law required him to do, and the verdict of the Jury on the facts cannot be disturbed. The appeals must be rejected.

The 19th December 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Conviction.**

*Referred under Section 434, Code of Criminal Procedure, and Circular Order No. 18, dated 15th July 1863.*

Sameerooddeen and others.

Where the evidence for the prosecution was not taken, the prisoner was held to have been illegally convicted.

*Kemp, J.*—THE sentence passed by the Deputy Magistrate must be quashed.

The evidence for the prosecution was not taken, and the defendant has been convicted illegally.

We pass no opinion on the question whether compensation could be awarded to the complainant under Section 44 of the Code of Criminal Procedure had the conviction been a legal one, inasmuch as it is not so.

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The 19th December 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Evidence—Accomplice.**

*Referred under Court's Circular No. 17 of the 17th June 1863.*

Sheikh Bechoo.

A person may call the woman with whom he is accused of having had sexual intercourse as a witness on his behalf.

A person is not, by reason of being an accomplice, disqualified from giving evidence either for or against a prisoner.

*Kemp, J.*—WE are of opinion that in this case the prisoner ought to have been allowed to call the woman with whom he was accused of having sexual intercourse as a witness on his behalf. She was not an accomplice, but, even if so, a person is not, by reason of being an accomplice, disqualified from giving evidence either for or against a prisoner.

As, therefore, evidence has been improperly rejected, the sentence is contrary to law, and, acting under the powers conferred upon us by Section 405 of the Code of Criminal Procedure, we order the present conviction to be annulled, and a new trial to be had.

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The 19th December 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**House-breaking—Theft—Cumulative sentence.**

*Referred under Section 434, Act XXV. of 1861, and Circular Order No. 18, dated 15th July 1863.*

Mussahur Daoudh.

Theft is the sequel of, and cannot be separated from, house-breaking. A cumulative sentence of 3 years' imprisonment was held to be illegal in such a case.

*Kemp, J.*—WE agree with the Sessions Judge that the Deputy Magistrate was wrong in separating the offences in this case. The theft was the sequel of the house-breaking, and cannot be disconnected from the latter offence. The cumulative sentence of three years is illegal, as the Deputy Magistrate was competent to sentence for a term of two years only for the offence of house-breaking.

The conviction is amended, and the sentence altered to one of two years instead of three years' rigorous imprisonment.

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The 21st December 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**False evidence—Written reports of depositions.**

Queen *versus* Kally Churn Gangooly, *Appellant.*

*Committed by the Assistant Commissioner, and tried by the Judicial Commissioner of Assam, on a charge of false evidence.*

In a case of false evidence, reading extracts from the alleged conflicting statements of the prisoner is not sufficient to enable the Jury to form a fair opinion on the

question. The whole of the deposition given on each occasion ought to be laid before the Jury.

Written reports of depositions are not evidence, except in the case provided for by Section 369 of the Code of Criminal Procedure.

*Kemp, J.*—In this case we think there has been an error in law in two respects.

The whole evidence laid before the Jury consisted of a short extract from the prisoner's evidence on a charge of bribery before the Magistrate, and another short extract from the prisoner's evidence on the same charge before the Sessions Judge.

We think that it is impossible for a Jury to form a fair opinion on the question of how far the statements are conflicting by simply reading these extracts, and that the whole deposition given on each occasion ought to have been laid before them.

We also observe that the words used by the prisoner on the two occasions were proved by the production of extracts from the examinations as taken down in writing, and attested by the Magistrate and Sessions Judge respectively. But such written reports of depositions are not evidence, except in the case provided for by Section 369 of the Criminal Procedure Code.

We, therefore, reverse the sentence, and order the prisoner to be discharged.

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The 21st December 1866.

*Present:*

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Jurisdiction—Fine—Mischief (Destruction of land-marks).**

Miscellaneous Case.

Queen *versus* Moorut Loll and others.

The Joint Magistrate was held not competent to direct under Section 44 of the Code of Criminal Procedure that a portion of a fine inflicted under Section 434 of the Penal Code be paid to an Ameen for the purpose of paying the expense of his deputation to restore the land-marks which had been destroyed by the opposite party.

*Kemp, J.*—We have heard the pleaders for the petitioner, and, without calling upon the other side, we are clearly of opinion that the Sessions Judge was right in amending the order of the Joint Magistrate under the provisions of Section 419 of the Code of Criminal Procedure.

The Joint Magistrate was not competent to direct, under Section 44 of the said Code, that a portion of the fine inflicted under Section 434 of the Indian Penal Code be paid to an Ameen, for the purpose of paying the expense of his deputation to restore the land-marks which had been destroyed by the opposite party.

Under Section 44, the fine or a portion of it can only be paid to the person who has suffered by the offence, or as compensation for expenses incurred in prosecuting the case.

The order to appoint an Ameen to lay down a boundary was illegal, and the Sessions Judge was quite right in reversing that order.

The application is rejected.

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The 22nd December 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, *Judge.*

**Recognizances to keep the peace.**

Miscellaneous Case.

*Petition of Birreshuree Pershad and another.*

It should appear on the face of a Magistrate's order that he had received credible information that the persons ordered to enter into their recognizances were likely to commit a breach of the peace, or to do any act that might probably occasion a breach of the peace.

*Peacock, C. J.*—It does not appear, on the face of the Magistrate's order, that he had received credible information that the persons ordered to enter into their recognizances were likely to commit a breach of the peace, or to do any act that might probably occasion a breach of the peace. Neither the facts stated on the face of his order, nor those which are stated in his letter of 29th November 1866, are tantamount to such credible information; nor does it appear that these persons had been convicted of any of the offences specified in Section 280 of the Code of Criminal Procedure.

The order is, therefore, not warranted by Section 280 or Section 282 of the Code of Criminal Procedure, and must be quashed, and the recognizances cancelled.

The 22nd December 1866.

*Present*:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

**Tender of pardon—Section 209, Code of Criminal Procedure.**

Queen *versus* Chundee Churn Banerjee.

*Committed by the Deputy Commissioner, and tried by the Judicial Commissioner of Assam, on a charge of giving a gratification to a Police Officer inducing him thereby to screen an offender from legal punishment.*

A Magistrate is competent to tender a pardon to any person. The fact of such party being directly or indirectly concerned in the offence does not preclude him from being admitted as a witness for the Crown under Section 209 of the Code of Criminal Procedure.

*Kemp, J.*—THIS prisoner was tried by Jury. The pleader for the prisoner objects to the conviction on two grounds:—

*1st.*—That the witness, Serjeant White, ought not to have been admitted to give evidence for the prosecution under Section 209 of the Code of Criminal Procedure, inasmuch as he was a party implicated in the offence.

*2nd.*—That there was no legal evidence against the prisoner, and consequently that there has been a misdirection to the Jury.

On the *first* point we are of opinion that a Magistrate is competent to tender a pardon to any person, and that the fact of such party being directly or indirectly concerned in the offence does not preclude him from being admitted as a witness for the Crown under the provisions of Section 209 of the Code of Criminal Procedure. On the *second* point there was clearly legal evidence to go before the Jury. The witnesses Radha Chundra and the constable speak directly to the participation of the prisoner in the offence with which he is charged, and the Jury chose to believe this evidence.

The Court, therefore, seeing no reason to interfere, reject the appeal.

**The words "for that purpose" in Section 175, Code of Criminal Procedure, refer only to binding witnesses to give evidence.**

No. 494.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to the Sessions Judge of Beerbhoom, dated Calcutta, the 19th June 1866.*

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble C. B. Trevor, H. V. Bayley, J. P. Norman, and L. S. Jackson, *Judges*.

SIR,—I AM directed to acknowledge the receipt of the Tabular Statement submitted by you, dated the 7th April last, in which is referred, for the Court's decision, the question whether the words "for that purpose" in Section 175 of the Code of Criminal Procedure refer only to binding witnesses to give evidence or to all the purposes for commitment, such as ordering the Police to serve processes against witnesses and accused persons and the like, and in reply to state that the Court agree with you in opinion, that the reference is only to the binding over persons to give evidence. On any other supposition, the power of summoning witnesses would appear to have been conferred on a Court of Session twice over, *viz.*, by Section 172 and also by Section 175 of the Code of Criminal Procedure.

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**Punishment for Dacoity.**

*Extract (para. 2) of Letter No. 520, dated the 29th June 1866, from the Officiating Registrar of the High Court of Judicature at Fort William in Bengal.*

2. THE Court observe that the sentence of 4 rupees fine passed upon the prisoners 5, 9, 17, 21, 13, 14, 25, 26, 28, 46, 47, 53, 61, 62, 63, 65, 80, 81, and 83, in the case of Bhojoo and others (Case 41. Statement 4) is illegal, as the punishment for dacoity under Section 395 of the Indian Penal Code is transportation or rigorous imprisonment and fine, but not fine alone.

**Verdict of Jury not necessary when prisoner pleads guilty.**

*Extract (para. 3) of Letter No. 520, dated the 30th June 1866, from the Officiating Registrar of the High Court of Judicature at Fort William in Bengal.*

3. THE Court observe that the prisoner Nundo Lall Aheer (Case 4, Statement 4) having pleaded guilty, the Additional Judge should not have taken the verdict of the Jury. It is only when the prisoner claims to be tried (Section 362 of the Code of Criminal Procedure) that the verdict of the Jury is required.

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**Cancelment of judgment on the appeal of Buloram Doss.**

No. 521.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to the Sessions Judge of Bhaugulpore, dated Calcutta, the 30th June 1866.*

*Present:*

The Hon'ble G. Loch and F. A. Glover, *Judges*.

SIR,—WITH reference to your letter No. 14, dated 10th January last, and the correspondence which has taken place subsequently, regarding the orders passed by the High Court on the 6th November 1865 on the appeal of Buloram Doss,* I am directed to state that, having re-perused the papers in the case, the Court have come to the conclusion that they mis-read the latter part of your judgment passed on appeal. Both the Judges before whom the case came understood the words contained in the last paragraph but one of your judgment to convey the meaning that sentence was passed by the Joint Magistrate after further evidence had been taken.

2. The Court desire me to express their regret for the mistake which has occurred; and they cancel their judgment by which the sentence passed by you was held to be illegal.

* Published in Vol. IV., p. 20.

**Kidnapping—Meaning of Section 368, Penal Code—Convictions under Sections 363, 366, and 368—Substitution of Transportation for Imprisonment.**

*Extract (paras. 2 and 3) of Letter No. 555, from the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, dated the 9th July 1866.*

2. THE Court agree with you in your concluding remarks in the case of Sheikh Oozeer (Case 3, Statement 4) as to the meaning of Section 368 of the Penal Code, which evidently refers to some other party who assists in concealing any person who had been kidnapped, and does not refer to kidnappers. You should have explained this to the Jury, which you do not appear to have done.

3. I am to point out that the prisoner in the same case should not have been convicted and sentenced under Sections 363, 366, and 368 of the Penal Code, but only under Section 366, the gravest charge of the three. As, however, the sentence is not beyond that which you are authorized to inflict under the Section last mentioned, the Court will not interfere. But, with reference to the form in which you have recorded sentence, first awarding rigorous imprisonment, and then commuting it to transportation, I am to point out that the correct mode of proceeding is to sentence the offender to transportation, mentioning at the same time that, under Section 59 of the Indian Penal Code, it is awarded instead of imprisonment.

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**Use of the term "Perjury" prohibited.**

No. 558.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, dated Calcutta, the 9th July 1866.*

IN acknowledging the receipt of your Sessions Statements for May last, I am directed to point out, with reference to the charges against Thugin Coolini and others (Case 8, Statement 4), that "perjury" is not a term used in Section 193 of the Penal Code, and that you, therefore, should not use it in future, but adhere closely to the phraseology of the law in the mode prescribed by Section 234 of the Code of Criminal Procedure.

**Previous convictions when to be considered—Evidence of character against person charged with Theft in a building.**

*Extract (paras. 2 and 3) of Letter No. 593, from the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, dated the 18th July 1866.*

2. THE Court observes, with reference to the charge against Bhagoman Sheikh (Case 11, Statement 4), that previous convictions should neither be a subject of charge, nor should they be mentioned in the address to the Jury, the former course being irregular, and the latter calculated to bias the minds of the Jury against the accused; but that they should, after conviction, be considered in determining the measure of punishment to be awarded.

3. I am to add that the charge against the prisoner in the same case is committing theft, a particular theft in a building, and that in such a case it is not competent to the prosecutor, in the first instance, to give evidence of character with a view of raising presumptions disadvantageous to the prisoner, though, if the accused set up his character as an answer to the charge against him, the prosecutor may meet his case either by cross-examination or by contradictory testimony.

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**Forgery of a Kuboolent how to be charged.**

No. 594.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, dated Calcutta, the 18th July 1866.*

IN acknowledging the receipt of your Sessions Statements for March last, I am directed to state that, a kuboolent being a valuable security as described in Section 30 of the Penal Code, the charge against Kashee Chunder Dutt (Case 4, Statement 4) should have been under Section 467 of that Code. The charge should, under Section 244 of the Code of Criminal Procedure, have been amended by you.

**Verdict in a case of causing Miscarriage charged under different Sections on identical facts.**

No. 595.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, dated Calcutta, the 18th July 1866.*

In acknowledging the receipt of your Sessions Statements for May last, I am directed to state that, in the 3rd and 4th heads of the charge against Surat Mundle (Case No. 1, Statement 4), the facts in evidence which substantiate the offence under Sections 328 and 312 of the Penal Code are identical, as far as they go, with those that establish the offence under Section 314 in the second head of the charge. Consequently, under Para. 1 of Circular No. 16, dated the 20th August 1864, I am to observe that the verdict of *not guilty* should have been recorded on the 3rd and 4th heads of the charge.

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**Opinion of Assessors not necessary when a prisoner pleads guilty.**

*Extract (para. 2) of Letter No. 599 from the Registrar of the High Court of Judicature at Fort William in Bengal, dated the 19th July 1866.*

2. The Court observe that, the prisoners Alfoo Sheikh and others (Case No. 1, Statement 4) having pleaded guilty, you should not have submitted the case for the opinion of the Assessors. It is only when accused persons refuse to plead or claim to be tried (Section 363 of the Code of Criminal Procedure) that the opinion of Assessors is required.

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**Police Reports not evidence—Confession as Queen's evidence not a ground for conditional pardon—Modification of sentence of whipping.**

*Extract (paras. 2, 3, and 4) of Letter No. 1334 from the Officiating Registrar, High Court, dated the 29th September 1866.*

2. With reference to the remark contained in the judgment of the Deputy Commissioner in the case of Aurjoon Bowree Chowkeedar (Case No. 673, Statement 4) that "the identification of six of the prisoners is fully borne out by the Police Reports," I am to draw your attention to Section 154 of the Code of Criminal Procedure, from which it will be seen that Police Reports are not evidence except against the Officer making them.

3. With advertence to the remarks contained in your judgment in the case of Chundoo Manjee Sonthal (Case No. 692, Statement 4), that, on noticing a tendency on the part of the prisoners to deny their Mofussil confessions, the Deputy Commissioner "admitted two of them who did confess as Queen's evidence," the Court observe that this is not a ground for conditional pardon under Section 209 of the Code of Criminal Procedure.

4. In conclusion, I am to observe that the Deputy Commissioner was not competent to modify the sentence passed by him on the prisoners Doola Sonthal and Lera Sonthal (Case No. 692; Statement 4) from 30 to 15 strokes of a ratan; he could, however, have changed it to imprisonment or fine under Section 12, Act VI. of 1864.

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**Medical Report not evidence.**

*Extract (para. 2) of Letter No. 1336 from the Officiating Registrar, High Court, dated the 29th September 1866.*

2. With advertence to the remark contained in your judgment in the case of Gopal Roy (Case No. 5, Statement 4), that "it is certain from the medical report that Dhowul received a severe cut on the leg," the Court observe that the medical "report" proves nothing, not being evidence. On this point your attention is drawn to Section 368 of the Code of Criminal Procedure.

**Procedure for refund of fine paid as compensation, on reversal of award.**

No. 1368.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to the Sessions Judge of Cuttack, dated Calcutta, the 3rd October 1866.*

(Criminal Side.)

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice.*

SIR,—With reference to your letter No. 365, dated the 4th ultimo, I am directed to state that it appears to the Court that there is no mode of compelling a person, to whom a fine has been paid as compensation awarded under Section 44 of the Code of Criminal Procedure, to refund the same on the reversal of the award.

2. The proper course in cases like this is, as enjoined in Circular Order No. 102, dated 16th June 1862, to hold the amount of fine for two months, which will cover the time allowed for appealing. If an appeal be preferred, the Appellate Court may, under Section 421 of the Code of Criminal Procedure, order the sentence to be suspended as to paying over the fine to the party injured until after the decision of the appeal. The Court of first instance should always, when an order for payment of the fine to the party injured has been made, call the attention of the Appellate Court to the fact, so that the order for payment over may be suspended.

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**Procedure on plea of guilty.**

*Extract (para. 2) of Letter No. 1403 from the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, dated 6th October 1866.*

THE Court observe that, the prisoner Neamut (Case No. 11, Statement 4) having pleaded guilty, you need not have submitted the case for the opinion of the Assessors, which is only required in cases *tried* with their aid; but you should have at once recorded the plea and convicted the accused person thereon as enjoined in Section 362 of the Code of Criminal Procedure.

**Abetment—Previous good character in the case of Murderers—Abetment without knowledge of commission of Murder.**

*Extract (paras. 3, 7, and 8) of Letter No. 1410 from the Officiating Registrar of the High Court, dated 9th October 1866.*

3. WITH reference to the second head of the amended charge against Mussamut Sullee (Case No. 3, Statement 4), the Court observe that, if the abetment charged was committed by keeping watch at the door when the murder was being committed, the prisoner should have been charged under Section 114 of the Penal Code, not under Section 109, for it could hardly be said that the murder took place in *consequence* of such abetment. This remark, *mutatis mutandis*, applies equally to the charge in Case No. 11, Statement 4, Bheem Purdhan and others.

7. With advertence to the remark contained in your judgment in the case of Bheem Purdhan and others (Case No. 11, Statement 4), that it would not be right to sentence all the prisoners to a capital punishment for the murder of the deceased, "*considering the character borne by him*," I am directed to state that this fact had nothing to do with the guilt of the murderers.

8. With reference to the further remark contained in your judgment in the same case that, as "the prisoners knew nothing "of the murder until after it had been com-"mitted, it is impossible to say that the act "was committed in consequence of any "thing done by them, and that, therefore, "they cannot be found guilty under Sections "109 and 302 of the Penal Code," the Court observe that they should have been charged under Section 301 of the Indian Penal Code, and that you might have amended the charge accordingly.

**Tender of pardon by Magistrates.**

No. 1585.

*From the Registrar of the High Court of Judicature at Fort William in Bengal, dated Calcutta, the 11th December 1866.*

(Criminal Side.)

*Present:*

The Hon'ble C. B. Trevor, *Judge.*

SIR,—Having laid before the Court your letter No. 47, dated the 15th October last, and its enclosures, relative to the trial of Fukir Mahomed and others, from which it appears that the Magistrate gave a purwanah to the Police authorizing the offer of a pardon to any of the dacoits in the case who would confess and give up the names of his accomplices, I am directed to state that the Magistrate had no authority to act as he did—that his powers, as to pardon, are limited by the express terms of Section 209 of the Code of Criminal Procedure, which require that the pardon shall be directly tendered by the Magistrate to any person or persons before him supposed to have been implicated, either directly or indirectly, in the particular offences, or privy to the same, on certain conditions, and that he shall record his reasons for tendering the pardon.

2. Under these circumstances I am to request that you will instruct the Magistrate to desist from issuing any such illegal purwanahs in future.

3. The enclosures which accompanied your letter No. 45, dated the 11th October, are herewith returned.

# CIVIL CIRCULAR ORDERS OF THE HIGH COURT.

**Rules regarding Pleaders' Fees circulated for the guidance of Civil Judges.**

CIRCULAR No. 22.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, dated Calcutta, the 13th June 1866.*

(Civil Side.)

*Present:*

The Hon'ble C. B. Trevor, *Judge.*

THE accompanying Rules* passed by the High Court under Section 37, Act XX. of 1865, are hereby circulated for the guidance of the Civil Judges subordinate to them, in all proceedings held on and after the 1st July ensuing, from which date† the law above mentioned will come into operation.

2. The Court expect that Civil officers will invariably act up to the letter and spirit of the Rules now forwarded.

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**Printed Forms on stamped paper of Certificates to be issued to Pleaders and Mooktears, obtainable at the District Treasuries.**

CIRCULAR No. 23.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, dated Calcutta, the 15th June 1866.*

(Civil Side.)

*Present:*

The Hon'ble C. B. Trevor, *Judge.*

I AM directed by the Court to inform you that arrangements have been made with the Superintendent of Stamps and Stationery to supply District Treasuries with printed forms, on stamped paper of the required values, of the Certificates to be issued to Pleaders and Mooktears under Section 10, Act XX. of 1865.

2. I am to request that you will cause this fact to be published throughout your district for the convenience of parties who may wish to provide themselves with the forms, that they are obtainable at the different local treasuries.

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CIRCULAR No. 24.

(*Not yet issued.*)

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**Exemption of Syud Sufder Ali Khan of Moorshedabad from personal attendance in the Civil Courts.**

CIRCULAR No. 25.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to the Civil Authorities in the Lower Provinces, dated Calcutta, the 6th July 1866.*

(Civil Side.)

*Present:*

The Hon'ble C. B. Trevor, *Judge.*

THE accompanying copy of Government letter No. 3436, dated the 25th ultimo, exempting Syud Sufder Ali Khan of Moorshedabad from personal attendance in the Civil Courts of Lower Bengal, is hereby circulated for general information and guidance.

No. 3436.

*From the Officiating Under-Secretary to the Government of Bengal, to the Registrar, High Court, Bengal, dated Fort William, 25th June 1866.*

(Judicial.)

I AM directed to request that, with the permission of the Hon'ble Judges of the High Court, you will have the goodness to include the name of Syud Sufder Ali Khan of Moorshedabad in the list of persons who have been exempted from personal attendance in the Civil Courts under the provision of Section 22, Act VIII. of 1859.

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* Already printed in Vol. V., under the head "Rules of Practice."—*See* page 15.

† *Vide* Act XXIX. of 1865.

**Calling attention to the revised rules for the transmission of Official Correspondence under the new Post Office Act, XIV. of 1866.**

CIRCULAR No. 26.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Authorities, dated Calcutta, the 9th July 1866.*

(Civil Side.)

*Present:*

The Hon'ble C. B. Trevor, *Judge.*

THE attention of all Civil Judges subordinate to the High Court is drawn to the revised rules for the transmission of Official Correspondence under the New Post Office Act (XIV. of 1866), published in the Notification of the Home Department, No. 567, dated 4th May last,* and they are requested to give effect to the instructions of the Government of India from the 1st August next.

* *Vide Calcutta Gazette* for 1866, pp. 1015-16.

2. With reference to the list of *Privileged Offices* appended to the rules, it will be seen that the instructions contained in paragraphs 2, 3, 4, 5, and 6 of the Notification do not apply at all to the Offices of Civil Judges subordinate to this Court, who will only need to be guided by the rules embodied in the remaining paragraphs which have been reproduced as an appendix to the present Circular. These paragraphs refer to the *three* following classes of Official covers:—

*First.*—(Paras. 7, 8, 9) to those addressed to the Registrar of the High Court or to other Privileged Offices. In regard to such covers, the only point requiring the attention of officers corresponding with them is, that each cover will bear, in place of the present frank, the full signature and designation of the officer by *whom it is despatched*, as well as the official designation of the office to which it is directed.

*Second.*—(Paras. 10, 11, 12, 13, and 14) to covers not sent by or to a Privileged Office. Such covers will be superscribed in the same manner as those of the preceding class; but they will bear in addition *postage labels marked with the word* "Service," Service labels will be procurable at the local Treasuries or Stamp Depôts, and Civil Judges are required to make immediate arrangements for supplying themselves with a number sufficient for a month's use in respect of covers addressed by them to offices not privileged or beyond the limits of their own districts. The supply will have to be renewed every successive month.

*Third.*—(Para. 15) to correspondence between Local Officials within the same district. No change is made in existing arrangements for such correspondence.

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*Extract from a Notification from Home Department, Simla, No. 567, dated the 4th May 1866.*

*Official covers addressed to a Privileged Office.*

*Para.* 7.—OFFICIAL covers addressed to a Privileged Office by any Office not included in the Privileged List must be endorsed "On Her Majesty's Service only," under the full signature and Official designation of the person by whom they are despatched.

8. The address must include the Official designation of the Office to which the cover is directed.

9. The Official covers for each Office will be enclosed in the Official bag, and sealed and sent out with the ordinary delivery, or given to the messenger of the Office, should one be in attendance.

*Official covers not sent by, or addressed to, a Privileged Office.*

*Para.* 10.—Official covers, which are not sent by, or addressed to, a Privileged Office, will be treated in all respects like private covers. Postage labels, marked with the word "Service," will be made available for the pre-payment of such covers.

11. Service labels are never to be used in payment of the postage of any letter which is not *bonâ fide* and exclusively on Her Majesty's Service. Every cover prepaid by Service labels must be endorsed "On Her Majesty's Service only," under the full signature and official designation of the person by whom it is despatched. The address must also include the Official designation of the Office to which it is directed. If the above conditions be not observed,

covers (even though stamped with service labels) will be treated as ordinary unpaid covers.

12. Service labels will be procurable at the Treasury or Local Stamp Depôt of each District; Officers requiring such labels will purchase the number required, paying for the same in cash as if they were ordinary postage labels. A receipt for the amount to be given by the Officer in charge of the Stamp Depôt will serve as a voucher for the charge to be made in the Contingent Bill of the purchaser.

13. As the present supply of Service labels is limited, no Public Officer should purchase more than he estimates will be sufficient for one month's supply; and it is to be remembered that Service labels are to be attached to letters addressed to, or despatched from, any Privileged Office.

14. All Officials who do not belong to Privileged Offices, and who have Official correspondence with other than Privileged Offices, will have to make arrangements for supplying themselves with Service labels either by direct purchase or through their Departmental superiors.

*Correspondence of Local Officials within the limits of their respective Districts.*

*Para. 15.*—For the present, no charge will be made in the arrangements under which the public correspondence of local Officials is conveyed, within the limits of their respective Districts, by District Post, or by General Post.

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*List of Public Offices with which the Post Office will keep accounts of postage on Official letters received and despatched, and for which Official bags will be made up.*

1. Accountant-General, or Deputy Accountant-General in a Presidency or Province.
2. Accountant-General, Public Works Department.
3. Adjutant-General.
4. Army Clothing Superintendent.
5. Board of Revenue.
6. Brigade Major on Station Staff.
7. Chief Engineer and Secretary, Public Works Department.
8. Chief Inspector of Musketry.
9. Commissary General.
10. Commissary of Ordnance.
11. Commissioner of Divisions.
12. Consulting Engineer.
13. Controller-General of Accounts.
14. Controller-General, Military Expenditure.
15. Controller of Military Accounts.
16. Controller of Public Works Accounts.
17. Customs Commissioner.
18. Deputy Inspector-General of Ordnance.
19. Director of Public Instruction.
20. Electric Telegraph Office, Calcutta.
21. Examiner of Commissariat, Stud, and Clothing Accounts.
22. Examiner of Medical Accounts.
23. Examiner of Ordnance.
24. Examiner, Pay Department.
25. Financial Department, Secretary's Office.
26. Foreign Department ditto.
27. Gazette, Official, Superintendent.
28. Geological Survey Superintendent.
29. Home Department, Secretary's Office.
30. India Office, London.
31. Inspector-General of Forests.
32. Inspector-General of Hospitals.
33. Inspector-General of Jails.
34. Inspector-General of Ordnance.
35. Inspector-General of Police.
36. Inspector-General of Military Works.
37. Judge Advocate-General.
38. Legal Affairs, Superintendent and Remembrancer.
39. Principal Medical Store-keeper.
40. Military Accountant.
41. Military Department, Secretary's Office.
42. Mint Master, and Head Commissioner or Commissioner for the issue of Paper Currency at the Presidency.
43. Post Office.
44. Presidency Pay Office.
45. Principal Inspector-General, Medical Department.

46. Private Secretary to Governor or Lieutenant-Governor.

47. Private Secretary to Viceroy.

48. Public Works Department, Secretary's Office.

49. Quarter-Master General.

50. Registrar to Archdeacon.

51. Registrar of High Court.

52. Resident and Political Agent.

53. Secretariat of Local Government or Administration.

54. Secretary to Commander-in-Chief.

55. Secretary to Commander-in-Chief of Her Majesty's Naval Forces.

56. Secretary to the Bishop.

57. Superintendent of Stamps and Stationery.

58. Superintending Engineer.

59. Surveyor-General.

60. Superintendent, Great Trigonometrical Survey.

61. Superintendent, Revenue Surveys.

62. Superintendent-General of Vaccine.

63. Superintendent-General of Irrigation.

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**Procedure when offence committed in or before Civil Court falls under two or more heads.**

CIRCULAR No. 27.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil and Criminal Authorities (including Judges of Small Cause Courts), Lower Provinces, dated Calcutta, the 10th July 1866.*

(Civil and Criminal Side.)

*Present:*

The Hon'ble C. B. Trevor, *Judge.*

THE Court are pleased to direct that, when an offence has been commited in or before a Civil Court, and it appears to the presiding Judge that the charge falls under two or more heads, all of which are not triable by a Court of Session exclusively, the Civil Court shall proceed under Section 171, rather than under Section 173, of the Code of Criminal Procedure; that is to say, in place of completing the investigation itself with a view to commitment, it shall send the case for investigation to any Magistrate having power to try, or commit for trial, the accused person for the offence charged.

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**Erratum in Rules regarding Pleader's Fees.**

CIRCULAR No. 28.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, dated Calcutta, 20th July 1866.*

(Civil Side.)

*Present:*

The Hon'ble C. B. Trevor, *Judge.*

ALL Civil Judges are hereby requested to make the following correction of a clerical error in the English and Vernacular copies of the Rules which were circulated with Circular Order No. 22, dated the 13th June 1866. In the last Clause of Rule 8th, the words "Section 53 or 54 of Act XX. of 1865" should be read "Section 53 or 55 of Act XX. of 1866;" the allusion being, not to the "Pleaders,' Mooktars,' and Revenue Agents' Act, 1865," but to the "Indian Registration Act, 1866."

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**Resignation of Baboo Gourhury Bose as a Pleader of the High Court, and the loss of his sunnud.**

CIRCULAR No. 29.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, dated Calcutta, 7th August 1866.*

(Civil Side.)

*Present:*

The Hon'ble C. B. Trevor, *Judge.*

I AM directed to inform you that Baboo Gourhury Bose, late a pleader of this Court, has resigned the office of Pleader, and that his resignation was accepted on the 20th of April last. As he has been unable to return his sunnud by reason of its having been lost, the Court requests that, should it ever happen to be presented before you, you will forward it to the Court accompanied by a statement of the particulars regarding its presentation with as little delay as possible.

**Revised list of Public Offices with which the Post Office will keep accounts of Postage, &c.**

CIRCULAR No. 30.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Authorities, dated Calcutta, the 11th August 1866.*

(Civil Side.)

*Present:*

The Hon'ble C. B. Trevor, *Judge.*

THE attention of all Civil Judges subordinate to this High Court is drawn to the following revised list of Public Offices published by the Home Department* in supersession of that notified on the 4th May last, and they are requested to cause it to be substituted for the list appended to Circular Order No. 26, dated the 9th ultimo.

* Notice No. 2957, dated 20th July 1866.

*List of Public Offices with which the Post Office will keep accounts of postage on Official letters received and despatched, and for which Official bags will be made up.*

1. Accountant-General, or Deputy Accountant-General, in a Presidency or Province.
2. Accountant-General, Public Works Department.
3. Adjutant-General and Assistant Adjutant-General of Division.
4. Army Clothing Superintendent.
5. Board of Revenue or Financial Commissioner.
6. Brigade Major or Station Staff.
7. Chief Commissioner and Personal Secretary.
8. Chief Engineer and Secretary, Public Works Department.
9. Chief Inspector of Musketry.
10. Commander-in-Chief, and Military Secretary to ditto.
11. Commissary-General.
12. Commissary of Ordnance.
13. Commissioner of Division of Revenue and Settlement.
14. Consulting Engineer.
15. Comptroller-General of Accounts.
16. Controller-General, Military Expenditure.
17. Controller of Military Accounts.
18. Controller of Public Works Accounts.
19. Customs Commissioner.
20. Deputy Inspector-General of Ordnance.
21. Deputy Inspector-General of Hospitals.
22. Director of Public Instruction.
23. Electric Telegraph Office.
24. Examiner of Commissariat and Stud Accounts.
25. Examiner of Medical Accounts.
26. Examiner of Ordnance, Barracks, Clothing, and Regimental Necessaries' Accounts.
27. Examiner, Pay Department.
28. Financial Department, Secretary's Office.
29. Foreign Department, ditto.
30. Gazette, Official, Superintendent.
31. General Superintendent for the Suppression of Thuggee and Dacoity.
32. Geological Survey, Superintendent.
33. Governor-General and Governor, and Private or Military Secretary to ditto.
34. Home Department, Secretary's Office.
35. India Office, London.
36. Inspector-General or Conservator of Forests.
37. Inspector-General of Hospitals.
38. Inspector-General of Jails.
39. Inspector-General of Ordnance.
40. Inspector-General of Police.
41. Inspector-General of Military Works.
42. Judge Advocate-General.
43. Legal Affairs, Superintendent and Remembrancer.
44. Lieutenant-Governor, and Private Secretary to ditto.
45. Principal Medical Store-keeper.
46. Military Accountant.
47. Military Department, Secretary's Office.

48. Mint Master, and Head Commissioner, or Commissioner for the Issue of Paper Currency at the Presidency.

49. Post Office.

50. Presidency Pay Office.

51. Principal Inspector-General, Medical Department.

52. Public Works Department, Secretary's Office.

53. Quarter-Master General.

54. Registrar to the Diocese.

55. Registrar of the High Court.

56. Registrar-General of Assurances.

57. Resident and Political Agent.

58. Secretariat of Local Government or Administration.

59. Secretary to Commander-in-Chief of Her Majesty's Naval Forces.

60. The Bishop.

61. Superintendent of Stamps and Stationery.

62. Superintending Engineer.

63. Surveyor-General.

64. Superintendent, Great Trigonometrical Survey.

65. Superintendent and Commissioner of Survey.

66. Superintendent-General and Superintendent of Vaccine.

67. Superintendent-General and Chief Engineer of Irrigation.

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**All covers sent by post to the High Court, to be addressed to the Registrar, Appellate Side.**

CIRCULAR No. 31.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil and Criminal Authorities subordinate to the High Court, dated Calcutta, the 14th August 1866.*

(Civil and Criminal.)

*Present:*

The Hon'ble C. B. Trevor, *Judge.*

WITH reference to the instructions recently issued by the Director-General of Post Offices to Officers of that Department, and cited on the margin for facility of reference, it is hereby requested that all covers sent by post to this Office on Her Majesty's Service be addressed *to the Registrar of the High Court, Appellate Side,* even when they contain letters addressed to the Deputy Registrar or parcels made up of judicial proceedings.

"At the Presidency Post Offices, the Clerk in charge, and at other Post Offices, the Post-Master, will be held responsible that no letter from a Public Office is allowed to pass as official *paid* which is not properly signed or stamped and endorsed by the Certifying Officer, and that *no letter is sent to any Public Office unless it is addressed to the official designation of the principal of the office,* and is certified by the signature of the sender as on Her Majesty's Service. Letters irregular in these respects will be treated as ordinary correspondence, and charged with the full rate of letter postage."

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**Pleaders' Fees in Mofussil Small Cause Courts.**

CIRCULAR No. 32.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all the Judges of Courts of Small Causes in the Mofussil, dated Calcutta, the 15th August 1866.*

(Civil Side.)

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble C. B. Trevor, G. Loch, H. V. Bayley, J. P. Norman, F. B. Kemp, W. S. Seton-Karr, L. S. Jackson, S. N. Pundit, G. Campbell, E. Jackson, A. G. Macpherson, J. B. Phear, and W. Markby, *Judges.*

ALL Judges of Courts of Small Causes constituted under Act XI. of 1865 are hereby informed that the Rules prescribed by the High Court in pursuance of Section 37 of Act XX. of 1865, and published in every issue* of the *Calcutta Gazette* for July 1866, so far as they are applicable, extend to Courts of Small Causes.

* *Vide* Nos. of the *Gazette,* dated 4th, 7th, 11th, 18th, and 25th.

The following special Rule is laid down for Small Cause Courts in the Mofussil:—

RULE 8A.

The amount in respect of the fee of an adversary's pleader, when allowed in any Miscellaneous proceeding or for any other matter than that of appearing, acting, or pleading in a suit prior to decree, shall be fixed by the Court according to the following scale, *viz.:*—

One rupee to 6 rupees in proceedings connected with costs not exceeding Rs. 500 in value.

The above scale will apply to applications under Section 53 or 55 of the Indian Registration Act, XX. of 1866.

**In what Courts Pleaders holding Certificates under Act XX. of 1865 are entitled to appear, &c.**

CIRCULAR No. 33.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Judges in the Lower Provinces, dated Calcutta, the 23rd August 1866.*

(Civil Side.)

*Present:*

The Hon'ble C. B. Trevor, *Judge.*

It is hereby notified that a pleader, whether of the senior or of the junior grade, holding a certificate under Act XX. of 1865 and the High Court's Rules of the 2nd May last, is not restricted by such certificate to any particular Court, or to a single district; but is entitled to appear, plead, and act in any Court, subject to the jurisdiction of the High Court, included within the class of Courts covered by his certificate: in other words, in any Court, in whatever district, situated, falling within the particular Clause (*a*, *b*, *c*, or *d*) of Section 10, Act XX. of 1865, to which his certificate relates.

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**Cases of execution of decree to be separately shown in the Monthly Statements, Nos. 2 and 3.**

CIRCULAR No. 34.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, dated Calcutta, the 11th September 1866.*

(Civil Side.)

*Present:*

The Hon'ble C. B. Trevor, *Judge.*

To enable it to exercise a more effective supervision over the proceedings of the Civil Courts in cases of execution of decree, the High Court is pleased to direct that a column be inserted in the Monthly Statements, Nos. 2 and 3, showing the number of such cases pending more than three months. Cases pending for more than one year will be separately shown in the column set apart for the purpose; and explanation will be required in regard to all cases pending more than three months. The explanation should invariably mention the date of the last *bond-fide* application in execution, that is, the last application which was followed up by some act done in furtherance of execution, either by the Court or the judgment-creditor.

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**Increase of the Salaries of Ministerial Officers.**

CIRCULAR No. 35.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Zillah and Small Causes Court Judges, dated Calcutta, the 11th September 1866.*

(Civil Side.)

*Present:*

The Hon'ble C. B. Trevor, *Judge.*

I am directed by the Court to forward, for your information, copy of a letter and of its annexure from the Secretary to the Committee appointed for the purpose of reporting on the question of increasing the salaries of Ministerial Officers, and to request that you will submit your returns to the Committee direct.

2.—(*To Zillah Judges alone*) The returns of your subordinates should be submitted through you.

*From the Secretary to the Committee appointed under Orders No. 2181, dated 19th July last, to the Registrar of the High Court, Fort William, the 7th September 1866.*

The Members of the Committee appointed by the Lieutenant-Governor of Bengal, for the purpose of considering and reporting on the question of increasing the salaries of Ministerial Officers attached to the Sudder and Subordinate Courts of Judges in the several districts of Lower Bengal, are desirous of ascertaining, somewhat in detail,

the various duties that are performed by every such Ministerial Officer.

2. I have the honor, therefore, to request that, with the permission of the High Court, you will be so good as to instruct all Judges to submit, for the information of the Committee, a Statement in the form subjoined, requesting the officers who have to submit the statement themselves to superintend the filling in of the Column of Remarks.

3. I have to add that, the sooner the Statements are submitted, the sooner, of course, will the increase of salaries contemplated be effected.

*Statement showing the duties entrusted to each Ministerial Officer employed in the Chief Office of the Judge or Magistrate or Collector of the District of*
*and in the Offices, whether located in the Sudder Station or in Sub-Divisions, subordinate to such Chief Office.*

| Designation of the Officer. | Amount of salary. | Remarks showing the duties entrusted to each Officer. |
|---|---|---|
| | | N. B.—It is not intended that in this column every minute duty that an officer may have to perform shall be entered. It will suffice if it is stated in what department of the office each officer is employed, and what are his duties and his responsibilities generally, so as that the committee may be informed to what degree the officer is trusted, and in what degree his duties require head-work or are merely mechanical, and in what degree his duties require a knowledge of the vernacular only, or of English and of the vernacular also. |

**Remands by Lower Appellate Courts.**

CIRCULAR No. 36.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all District Judges and Principal Sudder Ameens, dated Calcutta, the 12th September 1866.*

(Civil Side.)

*Present:*

The Hon'ble C. B. Trevor, *Judge.*

THE number of cases exhibited in the Periodical Statements, as having been remanded by the Lower Appellate Courts, leads the High Court to doubt whether sufficient regard is commonly had to the provisions of Sections 351 and 352 of the Civil Procedure Code. The Court, therefore, direct me to bring to your notice that by Section 351 a remand may be ordered when the Lower Court has disposed of the case on some preliminary point, *so as to exclude any evidence of fact* which shall appear to the Appellate Court essential to the rights of the parties, and the decision of the Lower Court upon such preliminary point has been reversed in appeal; and also that by Section 352 it is not competent to the Appellate Court to remand a cas[illegible] decision by the Lower Court, exc[illegible]e Courts. vided in the last preceding Sectio[illegible] unless the case has been decided on [illegible] *High* liminary point which [illegible] and that decision has excluded a[illegible] *William in* of fact which is necessary to th[illegible] *Courts of* dation of the rights of the [illegible] *ssil, dated* suit.

2. The High Court also h[illegible] believe that in many instan[illegible] Appellate Courts remand ca[illegible] low on a prelim[illegible] poin[illegible]cock, *Kt., Chief* grounds, even whe[illegible] on'ble C. B. Trevor, G. record is sufficient to [illegible] P. Norman, F. Court to pronounce a [illegible]arr, L. S. Jack- ment in the case. This c[illegible]mpbell, E. Jack- I am to remark, is oppo[illegible] J. B. Phear, and of the Code of Civil P[illegible] cases are frequently re[illegible] of Small Causes Lower Cou[illegible] Act XI. of 1865 are here- issue, or to determine [illegible] informed that the which, in the opinion of the Appe[illegible]ed by the is essential to the right determinat[illegible]n pursu- suit on its merits, and the recon[illegible] 1865, and ficient to enable the Appellate Cou[illegible] termine such issue on questions of fa[illegible]ney are remands, I am directed to observe, [illegible] warranted by law. In such cases Appellate Courts are competent, under Section 354, to frame an issue or issues, and to refer them to the Lower Court for [illegible] The Lower Court is thereupon to proceed to try such issue or issues, and to return to the Appellate Court its finding together with the evidence.

3. If further evidence in the shape of a report of an Ameen, or of any other nature, be required by the Appellate Court, the case should not be remanded for that purpose; but under Sections 355 and 356, the Appellate Court should either require the Lower Court to order the preparation of such reports, or take the evidence required and transmit it to the Appellate Court, or should

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take the evidence if it can be so taken, before itself, the Appellate Court being careful always to record the reasons for the admission of additional evidence.

4. The Court direct very particular attention to these instructions.

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**Regarding the paper to be used for engrossing Memoranda under the Registration Act.**

CIRCULAR MEMO. No. 37.

*Officiating Registrar of the High Judicature at Fort William in gal, dated the 20th September 1866.*

It is (Civil Side.)
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grade, hold *Present:*
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tificate to an'ble C. B. Trevor, *Judge.*
single district;
plead, and act letter is forwarded for the
jurisdiction of the all Civil Judges
within the class of Court:—
certificate: in ot
whatever district, No. 2671.
particular Clause
tion 10, Act XX. ating *Registrar-General,*
tificate relates. *to the Registrar of*
*are at Fort*
*dated Fort William,*
*July 1866.*

Cases of
shown in to your letter No. 2287, dated
instant, I have the honor to say
Memo. A to be despatched by the
courts, under Section 42 of the Registration Act, should, for the current year, be engrossed on hand-laid demy paper, supplies of which can be issued by the Superintendent of Stationery, printed in whatever form may be prescribed by the Court.

In future I shall take measures to have a sufficient supply of hand-laid medium indented for, that all the Registers of this Department may be uniform.

2. As Memoranda forwarded under Section 41 have to be *copied* into the Registers, it does not signify what size or description of paper is issued, but probably foolscap would, for some reasons, be most convenient.

**Particulars to be inserted in Monthly Statements under each subordinate Judicial Officer's name.**

CIRCULAR No. 38.

*To all Civil Judges, dated the 26th September 1866.*

[Requesting that, when submitting their Civil Statements for the current month, they will insert, under each subordinate Judicial Officer's name, the district in which his family residence is situated, and state whether he is well acquainted with English or not.]

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**Costs of Registration of Memoranda.**

CIRCULAR No. 39.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, dated Calcutta, the 29th September 1866.*

(Civil Side.)

*Present:*

The Hon'ble C. B. Trevor, *Judge.*

The rules alluded to in Section 80 of the Indian Registration Act (XX. of 1866) having been framed by the Registrar-General of Assurances, and approved and published* by the Local Government, the Court are pleased, in continuation of para. 10 of Circular Order No. 24, dated 19th June last, to forward Rules 44 and 45 for the information of Judicial Officers of every grade in the Mofussil, and to request their particular attention to the instructions contained therein as to the officer to whom the costs of registration are to be paid on realization.

* *Vide* Notification, dated 12th May 1866, at page 1046 of *Calcutta Gazette* of the 23rd May 1866.

*Rule* 44.—"The costs of registration of Memoranda under this Section will be paid in by the several Courts to the Registrar's Office on realization; the form of Memorandum shall contain a specification of the fee to be levied, and the registration of the Memorandum shall not be delayed till the receipt of the fee."

Section 43.

*Rule* 45.—"A running list of unpaid fees due on registred Memoranda shall be kept up; and on the receipt of any fee, the entry relating to such fee shall be struck out; the total of unpaid fees shall be reported every month to the Registrar-General."

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**Destruction of Records of Small Cause Courts.**

CIRCULAR No. 40.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to Judges of the Small Cause Courts, dated Calcutta, the 2nd October 1866.*

(Civil Side.)

*Present:*

The Hon'ble C. B. Trevor, *Judge.*

THE High Court is pleased to direct the destruction once a year of the records of all cases disposed of in the Courts of Small Causes, in which execution has been completely obtained, or in which three years have passed since the last attempt to execute was made, and when any further execution would be barred by the Law of Limitations. The Summons Book and Register will afford all information that can afterwards be required.

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**Local Investigations by Ameens.**

CIRCULAR No. 41.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, dated Calcutta, the 2nd October 1866.*

(Civil Side.)

*Present:*

The Hon'ble C. B. Trevor, *Judge.*

THE High Court have frequently observed that cases remain for an unreasonably long time pending in the Mofussil Courts, for the undelivered reports of Ameens entrusted with the duty of local investigations, and the delay on the part of these officers is commonly attributed to the great number of cases with which they are charged. The Court has now ample proof before it that very many of the cases, referred by Judges to Ameens for local enquiry, never should have been so referred. With a view, therefore, of obviating the delay which occurs through a course of procedure not authorized by law, the High Court deem it proper to impress upon the subordinate Courts of every grade that local investigations by Ameens should only be ordered in cases where they are absolutely required by the Courts on subordinate points, for a determination of the main issue in the case: for instance, in cases in which it is necessary to ascertain by measurement disputed areas of land, or to ascertain whether particular lands are identical with lands detailed in documents when the fact is disputed; and in such like instances. When, however, any fact can be elicited by evidence, that evidence should be heard by the Court itself, and not by an Ameen. With a view, too, both of shortening the trial in many cases, and of assisting the Courts in the examination of witnesses, it will be well if, when a map or measurement of the locality appears from the issues to be absolutely necessary, orders to prepare it are passed at the time of the fixing of issues. The map and the report of the Ameen can then be tested by the examination of the witnesses, and the Courts will be in a better position to conduct this examination than they are under the present system.

If these instructions be carried out, the High Court believe that Ameens being only employed in cases in which their services are essential, the Mofussil Courts will be enabled to dispose of suits more promptly and satisfactorily, and litigants will, in many cases, be saved the extra expense entailed by local investigations.

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**Moonsiffs' Punkahs and Punkah-pullers.**

CIRCULAR MEMO. No. 42.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, dated the 2nd October 1866.*

(Civil Side.)

THE following letter is forwarded for the information and guidance of the

Civil Authorities in the Lower Provinces:—

*From the Secretary to the Government of Bengal, to the Officiating Registrar, High Court, dated Darjeeling, the 6th September 1866.*

No. 2020 T.

SIR,—I am directed to acknowledge the receipt of your letter No. 2873, dated the 27th ultimo, and in reply to state, for the information of the Hon'ble Judges of the High Court, that the Lieutenant-Governor, adopting the Court's view of the question, has been pleased to decide that Moonsiffs shall be placed on the same footing as Deputy Magistrates and Deputy Collectors, in respect to the indulgence of punkahs and punkah-pullers in the hot season.

1 Judicial.

2. All charges under these orders for the current year should be included in the contingent bills of the Zillah Judges; special provision being made for the charge in the estimates of ensuing years.

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**Alteration of the Establishments attached to Civil Courts.**

CIRCULAR No. 43.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, dated Calcutta, the 6th October 1866.*

(Civil Side.)

*Present:*

The Hon'ble C. B. Trevor, *Judge.*

ALL Zillah and Subordinate Judges are requested, as soon as possible, after the re-opening of the Courts at the close of the ensuing Dusserah vacation, to inform the High Court whether, in consequence of the new method of transacting business in the Civil Courts adopted since the enactment of Act VIII. of 1859, they would recommend, keeping the numerical force at the present figure, any re-distribution of the salaries of their Ministerial Officers; or whether they would diminish their number in the gross, or reduce the number of the Native and increase that of the English hands of the Establishment. The Court require all Judges to send up a clear tabular statement of the alterations they would suggest, bearing distinctly in mind that the gross expenditure should not be increased.

2. The returns of the Principal Sudder Ameens, Sudder Ameens, and Moonsiffs should be submitted through the Zillah Judges, who will abstract and tabulate the information afforded, and lay it before the Court in the prescribed form.

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**Ameens' Fees and Salaries.**

CIRCULAR No. 44.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, Lower Provinces, dated Calcutta, the 10th October 1866.*

(Civil Side.)

*Present:*

The Hon'ble C. B. Trevor, *Judge.*

THE Court, having reason to believe that the Column relating to Ameens' fees in

Statement A, as well as that showing Ameens' salaries in Statement B, prescribed by Circular Order, dated 13th February 1865, No. 2 (as modified* by Circular Order, dated 23rd March 1866, No. 12), are not always prepared correctly, are pleased to circulate the following instructions for general observance in the preparation of the Columns in question :—

**N. B.*—The effect of the modification is confined to the Column about fees which was at first Column 5, but is now Column 7 of Statement A.

The returns should include all money received on account of Ameens' fees, whether the Ameen be one appointed under the Act, or temporarily employed under Sections 180 and 181 of Act VIII. of 1859. The fees should be invariably credited to Government, as required by Section 9, Act XII. of 1856, and shown in Column 7, Statement A, as also the amounts paid as salary, whether of a permanent or a temporary nature, which should be exhibited in Column 4, Statement B.

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**Attendance of Civil prisoners when required as parties or witnesses in Civil suits.**

CIRCULAR No. 45.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, dated Calcutta, the 12th October 1866.*

(Criminal Side.)

*Present :*

The Hon'ble C. B. Trevor and G. Loch, *Judges.*

THE High Court is pleased to forward, for the information of all Judges of Civil Courts, the following Rule,* which has been made by the Lieutenant-Governor of Bengal, with a view to securing the personal attendance of any prisoner confined in a Civil jail, when required either as a party or as a witness in a civil suit :—

* Dated 20th July 1866.

RULE.

" Under the provisions of Section 7 of Act II. (B. C.) of 1864, the Lieutenant-Governor of Bengal is pleased to notify the following rule :—

" Whenever, in a suit instituted in any Civil Court, it shall appear to the satisfaction of the Judge that the personal attendance of any prisoner confined in any Civil jail is necessary, either as a party or witness in that suit, it shall be competent to the Court to issue a writ, under its hand and seal, addressed to the Officer in charge of the jail, calling upon him to make over charge of the prisoner named therein to an Officer of the Court, to be deputed for the purpose of producing him in Court at a time to be specified in the warrant. The Officer so deputed shall be responsible for the safe custody of the prisoner from the time he receives charge of him, until he is re-committed to the jail."

**Amendment of Circular No. 34.**

No. 46.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, dated Calcutta, the 1st December 1866.*

(Civil Side.)

*Present :*

The Hon'ble C. B. Trevor and G. Loch, *Judges.*

In modification of the instructions contained in Circular Order No. 34, dated the 11th of September last, the High Court is pleased to direct that the cases exhibited in the new column therein prescribed be such only as are pending more than *six* (not "three") months, and that the explanation afforded be confined to such cases alone.

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**Expenditure on account of Stationery in 1864 and 1865 by each Sudder Ameen in his double capacity of Sudder Ameen and Sudder Moonsiff.**

No. 47.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to the Judge of , dated Calcutta, the 5th December 1866.*

(Civil Side.)

*Present :*

The Hon'ble C. B. Trevor, *Judge.*

Sir,—I am directed to request that you will be so good as to enquire and report, for the information of the Court, the *actual* expenses incurred in each of the years 1864 and 1865 by the Sudder Ameen of your District in his double capacity of Sudder Ameen and Sudder Moonsiff, on account of stationery, under the several heads specified on the margin. It will be unnecessary to state how much was expended in each month; the total amount spent under each head for the year will suffice.

| | Quantity. | Cost. |
|---|---|---|
| Serampore paper ... | ... | ... |
| Bengalee „ ... | ... | ... |
| Ink ... | ... | .. |
| Oil ... | ... | ... |
| Sealing Wax | ... | ... |
| Cloth ... | .. | ... |
| Wax Cloth | ... | ... |

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**Report called for on the number of applicants for admission as Pleaders in the Mofussil Courts.**

CIRCULAR No. 48.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil and Sessions Judges and Judicial Commissioners, Lower and Extra Regulation Provinces, dated Calcutta, the 13th December 1866.*

(Civil Side.)

*Present:*

The Hon'ble C. B. Trevor, *Judge.*

The Government of Bengal having, by Notification dated the 22nd November last,* fixed the last Monday of the month of January next ensuing for the examination of applicants for admission as Pleaders in the Mofussil Courts, and, as under the Rules †drawn up by the Court on the 2nd May last under Section 4, Act XX. of 1865, every candidate for such examination must give notice to the Judge of the District in which he resides of his intention to present himself for examination, six weeks at least previously, that is to say, *on or before the 17th instant,* the Court presume that each Judge will be able to ascertain immediately after the date last mentioned *how many* candidates are expected to appear at the coming examination. They request accordingly that a report may be submitted to them by each Judge, in time to reach them before the close of December, of the number of intending applicants for each of the standards of examination.

* *Vide* page 2051, *Calcutta Gazette,* dated 28th November 1866.

† Rules 11 and 21.

## Holidays for 1867.

CIRCULAR No. 49.

*From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Civil Judges in the Lower Provinces, dated Calcutta, the 29th December 1866.*

(Civil Side.)

*Present :*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. B. Trevor, *Judge*.

It is hereby notified, for general information, that the High Court and its Subordinate Civil Courts will be closed in the year 1867, on the dates indicated in the annexed list.

It is expected that the Civil Courts will not be closed, except on authorized holidays.

*List of the Holidays for the year 1867.*

| NAMES OF HOLIDAYS. | ENGLISH DATE. | BENGALI DATE. | DAYS OF THE WEEK. | NUMBER OF DAYS. |
|---|---|---|---|---|
| New Year's Day and the two days following ... | 1st to 3rd January ... | 18th to 20th Pous 1273... | Tuesday to Thursday | 3 days. |
| Idul-Fetar* ... ... ... | 7th and 8th February ... | 26th and 27th Magh 1273 | Thursday and Friday | 2 ,, |
| Basant-Panchami ... ... | 9th and 10th February... | 28th and 29th Magh 1273 | Saturday and Sunday | 2 ,, |
| Shibu-Ráttri ... ... | 4th and 5th March ... | 21st and 22nd Phalgun 1273 ... | Monday and Tuesday | 2 ,, |
| Dol-Játtra ... ... ... | 20th and 21st March ... | 7th and 8th Chaitra 1273 | Wednesday & Thursday ... ... | 2 ,, |
| Báruni-Asnán ... ... | 2nd April ... ... | 20th Chaitra 1273 ... | Thursday ... ... | 1 ,, |
| Mahábisham-Sankrânti ... | 12th April ... ... | 30th Chaitra 1273 ... | Friday ... ... | 1 ,, |
| Rám-Nabomi ... ... | 13th April ... ... | 1st Baisakh 1274 ... | Saturday ... ... | 1 ,, |
| Id-uz-Zohá † ... ... | 16th and 17th April ... | 4th and 5th Baisakh 1274 | Tuesday and Wednesday ... ... | 2 ,, |
| Good Friday and the day following ... ... ... | 19th and 20th April ... | 7th and 8th Baisakh 1274 | Friday and Saturday | 2 ,, |
| Moharram ‡ | 11th to 15th May ... | 29th Baisakh to 2nd Joishto 1274. | Saturday to Wednesday ... ... | 5 ,, |
| Queen's Birth-day ... ... | 24th May ... ... | 11th Joishto 1274 ... | Friday ... ... | 1 ,, |
| Dashahára Gánga-Asnán ... | 11th June ... ... | 29th Joishto 1274 ... | Tuesday ... ... | 1 ,, |
| Akheree-Chahar Shumbah ... ... / Rath Játtrá ... | 3rd July ... ... | 20th Assar 1274 ... | Wednesday ... . | 1 ,, |
| Ultá-Rath ... ... ... | 11th July ... ... | 28th Assar 1274 ... | Thursday ... ... | 1 ,, |
| Fáteha Duazdaham § ... | 15th July ... ... | 32nd Assar 1274 ... | Monday ... ... | 1 ,, |
| Janma-Ashtomi ... ... | 22nd and 23rd August ... | 7th and 8th Bhadra 1274 | Thursday and Friday | 2 ,, |
| Dussera Vacation, including Mahálaya ... / Lakkhi Pujá, Dewali, and Bhrâtaditia ... | 27th September to 29th October. | 12th Assin to 13th Kartik 1274 | Friday to Tuesday ... | [illegible] |
| Jagatdhâtri-Puja ... ... | 6th and 7th November... | 21st and 22nd Kartik 1274 | Wednesday & Thursday ... ... | 2 ,, |
| Kartik-Puja ... ... ... | 15th and 16th November | 30th Kartik and 1st Aghran 1274 ... ... | Friday and Saturday | 2 ,, |
| Shab-e-Barat ‖ ... ... | 12th December ... | 27th Aghran 1274 ... | Thursday ... ... | 1 ,, |
| Christmas Day and the two days following ... ... | 25th to 27th December... | 11th to 13th Pous 1274... | Wednesday to Friday | 3 ,, |

* But if the moon be not visible on the 6th of February, then on the 8th and 9th of February.

† But if the moon be not visible on the 6th of April, then on the 17th and 18th of April.

‡ But if the moon be not visible on the 5th of May, then from the 12th to 16th of May.

§ But if the moon be not visible on the 3rd of July, then on the 16th of July.

‖ But if the moon be not visible on the 28th of November, then on the 13th of December.

b

# CRIMINAL CIRCULAR ORDERS OF THE HIGH COURT.

**Erratum in Circular No. 19, dated 21st July 1863.**

CIRCULAR No. 6.

*From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Criminal Authorities, Regulation and Extra Regulation Provinces, dated Calcutta, the 17th April 1866.*

(Criminal Side.)

The Hon'ble C. B. Trevor, *Judge.*

THE Court request that "Section 67" may be substituted for "Section 367" in paragraph 4 of their Circular No. 19, dated 1st July 1863, the latter figure being a clerical error.

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**Adoption of Western Court's Circular No. 12, publishing a Table of changes made by Act VIII. of 1866 in the Schedule to the Criminal Procedure Code.**

CIRCULAR No. 7.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Criminal Authorities in the Lower and Regulation Provinces, dated Calcutta, the 14th June 1866.*

(Criminal Side.)

*Present:*

The Hon'ble C. B. Trevor, *Judge.*

THE Court are pleased to circulate, for the information and guidance of all Sessions Judges and Magistrates, the annexed Circular Order issued by the Western Court, No. 12, dated the 27th April 1866, publishing a Table indicating the changes which have been made in the Schedule annexed to the Criminal Procedure Code by the provisions of Act VIII. of 1866.

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CIRCULAR ORDER No. 12 of 1866.

*To the Criminal Authorities in the North-Western Provinces, Jhansie, and Kumaon, dated Agra, the 27th April 1866.*

N. A., N.-W. P.

*Present:*

W. Roberts, Esq., and F. B. Pearson, Esq., *Judges.*

R. Spankie, Esq., and G. D. Turnbull, Esq., *Officiating Judges.*

*Abstract.*

Table published indicating the changes which have been made in the Schedule annexed to the Criminal Procedure Code by Act VIII. of 1866, whereby the jurisdiction of the Magistrates has been enlarged in respect of the cognizance of certain classes of cases under the Indian Penal Code, according to which all Office copies of the Schedule should be corrected.

THE Court are pleased to draw the attention of the Criminal Authorities to the provisions of Act VIII. of 1866, published in the *Gazette of India* of the 3rd March 1866, amending the Schedule annexed to the Criminal Procedure Code.

2. The annexed Table has been prepared to indicate the changes which have been made in the law, whereby the jurisdiction of the Magistrates has been enlarged in respect of the *cognizance* of certain classes of cases under the Indian Penal Code. All Office copies of the Schedule should be corrected accordingly.

3. A copy of the Act is given below for facility of reference.

| 1 | 2 | 3 | | 4 |
|---|---|---|---|---|
| Section. | Offence. | By what Court triable. | | Remarks. |
| | | Under Act XXV. of 1861. | Under Act VIII. of 1866. | |
| 172 | Absconding to avoid service of summons or other proceeding from a public servant. | Magistrate of the District on Subordinate Magistrate of 1st class. | Any Magistrate. | |
| | If summons or notice required attendance in person, &c., in a Court of Justice. | Ditto. | Ditto. | |
| 173 | Preventing the service or the affixing of any summons or notice, or the removal of it when it has been affixed, or preventing a proclamation. | Ditto. | Magistrate of the District or Subordinate Magistrate of 1st Class. | Altered in accordance with Section 3 of Act VIII. of 1866. |
| | If summons, &c., require attendance in person, &c., in a Court of Justice. | Ditto. | Ditto. | Altered in accordance with Section 3 of Act VIII. of 1866. |
| 174 | Not obeying a legal order to attend at a certain place, in person or by agent or departing therefrom without authority. | Magistrate of the District, or Subordinate Magistrate of 1st class. | Any Magistrate. | |
| | If the order require personal attendance, &c., in a Court of Justice. | Ditto. | Ditto. | |
| 271 | Knowingly disobeying any quarantine rule. | Ditto. | Ditto. | |
| 272 | Adulterating food or drink for man intended for sale, so as to make the same noxious. | Ditto. | Magistrate of the District or Subordinate Magistrate of 1st Class. | Under Section 3 of Act VIII. of 1866. |
| 277 | Defiling the water of a public spring or reservoir. | Ditto. | Any Magistrate. | |
| 278 | Making atmosphere noxious to health. | Magistrate of the District or Subordinate Magistrate of 1st class. | Ditto. | |
| 279 | Driving or riding on a Public way so rashly or negligently as to endanger human life, &c. | Ditto. | Ditto. | |
| 280 | Navigating any vessel so rashly or negligently as to endanger human life, &c. | Ditto. | Magistrate of the District or Subordinate Magistrate of 1st Class. | Under Section 3 of Act VIII. of 1866. |
| 285 | Dealing with fire or any combustible matter so as to endanger human life, &c. | Ditto. | Any Magistrate. | |
| 286 | So dealing with any explosive substance. | Ditto. | Ditto. | |
| 287 | So dealing with any Machinery. | Ditto. | Magistrate of the District or Subordinate Magistrate of 1st Class. | Under Section 3 of Act VIII. of 1866. |
| 289 | A person omitting to take order with any animal in his possession so as to guard against danger to human life, or of a grievous hurt from such animal. | Ditto. | Any Magistrate. | |
| 290 | Committing a public nuisance. | Ditto. | Ditto. | |

| 1 | 2 | 3 | | 4 |
|---|---|---|---|---|
| Section. | Offence. | By what Court triable. | | Remarks. |
| | | Under Act XXV. of 1861. | Under Act VIII. of 1866. | |
| 291 | Continuance of nuisance after injunction to discontinue. | Magistrate of the District or Subordinate Magistrate of 1st Class. | Magistrate of the District or Subordinate Magistrate of 1st Class. | Under Section 3 of Act VIII. of 1866. |
| 325 | Voluntarily causing grievous hurt. | Court of Session. | Any Magistrate. | |
| 326 | Voluntarily causing grievous hurt by dangerous weapons or means. | Ditto. | Court of Session. | Under Section 3 of Act VIII. of 1866. |
| 380 | Theft in building, tent, or vessel. | Court of Session or Magistrate of the District. | Any Magistrate. | |
| 381 | Theft by clerk or servant of property in possession of Master or Employer. | Ditto. | Court of Session or Magistrate of the District. | By Section 3 of Act VIII. of 1866. |
| 392 | Robbery. | Court of Session. | Court of Session or Magistrate of the District. | |
| | If committed on the highway between sunset and sunrise. | Ditto. | Ditto. | |
| 393 | Attempt to commit robbery. | Ditto. | Ditto. | |
| 394 | Person voluntarily causing hurt in committing or attempting to commit robbery, or any other person generally concerned in such robbery. | Ditto. | Court of Session. | Under Section 3 of Act VIII. of 1866. |
| 448 | House-trespass | Magistrate of the District or Subordinate Magistrate of 1st Class. | Any Magistrate. | |
| 451 | House-trespass in order to the commission of an offence punishable with imprisonment. | Ditto. | Ditto. | |
| | If the offence is theft. | Court of Session, or Magistrate of the District, or Subordinate Magistrate of 1st Class. | Ditto. | |
| 452 | House-trespass, having made preparation for causing hurt, assault, &c. | Ditto. | Court of Session, or Magistrate of the District, or Subordinate Magistrate of 1st Class. | Under Section 3 of Act VIII. of 1866. |

ACT No. VIII. OF 1866.

*Passed by the Governor-General of India in Council (received the assent of the Governor-General on the 2nd March 1866).*

An Act further to amend the Schedule annexed to the Code of Criminal Procedure.

Whereas it is expedient further to amend the Schedule annexed to the Code of Criminal Procedure; It is enacted as follows:—

1. In lieu of the words in the parts of Column 7 of the said Schedule respectively referring to Sections 172, 174, 271, 277, 278, 279, 285, 286, 289, 290, 325, 380, 448, and 451 of the Indian Penal Code, shall be read the words "any Magistrate."

2. In lieu of the words in the parts of the said column respectively referring to Sections 392 and 393 of the Indian Penal Code, there shall be read the words "Court of Session or Magistrate of the District."

3. Nothing herein contained shall be taken to alter the effect which any other part of the said Schedule had immediately before the passing of this Act.

4. This Act shall be read with, and taken as part of, the Code of Criminal Procedure.

**Regarding commitment of European British Subjects for trial before the High Court—Alteration of dates for the remaining Criminal Sessions of that Court for 1866.**

CIRCULAR No. 8.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Justices of the Peace in the Lower and Extra Regulation Provinces of Bengal, dated Calcutta, the 6th August 1866.*

(Criminal Side.)

*Present :*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble C. B. Trevor, G. Loch, H. V. Bayley, J. P. Norman, L. S. Jackson, J. B. Phear, A. G. Macpherson, and W. Markby, *Judges.*

THE Court request the particular attention of Magistrates and others, who are Justices of the Peace, to the accompanying copy of an order passed regarding the commitment of European British subjects for trial before the said Court.

2. All warrants for the commitment of such European British subjects should be directed to the Superintendent of the Presidency Jail in Calcutta, and should be in the Form C., Appendix of Forms, Code of Criminal Procedure; and in pursuance of Section 9, Act XII. of 1865, the following words should be added at the end of the form before the date—"and you are hereby required to have the body or bodies of the said

before the said High Court for trial at the Sessions of the Court next ensuing the date hereof."

3. The Court observe that, in several cases in which European British subjects have been lately committed for trial to the High Court, there has been great want of care on the part of the Committing Officers In one case the witnesses were sent down before the prisoner, who did not arrive until after the conclusion of the Sessions, and after the witnesses had returned. On the prisoner's being brought up for trial, there were no witnesses against him, and he was discharged. In other cases, prisoners have been sent down without any witnesses. In others, prisoners have been sent without any warrant of commitment, and the warrant of commitment has been sent afterwards, instead of being delivered to the Police Officer in charge of the prisoner. The warrant of commitment ought always to be delivered to the Officer in whose custody the prisoner is sent, in order that he may deliver it with the prisoner to the Superintendent of the Jail as his authority to receive and detain the prisoner. Failure of justice has been caused in many cases through such neglects; and the Court trust that Justices of the Peace will be more careful in these respects in future, and that they will take proper steps for ensuring the attendance of the necessary witnesses at the Sessions. In

addition to the warrant of commitment, a warrant should be directed to the Police Officer in charge of the prisoner, and should direct him to take the prisoner and deliver him to the Superintendent of the Presidency Jail. A form of such warrant is given below.

4. The following are the days fixed for the holding of the remaining Criminal Sessions for 1866, instead of those originally fixed :—

Monday, 3rd September, instead of Monday, the 10th September.

Monday, 1st October, instead of Monday, the 8th.

Monday, 3rd December, instead of Monday, the 10th.

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FORM OF WARRANT.

To (the name of the Officer or Officers sent in charge of the prisoner) and to all other Her Majesty's Peace Officers in the Provinces and Districts of Bengal, Behar, and Orissa, and places subordinate thereto, whom this may concern.

Whereas of is charged with (state the offence as in warrant of commitment), and has been committed by me, the undersigned Justice of the Peace for Bengal, Behar, and Orissa,* and the places subordinate thereto, to the Superintendent of the Presidency Jail for trial before the High Court of Judicature at Fort William in Bengal. You are, therefore, hereby required to receive the said into your custody and to deliver him into the custody of the Superintendent of the Presidency Jail at Calcutta, to be there safely kept until he shall be thence delivered by due course of law.

(*Signature.*)

Justice of the Peace for Bengal, Behar, and Orissa,* and the places subordinate thereto.

Dated the day of 186 .

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ORDER.

THE High Court of Judicature at Fort William in Bengal is pleased to order that all European British subjects who, during the present month or in the months of August, September, October, and November next, shall be committed or bailed for trial before the said High Court by any Justice of the Peace beyond the local limits of the ordinary original Criminal Jurisdiction of the said High Court for an offence committed beyond those limits, shall be tried at the usual place of sitting of the said Court in Calcutta, and that such European British subjects shall, if not bailed, be committed for intermediate custody to the Presidency Jail, and, if bailed, shall be bailed for trial at such usual place of sitting of the said High Court.

HIGH COURT;
*The 5th July 1866.*

* This should be according to the appointment to the office of Justice of the Peace.

**Transportation in lieu of Imprisonment.**

CIRCULAR No. 9.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Sessions Judges, dated Calcutta, the 3rd August 1866.*

(Criminal Side.)

*Present:*

The Hon'ble C. B. Trevor, G. Loch, J. P. Norman, and L. S. Jackson, *Judges.*

WITH reference to the form in which many Sessions Judges pass sentence of transportation in cases in which imprisonment is awardable for 7 years or upwards, the Court request the attention of Sessions Courts to the terms of Section 59 of Act XLV. of 1860, from which it will be seen that the correct mode of proceeding is to sentence the offender to transportation, mentioning at the same time that, under Section 59 of the Indian Penal Code, such transportation is awarded instead of imprisonment, simple or rigorous, as the case may be.

**Early trial of Murder-cases before Vacation.**

CIRCULAR No. 10.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Sessions Judges, dated Calcutta, the 22nd August 1866.*

(Criminal Side.)

*Present:*

The Hon'ble C. B. Trevor, *Judge.*

THE Court request that, in holding their Jail deliveries for September next, Sessions Judges will make arrangements for trying, as far as possible, at the commencement of their Sessions, all cases in which murder (Section 302, Penal Code) is one of the offences charged, as it is important that the orders of the High Court in all cases in which capital sentences have been passed should be obtained and communicated to the Sessions Courts before the commencement of the vacation.

2. The High Court expect that no Sessions Judge will close his Court for the Dusserah Vacation as long as the orders of the High Court regarding such capital sentences have not been received.

**Registers of Warrants to be kept up.**

CIRCULAR No. 11.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to the Criminal Authorities, dated Calcutta, the 1st October 1866.*

(Criminal Side.)

*Present:*

The Hon'ble C. B. Trevor, *Judge.*

It having come to the Court's knowledge that the Register of Warrants prescribed by the Sudder Nizamut Court's Circular Order No. 167 of the 15th of May 1835 has, in many districts, fallen into disuse, the High Court desire me to call your attention to the above order, and to request that you will in future carefully keep up the prescribed Register, Column 6 being omitted, as it is no longer required. Instances have lately occurred of prisoners being illegally detained in jail after their term of sentence had expired, which would not have happened if the Registers of Warrants had been properly kept up.

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**Cases postponed in consequence of insanity, &c., of accused, to be excluded from the calculation of the average duration of cases tried.**

CIRCULAR No. 12.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Criminal Authorities, dated Calcutta, the 19th November 1866.*

(Criminal Side.)

*Present:*

The Hon'ble C. B. Trevor and G. Loch, *Judges.*

The Court is pleased to issue the following instruction for the guidance of Sessions Judges in the preparation of Annual Statement No. 10, and of Magistrates in that of Annual Statement No. 6, of the average duration of cases tried by them; to wit, that cases postponed under Section 388 or Section 389 of the Code of Criminal Procedure in consequence of the accused being of unsound mind, and therefore incapable of entering on their defence, should not be included amongst those on which the average is calculated, inasmuch as their postponement is caused by circumstances over which the Courts can have no control.

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**Commitment of European British subjects for trial before the High Court.**

CIRCULAR No. 13.

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*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Justices of the Peace in the Lower and Extra Regulation Provinces of Bengal, dated Calcutta, the 5th December 1866.*

(Criminal Side.)

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble C. B. Trevor, *Judge.*

In continuation of Circular Order No. 8, dated the 31st July last, requesting the attention of Justices of the Peace to the copy of an order which accompanied it, requiring that European British subjects who, during the months of July, August, September, October, and November last, should be committed or bailed for trial before the High Court, should be tried at the usual place of sitting of that Court in Calcutta, and, if not bailed, should be committed for intermediate custody to the Presidency Jail, and, if bailed, should be bailed for trial at such usual place of sitting as aforesaid, the Court are pleased to extend the operation of the said order until further notice.

**Police Officers how to be summoned as witnesses.**

CIRCULAR No. 14.

*From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Magisterial Authorities in the Lower Provinces, dated Calcutta, the 6th December 1866.*

(Criminal Side.)

*Present:*

The Hon'ble C. B. Trevor, *Judge.*

As there is reason to believe that public inconvenience has frequently been caused by the practice, said to prevail in several districts, of summoning police-officers as witnesses without reference to their immediate superiors, the Court are pleased to direct that, whenever a summons to appear as a witness in a criminal case is issued to an officer of police, it be served upon such officer through the Superintendent of the District, or the Assistant in charge of the Sub-Division to which he may belong.

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# RULINGS ON CIVIL REFERENCES UNDER SPECIAL ACTS.

The 13th June 1866.

*Present:*

The Hon'ble G. Loch and L. S. Jackson, *Judges.*

**Execution of decree—Arrangement between decree-holder and Judgment-debtor.**

*Reference to the High Court by Mr. C. D. Linton, Judge of the Court of Small Causes at Choadangah.*

Dwarkanath Sadhoo Khan,

*versus*

Doorga Churn Saha.

When an arrangement has been entered into between a decree-holder and a judgment-debtor for the payment of a sum decreed against the latter, the Court passing the decree should allow execution to be taken out as provided for in the arrangement come to between the parties, and there is no necessity to refer the decree-holder to a fresh suit.

*Case.*—THIS is an undefended action on an instalment-bond executed by the defendant in favor of Bamasoondery Dosseea, mother and guardian of Baneemadhub Holdar, minor, and Ram Chunder Holdar and Issur Chunder Holdar, who were plaintiffs in the Moonsiff's Court at Jenidah, and by them assigned to the present plaintiff, and which assignment was recognized by the Moonsiff's Court, and incorporated with its decree which was originally for a *lump sum;* and a notice under Section 216 of Act VIII. of 1859 was issued on the present plaintiff's application, and afterwards the application was struck off on default. And it appears that, on the 13th September last, the following Roobookaree was passed by the Moonsiff on the plaintiff's application, no reason being assigned therein why the instalment-bond should not be enforced by process of execution:—

"In the Court of the Moonsiff of Chowkey Jenidah, Zillah Jessore, the 13th September 1865, corresponding with 29th Bhader 1272.

No. 574 of 1865.

Dwarkanath Sadhoo Khan, *Decree-holder,*

*versus*

Doorga Churn Saha, *Decree-debtor.*

*Claim.*—To recover the amount of the decree from the decree-debtor.

This case has been this day heard before Baboo Modhoosoodun Dutt, Moonsiff of Chowkey Jenidah, Zillah Jessore, in the presence of the decree-holder's pleader Jonardhun Mitter, and the Court ordered that, as the kistbundee cannot be enforced, consequently the case is struck off the file."

The only question to be decided now is, can the arrangement come to *since the passing* of the decree in the Moonsiff's Court between the decree-holder and judgment-debtor, and assigned by the former to a third party, and recognized by the Court and incorporated with its decree, be enforced without the necessity for a new suit?

There is no doubt that a Court cannot, after a decree has once been passed for a lump sum and without consent of the judgment-creditor, direct payment of the amount by instalments, but an exception was made with reference to the peculiar circumstances of the case referred to in Vol. I., page 6, Miscellaneous Appeals, Sutherland's Weekly Reporter; and the new amended Civil Procedure now before the Council (Section 452) provides that a Court may order that the amount of a decree for money be paid by instalments, notwithstanding that the decree makes no provision for the payment by instalments of the amount decreed. But when an arrangement has been come to since the passing of a decree between the decree-holder and the judgment-debtor, and recognized by the Court, and incorporated with the decree, and certain steps have been taken to enforce such an arrangement, and no objection appears to have been taken by the judgment-debtor, the Court is bound, on the application of the assignee of such a decree, to enforce execution of the same, and not refer the party to a separate suit (*see* Vol. V., Weekly Reporter, page 19, Miscellaneous Appeals). Such a suit, leaving out

of question the expense and vexation consequent upon the same, ought not, in my opinion, to be entertained by another Court. The proper course, therefore, appears to me to be to refer the plaintiff to the Moonsiff's Court in order to enforce his decree like an ordinary decree by process of execution.

I refer this point on the application of the plaintiff's pleader, as it will be a precedent for other cases awaiting the result of the present reference; and, if the High Court should be of opinion that the present suit ought not to be entertained by me, I beg that a copy of its opinion be also forwarded to the Moonsiff of Jenidah.

*Judgment of the High Court.*—We certify to the Judge of the Court of Small Causes that, when an arrangement has been entered into between a decree-holder and a judgment-debtor for the payment of a sum decreed against the latter, the Court passing the decree should allow execution to be taken out as provided for in the arrangement come to between the parties, and that there is no necessity to refer the decree-holder to a fresh suit.

Copy of this opinion will be forwarded to the Moonsiff of Jenidah for his information and guidance.

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The 15th June 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, *Judge.*

**Abatement of suit—Survivance of cause of action.**

*Reference to the High Court by Mr. J. Pitt-Kennedy, Recorder of Moulmein.*

Moung Khine and others

*versus*

R. C. Burn and others.

Suit to recover possession of timber in which the first defendant had ceased to have any interest. After the settlement of issues, the first defendant died.—HELD that the cause of action against the other defendants survived, and that, the first defendant having no interest in the subject of the suit, it was not necessary that the suit should be revived against his representatives.

*Case.*—ON the 13th September 1865, Moung Khine, Thomas Dunlop Findlay, James Findlay, and John McCall filed in this Court against Robert Campbell Burn, Moung Shoay Gan, and Richard Snadden, the plaint following :—

"Suit for 52 logs of teak timber in "specie marked——, being a portion of 609 "logs hereinafter mentioned. Suit valued "at Rs. 3,380. Cause of action arose in "or about the month of July 1867.

"Plaintiffs state: That Moung Khine, the "first plaintiff, went to the Myneloongyee "forests, where he cut, with the permission "of the chief of Zimmai, 609 logs of teak "timber, as appears by the permit hereto "annexed and marked A, and afterwards "paid to the aforesaid chief duty for the "same, as appears by the document hereto "annexed and marked B. After having paid "the said duty, first plaintiff marked and "dragged the same into the river.

"That, after the duty had been paid by "the said first plaintiff, R. C. Burn and "Moung Shoay Gan, the first and second "defendants abovenamed, also proceeded to "the said forests with a large retinue of "armed followers, and, without permission "or authority, super-marked plaintiffs' logs "wrongfully with the marks M and C.

"That the aforesaid 52 logs of teak timber are now at Kadoe, a place within the "jurisdiction of this Court, and have been "entered there by R. Snadden, the third "defendant, as agent for the first defendant, "but who, in fact, is his partner, and has "great interest in the said timber, and the "said timber is now in the possession of the "third defendant, who refuses to deliver "the same, or any portion thereof, to the "plaintiffs.

"That second plaintiffs, Messrs. Todd and "Findlay and Co., are made parties to this "suit, as the said timber, together with other "timber which has not yet arrived, has "been sold to them as per document marked "C hereto annexed.

"That the said timber is valued at Rs. 65 "each log.

"That, as delivery is withheld as afore-"said, plaintiffs pray that the said defend-"ants be summoned to appear before this "Court, and that a decree be passed against "them, directing them to deliver to the "plaintiffs the aforesaid timber in specie, "with all costs of suit.

"And also that, pending the final determination of this suit, the said timber be "placed under attachment.

"And further that the summonses for "R. C. Burn and Moung Shoay Gan may "be served on Mr. R. Snadden, the agent of "the said parties."

R. C. Burn, the first defendant, by his written statement, as answer, alleged, among

other things, para. 8: "That first defendant, having long since parted with possession of the 52 logs now sued for in specie, hath it not in his power to deliver the same to plaintiff, nor is there any alternative prayer in the plaint. This defendant says he made over the said logs with others to third defendant, who received them in fulfilment of the agreement entered into between them, first, second, and third defendants. The said logs are held by third defendant as coming from Myneloongyee forests as having been brought therefrom by first defendant to the frontier of this country, and thence from Kyodan by third defendant's people, without let or hindrance by any one, and first defendant was in no way interfered with in foreign jurisdiction in bringing them, the said logs, to the frontier of this country." Para. 11: "That the first plaintiff never floated, worked, cut, or dragged the logs now claimed or any of them, but first and second defendants, at great expense, and in the exercise of their unquestionable right so to do, worked and floated the whole of the logs, the subject of this suit, from Myneloongyee to Kyodan and thence to Kadoe.

"That the plaintiff's marks were wrongfully put on each and all of the logs now claimed, and claimed title to these timbers as having lawfully passed from him to R. Snadden."

The third defendant, Richard Snadden, by his statement, amongst other things, alleged that he did receive the 52 logs in accordance with the agreement under which he made over the forests to first and second defendants, as stated by first defendant in para. 8 of his answer.

The defendants filed the agreement mentioned in para. 8 of the first defendant's answer, by which the first defendant binds himself to deliver all timber arriving from these forests at 40 rupees per log, to be paid within 10 days after the delivery of the timber, provided all litigation had then ceased.

After the settlement of issue, the first defendant R. C. Burn died. The Recorder was of opinion that the representatives of the said first defendant had such an interest in the subject-matter of the suit that the suit could not be properly heard in their absence, and he, accordingly, adjourned the hearing of the suit to a future day, and directed the respresentatives of the said defendant to be made parties.

On the application of the Law Advocate for the plaintiffs, the Recorder respectfully submits for the consideration of the High Court the following question:—

Was the Recorder bound to proceed with the suit in the absence of the representatives of the first defendant, R. C. Burn?

*Judgment of the High Court.*—By Section 20, Act XXI. of 1863, it is enacted that, "Save as in this Act otherwise provided, the proceedings in civil suits of every description between party and party brought in any Court established under this Act shall be regulated by Act VIII. of 1859 *(the Code of Civil Procedure)*, as amended by Act XXIII. of 1861, and by any other Act or Acts that may hereafter be passed for that purpose."

By Section 99, Act VIII. of 1859, it is provided that "the death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survive;" and by Section 100 it is provided that, "if there be two or more plaintiffs or defendants, and one of them die, and if the cause of action survive to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, and against the surviving defendant or defendants."

In this case the first defendant, R. C. Burn, ceased to have an interest in the logs which were the subject of the suit, for they were made over by him to the third defendant, who received them in fulfilment of the agreement entered into between the first, second, and third defendants. By the terms of that agreement, the first defendant bound himself to deliver all timber arriving from the forests mentioned in the suit at Rs. 40 per log of specified dimensions, half the proceeds to go in liquidation of a debt due by the first defendant, and the sum of Rs. 10 per log to be paid within 10 days after the delivery of the timber, provided all litigation had then ceased.

The logs having been delivered over in pursuance of the agreement, the first defendant ceased to have any further interest in them, and was merely entitled to the payment of Rs. 10 per log to be made according to the terms of the agreement. The suit was for the recovery of the possession of the timber, and the cause of action, if any, against the other defendants survived. The first defendant having no interest in the logs, it is not necessary that the suit should be revived against his representatives.

We, therefore, certify our opinion to the Recorder of Moulmein that the suit ought to proceed without making the representatives of the first defendant, R. C. Burn, parties thereto.

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The 23rd June 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

**Jurisdiction (of Recorder's Court)—Trespass to personalty in Foreign State (title to which depending on right to land in such Foreign State).**

*Reference to the High Court by Mr. J. Coryton, Recorder of Moulmein.*

Saya Loo

*versus*

Nga Paw Loo and others.

Trespass to personalty in a Foreign State (the title to such personalty depending upon the right to land in such Foreign State) is cognizable by the Recorder's Court so as to rebut a *primâ facie* title to such personalty acquired within the Court's jurisdiction.

The Recorder's Court cannot take judicial cognizance of the fact that the country in which the rights of the party attempting to rebut such *primâ facie* title accrued is lawless and unsettled, and possesses no tribunal capable of pronouncing a decision on the rights of the parties which the Recorder's Court could consider as the decision of a Court of competent jurisdiction.

Although the Foreign State might be civilized and have Courts competent to try the title, the Recorder's Court would have a right in a suit against a party subject to his jurisdiction, to try incidentally the question of title to the land for the purpose of determining the right to the personalty.

*Case.*—In this case plaintiff sues to recover 12 logs of teak timber, part of a lot of 230 similar logs which he alleges were his by right of purchase in May 1865, from one Moung Khine, who alleged that he had permission from Soolapoo, a Kareenee chief, to cut the timber, and that he had paid the duty on the same. The timber at the date of the purchase was lying ready to be dragged at Messaleen Creek, a place on the confines of the Kareenee and Shan States, the sovereignty of which States appears to be in dispute. The plaintiff alleges that, after he had purchased the timber and made a payment on account, the defendants, by armed force, came down upon the plaintiff's servants, and, having driven them away, impressed their own (the defendants') hammer-marks upon the timber. The plaintiff's people subsequently returned and placed the plaintiff's marks upon the timber. On the timber reaching the rope station of Kyodan in British territory, the defendants secured it and entered it as their own at the Government station of Kadoe. Defendants allege that they purchased the timber in dispute, as well as other timber lying felled at the time in the neighbourhood of Messaleen Creek, from one Rya Golay under a written contract filed in this Court, and that they paid 15,000 rupees as advance on such purchase. They deny the use of any force towards plaintiff's servants, and entirely ignore plaintiff's title. It appears that the timber in dispute was worked down from the spot on which it was marked by the defendants' agent Nga Youk. From the place at which the timber floated it was left to be carried along by the river without control until its arrival at the rope station at Kyodan.

The evidence, both as to the rights of the respective vendors and the acts of the parties, was in the highest degree confused and contradictory, but all tended to establish this fact, that the territory in which Messaleen Creek is situated is in a very lawless and unsettled state.

Under these circumstances, I think I am bound to consider the defendants as the *bonâ-fide* owners of the timber. They have some show of title to the timber on its reaching British territory by reason of their bearing their marks, and they appear to have had possession of it from its arrival in British territory until they entered it at Kadoe. No fraud or trespass is alleged to have occurred within British territory, nor has any authoritative decision of any Court in this territory in which the alleged trespass was committed been brought before me.

I therefore dismiss the suit with costs, but declare my judgment to be contingent, as provided by Section 22 of Act XXI. of 1863, upon the opinion of the High Court on the following points:—

*1st.*—Whether trespass to personalty in a Foreign State, the title to such personalty depending on the right to land in such Foreign State, is cognizable by this Court so as to rebut a *primâ facie* title to such personalty acquired within the Court's jurisdiction.

*2nd.*—Whether this Court can take judicial cognizance of the fact that the country

in which the rights of the party attempting to rebut such *primâ facie* title accrued is lawless and unsettled, and possesses no tribunal capable of pronouncing a decision on the rights of the parties before the Court, which this Court could consider as the decision of a Court of competent jurisdiction.

*Judgment of the High Court.*—We are of opinion that trespass to personalty in a Foreign State, the title to such personalty depending upon the right to land in such Foreign State, is cognizable by the Court of the Recorder of Moulmein, so as to rebut a *primâ facie* title to such personalty acquired within the Court's jurisdiction.

If the plaintiff can prove satisfactorily to the Court that he or his agents were in possession of the timber in dispute in the Foreign State; and that the defendant by force took possession of it and put his own mark upon it, and, having floated it down into British territory, was the first person who had possession of it there, the plaintiff would have a *primâ facie* title to the timber, which would enable him to sue the defendant in the Recorder's Court (if the defendant were subject to the jurisdiction) either for damages or for the timber. (*See* Mostyn *vs.* Fabrigus, Cowper's Reports 168; and Skinner *vs.* The East India Company, cited at pages 167 and 168 of the same case.)

If the defendant, in answer to such a *primâ facie* case, should attempt to prove that the timber belonged to him in consequence of a purchase made from the owner of land in the Foreign State, upon which the plaintiff, or those under whom he claims, had wrongfully and against the law of the Foreign State cut the timber, and the title to the land should in that or any other manner be incidentally brought into question, the Court would have the power to try whether, according to the law of the Foreign State, the plaintiff, or those under whom he claims, had a right to cut the timber.

The first possessor in the Foreign State would be *primâ facie* entitled to the timber, and the party who relied upon title to the timber as arising from a title to land would have to prove his right.

The first possession in British territory of personalty taken by force from another in a Foreign State would not confer a title as against the person from whom it was taken in the Foreign State.

*Answer to the 2nd question.*—The Recorder's Court cannot take judicial cognizance of the fact that the country in which the rights of the party attempting to rebut the *primâ facie* title referred to in the second question accrued, is lawless and unsettled, and possesses no tribunal capable of pronouncing a decision on the rights of the parties which the Recorder's Court could consider as the decision of a Court of competent jurisdiction. But whether the Court could make such presumption or not, the right to try incidentally the question of title to the land for the purpose of determining the right to the timber would not be affected, inasmuch as the Recorder would have a right to try such question incidentally in a suit against a party subject to his jurisdiction, although the Foreign State might be civilized and have Courts competent to try the title.

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The 21st July 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

**Jurisdiction (of Small Cause Court)—Suit for rent and penalty—Damages.**

*Reference to the High Court by Baboo Nobin Kissen Paulit, Judge of the Court of Small Causes of Midnapore.*

Sheikh Hingun Sowdagur, *Plaintiff,*

*versus*

Boistum Churn Ojah and others, *Defendants.*

Where a party sued for Rs. 17-8 as rent, and a like sum as penalty for non-payment thereof, it was held (1) that he was, in fact, suing for a penalty equal to double the amount due, and that a Small Cause Court was competent to entertain the suit; and (2) that the plaintiff could not recover more than the damages actually sustained.

*Case.*—PLAINTIFF sues the defendants for Rs. 45, *viz.*,—

Rs. 17-8 as balance of rent of certain fisheries;

Rs. 17-8 or the same amount as penalty for non-payment of the above; and

Rs. 10 as costs for repairing the bunds of the fisheries, under the conditions of an "ekrar kistbundee" or instalment-bond or agreement executed by them in his favor.

The deed, which is engrossed on a stamped paper of the value required for a bond, is to the following effect:—

"We shall catch and take the fish of the "two bund fisheries of your aymahs, Chota "Keoodee and Islampore, for this year 1273.

"On payment of a jumma of Rs. 28, and "having paid Rs. 5 of the same in advance, "we agree and bind ourselves to make or "cut openings on the said bunds, catch the "fish, and then repair or close the openings. "If, owing to the rains or other cause, the "Bunds are broken where the openings will "be made by us, we further agree to "strengthen and restore them to their former "condition, and, should we fail or neglect to "do so, you will repair the bunds at your "own cost, and we shall make good the "same to you without objection; and we "further agree and bind ourselves to pay the "balance of the jumma, Rs. 23, in the instal-"ments noted below. Should we fail to pay "any of these instalments, you shall not "wait for the remainder becoming due, "but at once recover from us double the "total amount that will be due to you, to "which effect we execute this ekrar kist-"bundee in your favor."

It is contended, on the part of the defendant, that this deed is of the nature of a kubooleut between landlord and tenant; that the main claim being for arrears of rent due on account of fisheries, the Small Cause Court has no jurisdiction under Exception 4, Section 6, Act XI. of 1865; and that it should be brought before a Revenue Officer under Clause 4, Section 23, Act X. of 1859.

This argument, which is based solely on the term "jumma" used in the deed, is not, in my opinion, tenable. Looking to the short term within which the fish was to be caught, the conditions and designation of the deed itself, and the particulars of the claim preferred by plaintiff, I consider the deed to be in every respect an ordinary agreement for price of fish, &c., or rather a civil contract for the breach of which plaintiff can seek for remedy in a Civil Court only; and this Court can therefore take cognizance of the suit. Yet, on the application of the pleader for the defendant, I deem it necessary to refer the point for the opinion of the High Court.

*Judgment of the High Court.*—We are of opinion that, although the plaintiff sues for Rs. 17-8 as balance of rent and Rs. 17-8 as penalty, he is in effect suing for a penalty equal to double the total amount due. The Small Cause Court is competent to entertain the suit. The full penalty should not, however, be awarded, but only so much of it as is sufficient to cover the damages sustained —that is, the full amount of the instalments which remain unpaid, with interest thereon, from the time when they or any of them respectively became due. (*See* Doyle *versus* Mundul, Small Cause Court Rulings, 5 Weekly Reporter, p. 10.) This will be in addition to damages for not reinstating the bunds, if found to be due.

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The 21st July 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

**Jurisdiction (of Small Cause Court as to amount) —Suit on bond.**

*Reference to the High Court by Mr. C. D. Linton, Judge of the Court of Small Causes of Meherpore.*

Sukee Monee Debia, *Plaintiff*,

*versus*

Huree Mohun Mookerjee and others, *Defendants*.

**A Small Cause Court can try a suit for an amount within its jurisdiction, notwithstanding that it is upon a bond the amount of which is beyond its jurisdiction.**

*Case.*—THIS is an action brought by the plaintiff to recover from the defendants the sum of 500 rupees after abandoning an excess of Rs. 16-5-6, being the balance of 13 expired kists from 1266 to 1272, after giving credit in the plaint for Rs. 2,143-10-5 due on a bond for Rs. 3,000.

For the defendants, a preliminary objection to the hearing was urged, and it was submitted that the Court had no jurisdiction to try the case, because the amount of the bond exceeded the amount cognizable by this Court as on behalf of the 2nd defendant. The fact of execution of the bond was put in issue, but the 1st defendant admitted the bond.

Plaintiff's pleader contended that, although the bond was for a sum not cognizable by this Court, the present action was for only Rs. 500, and that, as plaintiff had abandoned the excess in order to bring this suit within the jurisdiction of this Court, this gave the Court jurisdiction to try the case, especially as the instalments to be paid in 1273 B. S., *viz.*, Rs. 550, were not yet due and payable, and the bond contains no stipulation that, if default is made in the payment of any one instalment, the whole amount of the bond will become due.

It appears to have been held by the Sudder Court, on a question submitted to it as to the jurisdiction of a Moonsiff in a suit for an instalment the amount of which is within his competence, but which on-

ginates in a bond of which the amount is beyond his competence, that, should the original bond be brought into question and its validity need to be determined, the Moonsiff cannot have jurisdiction unless the sum which forms the subject of suit, together with the sum of all instalments subsequently claimable under the bond, be within the legal competence of a Moonsiff; but, if the defence should merely be that the instalments sued for have been paid, and the mere question is whether such is the fact or not, the Moonsiff might be competent to decide the case. *See* Circular Order, Calcutta and Western Court, 31st August 1832, and Circular Order 14th May 1847, both referred to in Macpherson's Civil Procedure, page 164, Note A; also Marshman's Civil Guide, pages 85 and 86; and in the case of Duljeet Chunduck *versus* Moojeeram, which was an action to recover from defendant the sum of Rs. 325, being the 1st instalment due on a bond for Rs. 2,500, reported at page 20 of the Reports of Principal Commercial Cases, heard and determined in the Supreme Court of Judicature at Fort William in Bengal, and the Calcutta Court of Small Causes, from 1st January 1851 to 31st December 1860, it was held by Mr. J. Reddie, the then First Judge of the Calcutta Small Cause Court, that, where the bond was disputed, the Small Cause Court had no jurisdiction in the matter. A more difficult question was that raised in the Westminster County Court before Mr. Moylaw in the case of Head *versus* Tudor (1 C. C. Chron. 174) which was an action against a co-obligee to recover his share of 2 instalments paid by the plaintiff upon a joint and several bond for £250. The instalment sued for was less than £20. But the learned Judge non-suited the plaintiff for two reasons: *first*, because the bond must be produced to prove the debt, and that being for £250, placed it beyond his jurisdiction; and, *secondly*, that it was not competent to the plaintiff to sue his co-obligee for each separate instalment. So in the case of Archard *versus* Norman (1 C. C. Chron. 38), the same doubt was suggested as to the recovery of interest upon a judgment-debt. That was a summons for £15, the amount of one year's interest on a judgment recovered for £300. To prove the interest due, it was necessary to prove the debt, and it was again objected that the debt being more than £20, the Court had no jurisdiction; and the learned Judge seemed to be of this opinion, for he said: "Before "I can proceed to hear the case, I must be "satisfied that the principal is due; I must "enquire if there is a sum of £300 owing, "and that at once ousts the Court of its "jurisdiction." Similar questions have also been raised as to interest on bills and notes; but, says Lloyd in his work on the Law and Practice of the County Courts, 6th Edition, pages 105 and 106, referring to the case of Head *versus* Tudor, "neither of these "reasons appear to us sufficient, for the test "is this—*Is there, at the moment of action* "*brought, a complete right of action for a* "*demand not exceeding £50?* The mo- "ment the plaintiff had paid any instal- "ment, he had a right of action against his "co-obligee for contribution; and the amount "of the cause of action upon which such "right accrued was not the whole bond, "but the defendant's share of the sum so "paid." And again, referring to Archard *versus* Norman, he says: "But we think the "criterion in each case is, what is the "total amount due on the instrument; if that "exceeds £50, the County Court has no "jurisdiction. Interest may be sued for "separately if the principal be not due, and "so may an instalment. But if the principal "is due, and it, together with the interest, "exceeds £50, or if two instalments together "exceeding that amount be due, the demand "cannot be divided so as to bring two or "more suits in the County Courts."

According to the Stamp Act No. X. of 1862, a stamp on a plaint should be estimated, not on the amount of the whole bond, but on the amount claimed in the suit; and the amount claimed by the plaintiff in the present case is within the pecuniary limits of the jurisdiction of a Small Cause Court, as the plaintiff has abandoned the excess. As such, whatever the amount of the bond, and whatever may be the line of defence adopted, I think, if a sum not exceeding 500 rupees is sought to be recovered, I have jurisdiction in the matter; but, as this point has not yet been settled in India, I have not entered into the merits of the case as regards the 2nd defendant. I, therefore, at the request of both parties, refer the point for the decision of the High Court.

*Judgment of the High Court.*—The case is clearly stated and discussed by the Judge of the Small Cause Court.

We are of opinion that the view taken of this case by the Judge of the Small Cause Court is correct.

The true test is—Is the sum payable and demanded in the action within the limit of the Court's jurisdiction as to amount?

The 28th July 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

**Jurisdiction (of Small Cause Court)—Rent—Damages—Breach of Contract.**

*Reference to the High Court by Mr. C. D. Field, Officiating Judge of the Principal Court of Small Causes of Jessore.*

Deb Nath Ghose

*versus*

Pachoo Mollah.

Suit for money for which plaintiff agreed to let defendant tap certain date-trees and appropriate the produce for a single season.—HELD that such a suit was not one for rent, but for the breach of a contract in respect of which a Small Cause Court has jurisdiction.

*Case.*—IN this action the plaintiff seeks to recover Rs. 5-8, being the amount for which he agreed to let the defendant tap 35 date-trees and appropriate the produce for a single season. The trees at the end of the season reverted to the plaintiff, who had himself taken them on similar conditions from the owner. Is such a claim cognizable in a Civil Court, or is it, in reality, a suit for *rent* to be entertained only by a Revenue Court under Clause 4, Section 23, Act X. of 1859? This latter view might seem to be the correct one, regarding rent as the return made for the use of a *natural agent*. The words of the above-quoted Clause are "arrears of rent due on account of land either kherajee or lakheraj, or on account of any rights of pasturage, forest rights, fisheries, or the like." Rights of pasturage, forest rights, and fisheries include the use of a natural agent. The use of a house for the rent of which a suit can be brought in the Civil Court is not the use of a natural agent, but of that which has been constructed by human means, and which owes its existence to man's handiwork. So far the analogy would seem to be in favor of the present suit falling under the class which is entertained in the Revenue Courts. Applying the principle indicated in the Case No. 464 of 1863, Messrs. Robert Watson and Co., Appellants, 6th April 1864, to the present instance, I think the rent may be fairly said to issue out of the land; as, while the trees remain undissevered from the soil, they may justly be held to be a portion thereof. Once dissevered, they become altogether different, and their very essence is changed. The law regards them as moveable property, and no longer as immoveable property of the same nature and kind as the soil itself.

It may be urged that the bargain was merely a sale of the produce of the trees. Now, I think, if a crop of fruit, apples, or peaches, or mangoes, which were in actual existence on the trees, were sold, this argument would properly apply. But, if a garden of these fruit-trees were let before the trees had blossomed or the fruit was formed, I opine the claim would be one for rent. In the present case, when the trees were let, the juice from which the *goor*, and subsequently the sugar, was to be obtained, was not in *esse* but in *posse*, and had to be derived from the earth, which had again to be fed by the clouds before the juice could be brought into being. The subject of the contract was the trees' capacity of producing the date-juice—not certain date-juice then in existence. It was the use of a natural agent as a means of production, and not the product of this natural agent, for which the sum of Rs. 5-8 was agreed to be paid.

*Judgment of the High Court.*—The case is not one of rent. The suit is for the breach of a contract in respect of which the Court of Small Causes has jurisdiction. The Judge has argued the case, but has not expressed his own opinion, as he ought to have done.

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The 28th July 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

**Jurisdiction—Civil action—Criminal proceedings.**

*Reference to the High Court by Mr. C. D. Field, Officiating Judge of the Principal Court of Small Causes of Jessore.*

Shama Churn Bose

*versus*

Bhola Nath Dutt.

In a case where a party took away a cow out of another's field, and wrongfully detained it, pretending that he purchased it at an auction-sale in execution of a decree, it was held that there was a remedy by civil action; that the plaintiff was not bound to institute a criminal proceeding in the first instance; and that the Civil Court was bound to take cognizance of it under Section 1 of the Code of Civil Procedure.

*Case.*—THE plaintiff in this case sues to recover the price of a cow which he alleges that the defendant took away out of his field, and now wrongfully detains, pretending that he purchased it at an auction-sale in execution of a decree. The plaintiff declares that the cow was never seized, never put up to, or sold by, auction; that there is no question of disputed property in the animal; that when he, having heard that his cow was with defendant, went to claim it, the latter told him that the cow never belonged to him (the plaintiff) but to one Tokeem, against whom defendant had obtained a money-decree, and, taking out execution, had seized the cow and purchased it himself at the auction-sale. Plaintiff swears that the cow never belonged to Tokeem, and could not have been seized in execution, as it was in his possession all along. The defendant has not appeared to defend the action, and all the statements of the plaintiff remain uncontradicted. Were no further consideration involved, the plaintiff would be entitled to an *ex-parte* decree; but, if the facts alleged be all true, the defendant Bhola Nath Dutt has clearly committed the offence of "theft" as defined in the Indian Penal Code (*vide* definition of "theft," Section 378, P. C., and of the word "dishonesty," Section 24; also the case of the Queen *vs.* Mudaree Chowkeedar, Weekly Reporter, Vol. III., page 2 of the Criminal Rulings), inasmuch as he has taken moveable property out of the possession of the plaintiff without the plaintiff's consent, and has thereby caused wrongful loss to the plaintiff, the means whereby he became possessed of the cow being unlawful, and his intention to cause this wrongful loss being an obvious inference from his conduct, and a simple application of the maxim that every one must be supposed to intend the natural consequences of his own acts. The point on which I then solicit the decision of the High Court is the following, *viz.*: "Can the plaintiff recover in a civil action, without having first criminally prosecuted the defendant?"

In England, and under English Law, the remedy for a tort, or civil wrong, when the wrongful act amounts to a felony, is suspended until the requirements of public justice have been first satisfied by the prosecution of the offender. "The policy of the law," observed Lord Ellenborough, in the case of Crosby *vs.* Long, 12 East 403, "requires that, before the party injured by "any felonious act can seek civil redress "for it, the matter should be heard and "disposed of before the proper criminal "tribunal, in order that the justice of the "country may be first satisfied in respect "to the public offence." The law on this point in England will be found fully stated at pages 26-27 of Mr. Addison's work on Torts, 2nd Edition; also at pages 162 and 209 of Broom's Legal Maxims, 4th Edition.

Whether the principle is to be applied to the Criminal Law of this country, and, if so, with what limitation, is an important point never yet, I believe, determined. In a recent civil case decided by the High Court at Fort William in Bengal, the Judges intimated that the question was one which might have been entertained, had not the case been dismissed on other grounds. The late Sudder Court of Madras indeed laid down (page 258 of Decisions for 1859) that

a party might be civilly sued for breach of trust, even though he might have been indicted under the Breach of Trust Act. This decision is, however, strictly in accordance with English Law, which does not regard breach of trust as a felony.

The rule of Law in England is, as remarked by an able writer on Criminal Jurisprudence (Mr. Stephen, "General View of the Criminal Law of England," page 107), justified partly by the phrase that the private wrong is "merged in the felony; partly by the technical reason that the felon's property is transferred to the Crown on his conviction; partly by the apprehension that, if crimes could be treated as wrongs, they would not be otherwise prosecuted; partly by the reflection that the common run of criminals are so poor that no damages could be got from them, and that the power which the Courts at present possess of ordering the restitution of stolen property or its proceeds is sufficient for practical purposes." The second of these reasons would not apply in this country, as the provisions of Sections 61 and 62 of the Penal Code differ widely from the Law of Forfeiture in England. The third and fourth reasons would have as much weight in India as in England.

It may indeed be urged that, as the Criminal Law and the Civil Procedure of this country have been codified without any provision being made for the point, it was not intended to introduce the principle into India. To this it may be replied that the Criminal Procedure Code contains no express provision analogous to 24 and 25 Vic., Cap. 96, Sec. 100, authorizing Criminal Courts to restore stolen property to its owners; yet Criminal Courts of all classes in India make such restoration daily. There are, besides, many undoubted principles of Criminal Law which are acted on without hesitation, though not found in the Criminal Procedure Code.

If the principle be held applicable in this country, it becomes a question how and with what limitation it is to be applied. The division of offences into felonies and misdemeanors is merely absolute in England, and is totally unknown to the Penal Code. The Code of Criminal Procedure recognizes a twofold division into offences punishable with imprisonment not exceeding 6 months, and those punishable with more than 6 months' imprisonment; but this division would clearly not suit the present occasion.

A suitable line of demarcation may be found indicated in Sections 213 and 214 of the Penal Code, read with the Exception and Illustrations attached to the latter Section. If the civil remedy should be suspended in any case until the offender be criminally prosecuted, it appears to me that it would properly be so suspended in those cases in which the wrongful act is an offence not so much against an individual as against the community at large. As the law which authorizes this reference requires me to express my own opinion on the subject, I think there are weighty reasons for following, in India, the rule of the English Common Law; and I conceive the present case to be one in which a criminal prosecution ought to be a necessary preliminary to a civil action. If this view be adopted, it is very important that some line of distinction should be laid down between those cases in which the ends of public justice should be first vindicated by a criminal prosecution, and other cases in which a wrong, which involved a criminal offence, might be made the subject of a civil action without any previous criminal proceedings. Such a rule would seem all the more necessary, inasmuch as, under the head of Theft, Cheating, &c., in the Penal Code, certain acts are criminally punishable, which, under English and other systems of jurisprudence, could be dealt with only by a civil tribunal.

*Judgment of the High Court.*—We are of opinion that in this case there is a remedy by civil action, and that the plaintiff was not bound to institute a criminal proceeding in the first instance. There is no Act of Parliament, Regulation, or Act of the Governor-General in Council by which the cognizance of such a suit is barred. The Civil Court is therefore bound to take cognizance of it according to the express provisions of Act VIII. of 1859, Section 1, and cannot act upon its own notions of policy.

The 25th August 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, *Judge.*

**Registration—Sections 53 and 55, Act XX. of 1866.**

*Reference to the High Court by Baboo Banee Madhub Shome, Judge of the Small Cause Court of Pubna.*

Kristo Kishore Ghose

*versus*

Brojonath Mozoomdar.

In cases of application to the Court under Section 53 of the Registration Act XX. of 1866, the Court ought not to summon the defendant, but the applicant is entitled to a decree merely on production of the obligation and the record duly signed.

Under Section 55, the Court may after decree, on a representation by the judgment-debtor, set aside the decree, and stay or set aside execution.

*Case.*—THIS case has this day been brought before me under Section 53, Act XX. of 1866, upon an obligation specially registered under Act XVI. of 1864. But the said Section 53 provides that the obligee of any such specially registered obligation is, in the first instance, to present a petition to any Court competent to try a regular suit on such obligation for the amount secured thereby, upon which the Court, on production of the bond, is to pronounce a decree as in other suits; whereas the old law, namely Act. XVI. of 1864, contained no such provision, and under it the obligee could at once sue for execution in satisfaction of the amount secured by such obligations, and therefore the points on which I would solicit the opinion of the High Court are whether, under the present law, after the obligee presents his petition, it is necessary for the Court to summon the obligor to appear and make his defence, and whether, if the obligor, without being summoned, appears and objects to the claim of the petitioner, the Court can hear him in his defence, and allow the objection taken by him to be heard.

I have carefully read the two Sections 54 and 55 together, and the wording of them seems to me to be doubtful, because, as far as I am able to make out, the intention of Section 54 appears to be that whenever, at any stage before a summary decree is passed in any suit under this part of the Act, any objection is taken to the claim of the petitioner, the Court may then order the obligation sought to be enforced to be forthwith deposited with an officer of the Court, and stay all proceedings until the petitioner furnishes security for costs; and Section 55 seems to me to restrict the entertainment of objections after decree, when only the Court may hear and decide any objections raised by the obligor, and, if necessary, set aside its former decree. The meanings, therefore, of the two Sections above mentioned, appearing to me to conflict, I beg most respectfully to refer the points above enumerated for the consideration and opinion of the High Court.

*Judgment of the High Court.*—We are of opinion that, in cases of application to the Court under Section 53, Act XX. of 1866, the Court ought not to summon the defendant, the intention of the Act being that the applicant should merely, on production of the obligation and the record duly signed, obtain a decree for the sum mentioned in the petition, or any less sum which may appear to be due, with interest and costs.

It is competent to the Court, under Section 55, on a representation by the judgment-debtor after decree, to set aside the decree and stay or set aside execution.

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The 25th August 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, *Judge.*

**Limitation—Mooktear's pay.**

*Reference to the High Court by Baboo Doorgapersaud Ghose, Judge of the Small Cause Court of Santipore.*

Nitto Gopal Ghose

*versus*

Mr. A. B. Mackintosh.

A suit by a mooktear for salary is not barred by the limitation of one year prescribed in Clause 2, Section 1, Act XIV. of 1859. If the plaintiff was engaged upon a distinct contract that he would be paid a fixed monthly salary, the limitation prescribed in Clause 9 would probably apply.

*Case.*—THE claim is for Rs. 253. Cause of action, for balance of pay due to the plaintiff as mooktear from April 1863 to June 1865, at Rs. 45 per month.

The case was instituted on the 11th April 1866.

The plaintiff served the defendant in the capacity of Mooktear for a period of 27 months, from April 1863 to June 1865, at a salary of Rs. 15 per month. His salary for the whole time amounted to Rs. 405, of which he received Rs. 152, leaving a balance of Rs. 253, for the recovery of which the present suit was laid. Indeed, the plaintiff's pay was never paid monthly, or for any definite period, but the amount of Rs. 152, which the plaintiff received, must be considered as appropriated to payment of his pay from April 1863 to 4th February 1864. The balance of his pay, which remains due to him, runs from 5th February 1864 to June 1865. The case being instituted on the 11th April 1866, that part of the plaintiff's claim which embraces the time from 5th February 1864 to March 1865 is beyond a year. Now, by Clause 2, Section 1 of Act XIV. of 1859, a period of one year from the time the cause of action arose is applicable to suits to recover wages of servants. If the word "servant" in the Clause quoted above means all kinds of servants, then the plaintiff could not be entitled to recover his pay for that period which is more than a year, computed from the date of institution. But the circumstance of its being coupled with the words "artisans or laborers," and the word "wages" itself used in the Clause, lead me to think that the Clause does not include any other kind of servants than the domestic and menial ones. The plaintiff being a mooktear, with the general powers of an agent from the defendant, his case, I am of opinion, is governed by the provisions of Clause 16, Section 1 of the Act, which prescribe six years' rule of limitation. The part of the plaintiff's claim which is beyond a year on the date of institution of this case, is decreed in favor of the plaintiff, subject to the opinion of the High Court.

*Judgment of the High Court.*—We certify our opinion that, in this case, the view taken by the Court of Small Causes at Santipore on the point of limitation is correct, in so far as he decided that the suit was not barred by the limitation of one year. If there was an engagement of the plaintiff, with a distinct contract to pay him at the rate of 15 rupees per month, the limitation prescribed in Clause 9, Section 1, Act XIV. of 1859 would probably apply, and not the rule laid down in Clause 16.

The 25th August 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

**Jurisdiction (of Small Cause Court)—Mahomedan Law—Gift—Dower.**

*Reference to the High Court by Baboo Banee Madhub Shome, Judge of the Small Cause Court of Pubna.*

Neeloo Bebee, wife of Misser Biswas,

*versus*

Misser Biswas.

Suit for Rs. 100 on account of Den-mohr.

HELD that a suit for 100 Rs. would not lie in the Small Cause Court upon a deed by which the defendant conveyed to the plaintiff, in lieu of the amount (100 Rs.) due to her as dower, a half share in all his property, moveable and immoveable, and under which deed, therefore, the plaintiff was entitled to a moiety of all such property, but could not sue for the sum orginally stipulated for.

*Case*—ON the 8th Cheyt 1270 B. S., the defendant married the plaintiff, stipulating to pay her, under the Mahomedan Law, a dower (Den-mohr) of Rs. 100, and, in lieu thereof, conveying to her, by a deed of gift, his rights and interests in one moiety of the jotes, cattle, and other moveable and immoveable property, and has not yet tendered possession of the same to the plaintiff, but has rather himself appropriated the immoveable property. Hence the plaintiff has brought this action to recover the said amount of dower, *viz.*, Rs. 100. The defendant, admitting the marriage and the deed of gift, urges that, under the Hiba, plaintiff is only entitled to sue for possession of the property therein conveyed, and not for the recovery of money; and that, as he

has not, nor is willing to divorce the plaintiff, she is not at all competent to sue him for the amount of Den-mohr.

The plaintiff's vakeel, on the other hand, pleads that, as the property conveyed by the Hibanamah is not therein specifically described, except the mere mention of the names of certain property, the plaintiff has no means to obtain possession of any property whatever under that deed; and, further, that a gift under the Mahomedan Law is not valid without delivery of possession, and that it is evident from the Hibanamah, which the defendant admits, that he agreed to pay to plaintiff the sum of Rs. 100 on account of dower. This amount is recoverable as other debts upon contracts, and the present suit, therefore, is maintainable in this Court. The defendant's pleader likewise contends that suits for dower are not cognizable by this Court, and that, as no stipulation for the payment of money is made in the Hibanamah, this action of the plaintiff cannot stand. She can only sue for possession of the property transferred to her by gift.

The points for determination are—

*1st.*—Whether suits for Den-mohr are cognizable by this Court.

*2nd.*—Whether, under the Hibanamah admitted on both sides, the plaintiff's suit for the amount of Den-mohr can, or cannot, lie.

I do not think that suits arising out of, and relating to, debts due as Den-mohr, are such as are cognizable by the Small Cause Courts, because such suits are of a difficult nature and involve the decision of the more intricate questions, such as those which relate to the marriage between the husband and wife. Besides, the objection taken by the defendant that, as he has not divorced the plaintiff, she cannot sue the defendant for the amount of the Den-mohr, is necessary to be decided according to the provisions of the Mahomedan Law, and is, therefore, a difficult matter of adjudication not within the competency of this Court.

2. From a perusal of the Hibanamah, it appears that the gift was made in lieu of the amount of dower (Den-mohr). It is therefore one of those kinds of gifts under the Mahomedan Law that are called Hiba-bil Iwaz. This being the case, the Hiba-bil Iwaz—that is, a gift made in lieu of some consideration—is always valid without delivery of possession of the gifted property to the donee. These kinds of gift resemble the Mahomedan Law of Sales, and are not void without the seisin of the donee (*see* Macnaghten's Mahomedan Law, page 216). It is also to be remarked that the Hibanamah contains no such stipulation as to plaintiff being entitled to sue for the recovery of the amount of Den-mohr, on her failing to obtain possession of the gifted property; and the deed of gift admitted on both sides is required virtually to be set aside, if, as prayed by the plaintiff, the debt due on account of Den-mohr be now allowed to be judicially enquired into. Under these circumstances, I consider the case not cognizable by a Small Cause Court.

*Translation of Hibanamah.*

Neeloo Beebee, daughter of Jageer Paramanick—

I, Missur Biswas, son of Nasser Paramanick, do hereby execute this deed of gift that I married you, having agreed to pay the sum of Rupees 100 on account of Den-mohr; but, being now unable to pay the same in cash, I do hereby convey to you, in lieu of the said money, as a gift, one moiety of the jotes, Khana-batee (dwelling-house), cattle, calves, furniture, and moveable and immoveable property, both ancestral and self-acquired, held by me in my own name, or benamee under undivided and undisputed possession and enjoyment, as well as one-half of those I will hereafter myself acquire and create; and you do from this day hold and enjoy the said moiety of which the power of transfer by sale and gift is vested in you, and that neither I nor my heirs will have any right to claim, possess, and transfer the said moiety by sale or gift, and that, if at any time I or my heirs claim or enjoy the same, it will be null and void; and, therefore, I do hereby execute this deed of gift in lieu of the said amount of Den-mohr.—The end. Dated the 8th Cheyt 1270.

*Judgment of the High Court.*—We are of opinion that, upon the document submitted to us in this case, a suit for 100 rupees would not lie in the Court of Small Causes. The defendant appears to have conveyed by that document to the plaintiff, in lieu of the amount due to her as dower, a half-share in all his property of every kind, moveable and immoveable. She is therefore entitled, under that document, to one moiety of all such property, but cannot sue for the sum originally stipulated for.

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The 25th August 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

**Damages—Irregularity—Sale in execution of decree.**

*Reference to the High Court by Baboo Doorgapersaud Ghose, Judge of the Small Cause Court of Santipore.*

Romesh Chunder Banerjee

*versus*

Jadob Chunder Chatterjee.

The affixing, in the Principal Sudder Ameen's Court, of a notification of sale in execution of a decree of the Small Cause Court was held to be no irregularity in the sale by reason of which damages could be recovered under Section 252, Code of Civil Procedure; the law making no provision for the service of the notification of sale on the judgment-debtor in person or in the village in which he lives.

*Case.*—THE plaintiff sues the defendant for damages under Section 252 of Act VIII. of 1859, alleging that the defendant, having obtained a decree against the plaintiff in the Santipore Small Cause Court, caused it to be executed in the Moonsiff's Court, and had it satisfied by attachment and sale of a decree which the plaintiff had in the Principal Sudder Ameen's Court at Santipore, without serving on him personally, or in the village where he resides, the sale-notification usually issued in such cases.

The defendant contends that the sale held by the Moonsiff has not been vitiated by any irregularity, inasmuch as one of the sale-proclamations was affixed in the Moonsiff's Court, and another copy in the Court of the Principal Sudder Ameen at Santipore; and that it is not required by Act VIII. of 1859 that it shall be served on the judgment-debtor in person, or in the village where he resides.

A reference to the records of the Moonsiff's execution-case shows that the property was attached in the Principal Sudder Ameen's Court at Santipore, that a written notification of the sale was affixed in the Court-house of the officer who conducted the sale, and another in the Court of the Principal Sudder Ameen where the attachment was made.

I am therefore of opinion that the affixing of the written notification of sale in the Principal Sudder Ameen's Court-house at Santipore was a virtual service of it in the town of Santipore where the attachment was made; that the law makes no provision for serving the sale-notification on the judgment-debtor in person, or in the village in which he lives; and that the plaintiff is entitled to no damages in consequence of there having been no irregularity in the sale.

The case has accordingly been dismissed subject to the opinion of the High Court.

*Judgment of the High Court.*—We certify our opinion that the judgment of the Court of Small Causes in this case is correct.

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The 12th September 1866.

*Present:*

The Hon'ble J. P. Norman and L. S. Jackson, *Judges.*

**Jurisdiction (of Small Cause Court)—Suit by co-sharer for contribution of Government Revenue.**

*Reference to the High Court by Baboo Punchanun Banerjee, Judge of the Small Cause Court of Hooghly.*

Modoosoodhun Mozoomdar and others

*versus*

Bindoobashiny Dossee and others.

A suit by one co-sharer of an estate, who has paid Government revenue to save the estate from sale, against another sharer for his share of the Government revenue so paid, is not maintainable in a Court of Small Causes under Section 6, Act XI. of 1865.

*Case.*—THE plaintiffs, describing themselves as 1 anna 10 gundahs sharers of Kismut Palerah and Patool Pergunnah Barroh, and of Juroorah and Julkur Gopeenauthpore, sue Bindoobashiny Dossee, alleging her to be an 8-gundahs sharer of the above estates, for contribution in respect of arrears of revenue due from 1270 to 1272 paid by them in excess of their quota to save the entire estate from sale. The defendant denies the demand, and pleads that she is a 16-gundahs sharer of the estates in question, and not an eight-gundahs sharer as she is represented by the plaintiffs to be; that, being a Hindoo female of rank, and thus unable to make the Mofussil collections herself, she has made over certain ryots of the estates to the plaintiffs who have realized rents from them, and paid the Government revenue, as they were bound to do, and cannot therefore sue for contribution; and that an action of this kind cannot be maintained in a Small Cause Court.

The question of law on which the ruling of the Court is solicited is whether a suit of the nature described above will lie in a Small Cause Court. I am of opinion that it will lie, as it clearly comes within the purview of Section 6, Act XI. of 1865. It is contended by the pleader for the defendant that, even according to the plaintiff's own allegations, this is not a suit for money due on a bond or other contract, there being no contract by the defendant to pay the plaintiff her quota of the arrears of revenue due and paid by the plaintiffs above. But, though there is no express, there is evidently an implied, contract on the part of the defendant to pay the money claimed. Wherever there are several co-sharers of an estate, and any of them pays the entire Government revenue, to save the estate from sale, and to preserve the interest of others, the law would always presume an undertaking on the part of those others to pay each his own quota of the revenue. Therefore, the claim of the plaintiffs in this case is one for money due on a contract, and therefore comes within the scope of Section 6 of Act XI. of 1865. One objection may probably be urged to the jurisdiction of Small Cause Courts to try such cases, and that is, that a question of the extent of the defendant's interests in the estate arises, the defendant alleging it to be 16 gundahs, whereas the plaintiffs state it is only 8 gundahs. But I think this objection is altogether untenable, for, if the interest of the defendant be, as she represents it to be, 16 gundahs, and not 8 gundahs, the plaintiffs would be entitled to recover more from her than they claim; and certainly the Court can have no hesitation to award the amount claimed, even if there be a doubt as to more being due to the plaintiffs than they say there is. As regards the adjudication of the suit in question, the plea of a greater interest in the estate on account of which the revenue was paid by the plaintiffs than is set forth in the plaint cannot therefore make any difference. As for the plea urged by the defendant, that she has made over certain ryots to the defendants who have collected rents from the said ryots, and paid her quota of the Government revenue, and that, in doing so, she has only acted in conformity with an arrangement existing between them, and the suit for contribution cannot be maintained, this is altogether a question of fact into which the Small Cause Courts are not precluded from enquiring.

*Judgment of the High Court.*—This is a case submitted for the opinion of this Court by the Judge of the Small Cause Court at Hooghly.

One of several co-sharers of an estate, having paid Government revenue to save the estate from sale, sued another sharer in the Small Cause Court for the amount alleged to have been paid by him on account of such share; and the question shortly is, whether such a suit is maintainable in a Small Cause Court under Section 6 of Act XI. of 1865.

The ground on which the Judge of the Small Cause Court assumes that he has jurisdiction is, that the claim falls within the description of "money due on bond or other contract." It is not alleged that there was in fact any contract between these parties. They are simply joint sharers, apparently, with a great number of other persons in an estate. If one of such parties, to protect his own interest, pays Government revenue whereby the share of another is exonerated, he has a remedy, not only under Section 9 of Act XI. of 1859, but by action independently of that enactment. Instances of such suits are to be found (S. D. A. Rep., 1850, p. 583; 1856, p. 635; 1858, pp. 524-531). The liability is not founded on any contract, for the several parties may be strangers to each other, but on a duty arising from the legal relations of the parties.

We think that the Small Cause Court has no jurisdiction to try the suit.

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The 17th September 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

**Jurisdiction (of Small Cause Court) —Mortgage of rents—Bond-debt.**

*Reference to the High Court by Mr. C. D. Field, Officiating Judge of the Principal Court of Small Causes of Jessore.*

Mohima Chunder Mookerjee

*versus*

Ram Churn Roy.

**Where an ijara constituted a mortgage of the rents as a security for an amount due on a bond, with a stipulation that the balance, after paying the jumma payable by the mortgagor, should be applied by the mortgagee in payment of the bond—HELD that the Small Cause Court has jurisdiction to try what amount is due on the bond, and also to try the question of payment by means of the rents assigned.**

*Case.*—THE plaintiff in this case sues to recover Rupees 296, being the amount (including interest) due on a bond dated 22nd Bysack 1271 for Rupees 200, payable in Falgoon 1272, with interest at 24 per cent. per annum. The defendant admits the execution of the bond, but pleads, *first*, that he only received Rupees 125 as consideration therefor—on which plea, however, I find against him; and, *second*, that he has paid Rupees 124-2-9.

The plea of payment arises in this way. The defendant alleges that, simultaneously with the execution of the money-bond, he gave an ijara of certain jummas to Tarucknath Mookopadya, son of the plaintiff, who took this lease *benamee* for his father. No *subpœna duces tecum* was served on either plaintiff or his son, but at the hearing, plaintiff, being asked as to the existence of this ijara lease, admitted and produced it. Both parties then adopted the document, and the sole contention was as to the amount collected by plaintiff under this authority. A translation of the lease accompanies this reference. The following points must be noticed:—

*1st.*—Neither party deny that the lease was part of the entire transaction.

*2nd.*—It has not been objected, on the part of the defendant, that the effect of the lease is to avoid the defendant's personal liability for the loan.

*3rd.*—Though the annual profits of the lease are Rs. 74-2-9, it has not been urged that plaintiff is chargeable with more than the actual collections made by him. The agreement, moreover, contains a stipulation that all receipts above this sum should go to the lessor (though there is no mention whether they were to be paid over in cash or credited to the bond-debt), and that, if the receipts fell short of this sum, the lessor should make up the deficiency.

*4th.*—The profits of the farming lease for six years are Rs. 74-2-9 × Rs. 6 = Rs. 445-6. The amount of principal and interest of the bond-debt is Rs. 200 (48 × 6 = Rs. 488).

*5th.*—There is no proviso for cancelling the lease, if the bond-debt be paid off, during the continuance of its term. On the contrary, there is an express stipulation that such payment is to have "no concern" with the so-called ijara.

Now, that the lease is not an ordinary farming lease is, I think, evident from the fact that the lessee was not to benefit by the excess collections over the sum of Rs. 74-2-9. The question then arises: "Is "the transaction an usufructuary mortgage "in the form of a lease?" If the transaction is to be viewed in this light, the further question will arise: "Can this Court enquire "into the alleged payment, or (having

"regard to the nature of the entire transac-
"tion) is its jurisdiction wholly barred?"

Now, with respect to the first question, I may quote the language of Mr. Story (Equity Jurisprudence, Volume II., page 197): "As to what constitutes a mortgage, there "is no difficulty whatever in Courts of "Equity, although there may be technical "embarrassments in Courts of Law. The "particular form or words of the conveyance "are unimportant, *and it may be laid down* "*as a general rule*, subject to few exceptions, "that, wherever a conveyance, assignment, "or other instrument transferring an estate "is originally intended between the parties "as a security for money or for any other "encumbrance, whether this intention ap-"pears from the same instrument or from any "other (or even by parol evidence, as Mr. "Smith adds in his Manual of Equity, page "279), it is always considered in equity as a "mortgage, and consequently is redeemable "upon the performance of the conditions or "stipulations thereof. * * * * So in-"separable indeed is the equity of redemption "from a mortgage, that it cannot be dis-"annexed even by an express agreement "of the parties." Now, I think the present case, which is rather one of assignment than of lease, falls within the above definition of a mortgage; and the stipulation that the payment of the bond-debt within the terms of the so-called lease should have no concern therewith, is disposed of by the concluding portion of the passage quoted. I think, therefore, looking to the conduct of the parties, and applying the above exposition of the law, that the present transaction must be regarded as a mortgage.

The next question that arises divides itself into two points, *viz.: 1st*, Viewing the transaction as a mortgage, is the jurisdiction of this Court wholly and entirely barred? *2nd*, If not, is it barred as to an enquiry into the alleged plea of payment? "If by the terms of the contract," says Mr. Macpherson (Work on Mortgages, page 11), "the mortgagee is to look to the usufruct of the land for the payment of both principal and interest, the mortgagor is not personally liable for the payment of either in the absence of a special agreement that he shall be so." Now, in the present case, although there is no special contract to this effect, no objection has been raised on this score, and I think the mortgagee is not debarred from choosing this particular one out of those remedies open to him.

I now come to consider whether this Court has jurisdiction to enquire into the plea of payment, under the particulars of the case. The late Judicial Commissioner of the Punjab has, I find, ruled that Courts of Small Causes cannot enter into such enquiries (Judicial Commissioner's Letter No. 227 of 15th January 1862, to the Judge of the Court of Small Causes, Lahore).

The present instance is rather one of what was formerly known as "Vivum Vadium" (*see* Addison's Contracts, page 250, and Story's Equity Jurisprudence, Vol. II., page 182), than of "*Mortuum Vadium*," though both have been treated under the general head of "Mortgage." When the mortgagee has not (as in the present case) been debarred from making the mortgagor personally liable, it seems rather inequitable that he should be able to come into Court, and ask for the whole of his money without giving any account of what he has collected and repaid to himself. It may certainly be said that the party injured could have protected himself by contract against this contingency, and that he has his remedy in another Court. But in India every Court is a Court of Equity, and, unless restrained by the terms of the act creating its jurisdiction, can undoubtedly enquire into the whole of each case coming before it. A Court of Small Causes has jurisdiction in respect of claims for *money due on contract* and in respect of *personal property*. In the present case, there is no question of foreclosure, or of claim to the land itself. The question of payment is involved in the consideration of the agreement collateral with the bond. If that agreement is to be regarded as a lease, a lease is personal property (Williams on the Law of Real Property, pages 8 and 10); and the question between the parties in the present case is not of the nature of payment of rent under this lease, which would belong exclusively to a Revenue Court. But the parties have treated the agreement, not as a lease, but clearly as an assignment of rents. And what has been assigned? Is it not the right to collect the rents of the *jummas* mortgaged, the mortgagor's contract with the tenants for the payment of rent? and is not this a chose in action partaking of the nature of personalty, and not of realty. I think, therefore, that the plea of payment may be well disposed of by this Court. I may remark that, as between the mortgagee and assignee and the tenants, there is no question as to the payment of rent which should be decided in a Revenue Court;

for the question is not—"How much rent did the tenants pay?" but, as between the assignor and assignee, "How much did the latter receive?"

I solicit the decision of the High Court on the following points:—

*1st.*—Whether or not the transaction constitutes a mortgage.

*2nd.*—Whether or not the jurisdiction of a Court of Small Causes is wholly barred, viewing the bond and the ijara lease as one transaction.

*3rd.*—If not wholly barred, is it yet barred as to the plea of payment?

*Translation of Lease.*

To Taruck Nath Mookhopadhya.

I do hereby execute a term lease or ijara pottah to the following effect. Appertaining to the villages under the putnee of Mohima Chunder Banerjee, the putneedar of the 6 annas and 8 gundahs *hissa* of the Eastern *girdo* or division of Pergunnah Goherpore, and comprised within the resumed *birtee* or grant, there is in village Premchara a jumma of Rs. 5-7-7½ under Goriboollahs Moodofut; and a second jumma of Rs. 2-1-2¾ under that of Azim and Kolly Muddy; and a third of Rs. 11-6-9-2 Kurra under that of Hurroo Panchoo; and a fourth of Rs. 9-1-0-2 in Mouzah Khoodrah, under the Moodofut of the Kurmokur family, being a total jumma of Rs. 28, inclusive of costs and ijardaree payable by me. The *haust bood*, or total amount of collections from the ryots of the aforesaid jote jumma Brohmuttur, and purchased Brohmuttur lands situate in villages Premchara, Maunsinghpore, Pearpore, and Khoodrah, being Rs. 102-2-9 per accompanying forsud, or list of ryots, I do hereby, in compliance with your application, execute an ijara of the said jumma of Rs. 102-2-9 in your favor at a fixed jumma of Rs. 92-2-9, after deducting and reserving Rs. 5 on account of surrunjamee, or costs of collections, &c., for a term of 6 years, from 1271 to 1276 B. S. Being in possession of the said property for the aforesaid term in virtue of ijara rights, you will, during the said period, on demand pay the Sudder khajana Rs. 28 of the said jote jumma, &c., to the putneedar Mohima Chunder Banerjee at Khoodrah, and take dakhilas in my name; and, on receipt of the same, I will grant you dakhilas for the amount of the ijara. Deducting Rs. 28 on account of Sudder khajana, you will every year cause the balance sum of Rs. 74-2-9 to be endorsed as paid on the back of the bond, whereby I have borrowed the sum of Rs. 200 from Mohima Chunder Mookerjee, of village Bundohilla, of the aforesaid Pergunnah, towards the liquidation of the principal and interest thereof. In the event of your neglecting to pay this Sudder khajana, and the amount due to my creditor, should any action be brought against me, you will be held responsible for the same. If, upon enquiry, the jumma laid down in the *haust bood* should be found less, I shall make up the deficiency by adding the jumma of some of my other ryots. Should any ryot desert or abscond within the said term, you will farm out the said *mehal*, and, should there be in consequence any excess collection, I shall be entitled to the same. On the other hand, should there be any deficit, I will make it good accordingly. Should I be able to clear off my liability to the said creditor within the term of the ijara, the terms of the ijara will cease to be binding. I accordingly execute this pottah to the above effect on receipt of an ijara kubooleut.

*Judgment of the High Court.*—We think that the ijara was substantially an assignment of the rents as a security for the amount due on the bond, with a stipulation that the balance, after paying the jumma of Rs. 28 payable by the defendant, should be applied in payment of the bond. The balance was fixed at Rs. 74-2-9 a year, to be endorsed on the bond in payment.

Paragraph 5 of the case stated by the Judge of the Court of Small Causes seems to be a mistake. According to the copy of the ijara sent, it was expressly stipulated by the ijara in the last paragraph but one, that the ijara was to cease if the liability on the bond should be cleared off within the term of the ijara.

It appears to us that—

*1st.*—The ijara constituted a mortgage of the rents, with a stipulation that the mortgagee should write off Rs. 74-2-9 a year in payment of the bond.

*2nd.*—That the Small Cause Court has jurisdiction to try what amount is due on the bond.

*3rd.*—And also power to try the question of payment by means of the rents assigned.

The 26th September 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

**Mahomedan Law of Dower—Limitation.**

*Reference to the High Court by Baboo Punchanun Banerjee, Judge of the Small Cause Court of Hooghly.*

Begoo Jaun

*versus*

Gashee Bebee.

**Where a wife demanded only a portion of her Den-mohr or dower from her husband, limitation as to her claim to the remainder will count from the date of her husband's death, and not from the date of her former demand.**

*Case.*—THE plaintiff alleges that, at the time of her marriage, her husband Bashatoollah stipulated to pay a "Den-mohr," or dower, of Rs. 200; that, on her demanding payment of Rs. 50 out of the said amount, her husband executed in her favor a kobalah on the 11th Joistee 1267, whereby he conveyed to her 5 cottahs of lakheraj land, with the trees standing thereon, in lieu of the above sum of Rs. 50 on account of Den-mohr or dower; that there thus remained a balance of Rs. 150 which was never liquidated by her husband who died in Falgoon 1271; and that the defendant, having obtained a decree in the Hooghly Sudder Ameen's Court awarding her possession of 12 annas of the property left by the said Bashatoollah, late husband of the plaintiff, is liable for the above sum of Rs. 150, to recover which from the defendant the plaintiff sues. The defendant pleads limitation in bar of the plaintiff's claim, and further contests his liability for the whole amount of the balance due on account of "Den-mohr" or dower, she having succeeded only to 12 annas of the property left by the plaintiff's husband, the deceased Bashatoollah.

The question of law submitted for the decision of the Court is whether the plaintiff's suit is barred by the Statute of Limitation.

Under the Mahomedan Law as laid down in Macnaghten, Chapter VII., paras. 20 and 22, "Den-mohr" or dower becomes due on the consummation of marriage, or on the death of the husband or wife, or on divorce; and where there is no stipulation as to whether the payment of dower is to be prompt or deferred, it is payable on demand. In this case, it appears that there was no stipulation of the above nature; hence the "Den-mohr," or dower, is to be considered as payable on demand, or on the death of the plaintiff's husband. It is contended by the defendant that, the plaintiff having demanded payment of the "Den-mohr," or dower, on the 11th Joistee 1267, the period of limitation will run against her from that date. But on a perusal of the kobalah (a translation of which is hereto annexed) whereby the plaintiff's husband conveyed to her 5 cottahs of lakheraj land, in lieu of Rs. 50 of the whole Den-mohr or dower, I find that the plaintiff demanded only Rs. 50 out of the total amount of Rs. 200 stipulated to be paid as "Den-mohr" or dower, and not the whole of that sum; so that the demand in question can be no bar to the plaintiff's suing for the balance of Rs. 150 within the prescribed period of limitation from the date of her husband's death. If the plaintiff had demanded the whole sum and been refused, her cause of action in regard to the whole sum would, I conceive, have arisen from the date of demand; and, if the plaintiff's demand in regard to Rs. 50 had been refused, she would have been precluded from suing for the same, unless she had done so within the prescribed period of limitation from the date of demand. But in the present instance, she demanded only Rs. 50 and obtained it; consequently that demand cannot bring into operation the Statute of Limitation in respect of the balance of Rs. 150 from the date thereof. In this view, the plaintiff, having sued within 1 year and 6 months from the date of her husband's death, is in time, whether the limitation of 3 years as laid down in Clause 9, Section 1, or that of 6 years as prescribed by Clause 16, Section 1 of Act XIV. of 1859, be applicable.

*Translation of Kobalah.*

To Begoo Jaun Bebee,
Daughter of Hossein Khan deceased,
of Sonatolly, in Hooghly,
"Pergunnah Arsahr."

I, Sheikh Bashatoollah, son of Nawab Jaun (deceased), and grandson of Rohomutoollah (deceased), of Sonatolly, in Hooghly, Pergunnah Arsahr, do hereby execute in the year 1267 B. S. this *kabalah* in lieu of Den-mohr due to you. I, having married you in accordance with the Mahomedan Law, with stipulation for a payment of a sum of Rs. 200 as Den-mohr, am living with you. Now, on your demanding from me out of the fixed "Den-mohr" money, Rupees 50, and being unable to pay you the said sum

in cash, I do hereby convey to you my right and title in 5 cottahs of lakheraj land situated in Sonatolly, the boundaries of which are given below, with all its appurtenances, mango, jack, and other trees, &c., which I am holding in undisputed possession under a kobalah dated 2nd Assar 1265, in consideration of Rupees 50, in lieu of the above sum of Rupees 50 on account of Den-mohr, and deliver to you possession of the same from this date. You shall hold possession of the same, and be entitled to enjoy it from generation to generation, and dispose of it by gift or sale. I or my heirs shall have no right or concern in the said premises; any claims that may be preferred to the same by me or my heirs shall be null and void. Now, having made over to you the former kobalah and documents relative to the said land, as well as my own purchase-deed, I do execute and sign this kobalah in a sound state of health and mind, of my own free will, in the presence of witnesses, in lieu of Rupees 50 on account of the Den-mohr money.—Dated 11th Joistee 1267.

*Judgment of the High Court.*—We are of opinion that the plaintiff's claim is not barred by limitation.

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The 29th September 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

**Jurisdiction—Damages for breach of contract —Execution.**

*Reference to the High Court by Mr. C. D. Linton, Judge of the Small Cause Court of Meherpore.*

Soojun Mundul

*versus*

Woozeer Mundul

A suit will lie in the Civil Court to recover damages for breach of contract by defendant to certify, or for his fraudulently omitting to certify, in consequence of which, on an execution fraudulently issued against the plaintiff, his property was seized.

*Case.*—THIS is an action brought by plaintiff to recover from the defendant Rs. 100-6-9 under the following circumstances:—

It appears that Woozeer Mundul brought a suit for half share of paddy, or the value of the same, against Soojun Mundul and other *pro formâ* defendants in this Court, viz., suit No. 55 of 1866; and at the request of both parties that case was referred to arbitration, and the award made returnable on the 26th of February last. The award was made on the 13th of Falgoon 1272, corresponding with 23rd February 1866, and it awarded that defendant Soojun Mundul was to give to plaintiff, *viz.*, Woozeer Mundul, 7 *bis* of paddy, or its value Rs. 93-5, and that a decree for the same was to be passed. On the 26th of February the case was taken up, and in pursuance of the award a decree was passed for Rs. 93-5 in plaintiff's favor, and signed by Mr. Field (who sat with me on that day) and myself. On the 31st July last certain cattle of Soojun Mundul was attacked by Woozeer Mundul, and on the 1st August last an application was made by Soojun, in which he stated that, on the 18th of Falgoon 1272, corresponding with 28th February 1866, he had made over the 7 *bis* of paddy mentioned in the award to Woozeer. I took evidence on this point, as Section 11, Act XXIII. of 1861, enacts that all questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, &c., &c., shall be determined by order of the Court executing the decree, and not by separate suit. But as the evidence proved that the alleged payment of 7 *bis* was made the day after the date of award, but prior to date of decree, I rejected the application on that ground as well as on the ground that the evidence was untrustworthy. Soojun Mundul, therefore, now brings the present action to recover from Woozeer Mundul the 7 *bis* of paddy, or its value, *viz.*, Rs. 93-5, and costs of execution of decree and interest Rs. 6-6, and *khorakee* for cows annas 11-9, total Rs. 100-6-9, and the defendant again denies that he received that quantity of paddy from plaintiff, and urges that the action is not cognizable, as there has already been a decree in case No. 55 of 1866 in his favor for Rs. 93-5, which has been realized from the plaintiff.

The plaintiff's pleader urges that this suit is cognizable for the following reasons:—

*1stly.*—That, when the decree in case No. 55 of 1866 was passed in his presence, he had received no instructions from his client that he had paid the paddy mentioned in the award to the defendant; and

*2ndly.*—That he is prepared with evidence to prove that, at the time of making the award, plaintiff made an express contract that he would certify the payment of paddy to the Court, but in fraud failed to act up to that contract.

I am of opinion, for the reasons urged by the defendant and others, that there is no allegation of any express contract in the plaint that this suit is not cognizable, as it was the plaintiff's duty to have informed his pleader about the alleged payment of paddy, and the decree was not passed behind his pleader's back and collusively obtained. But as the High Court expressed an opinion in the case noted in the margin that, if money is paid by a judgment-debtor to a judgment-creditor, and in making such payment there was an express contract that the latter should certify the payment to the Court, and in fraud fails to do so, the judgment-debtor might have a cause of action against the judgment-creditor; and, as it was further held in the case noted in the margin that a suit lies for specific performance of a contract in respect of an adjustment subsequent to, and for property beyond, the decree, notwithstanding Section 11 of Act XXIII. of 1861, which applies only to subject-matters relating to the decree, I beg to submit the following point in the decision of the High Court:—

The 10th June 1865. Alumja Bibee and another, plaintiffs, *versus* Gooroochurn Roy, defendant. Sutherland's Rulings on References from Mofussil Small Cause Courts, p. 126.

The 4th July 1865. Ramlochun (plaintiff), appellant, *versus* Madhub Chunder (defendant), respondent. Weekly Reporter, vol. 3, p. 118.

Is the plaintiff's suit, under the circumstances above stated, cognizable by a Civil Court?

*Judgment of the High Court.*—We are of opinion that the plaintiff is entitled to sue the defendant to recover damages for breach of his contract to certify, or for fraudulently omitting to certify, in consequence of which, on an execution fraudulently issued against him, his property was seized.

The plaintiff does substantially ask for the damages sustained by the execution, for he asks for Rs. 6-6 on account of costs of execution.

The Judge should raise the proper issues to determine the merits.

The 8th December 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

**Jurisdiction—Suit by Secretary and Manager of a Government Aided School—Damages—Improvements to another's house—Presumption of Gift.**

*Reference to the High Court by Mr. C. D. Linton, Judge of the Court of Small Causes of Chooadangah.*

Sreehurry Roy, Secretary and Manager of the Government Aided School at Koorulgachee, *Plaintiff*,

*versus*

Mr. James Hills, of Nischindapore Factory, *Defendant*.

*Baboo Sreenath Doss*, for Plaintiff.

*Mr. R. T. Allan* for Defendant.

Suit by the Secretary and Manager of a Government Aided School for damages against the owner of the school premises for breaking down the building and removing the materials belonging to plaintiff.—HELD that the plaintiff, as Secretary and Manager, could maintain the action for the benefit of the school; that on the facts the plaintiff was not entitled to greater damages than had been awarded to him for the value of the materials removed by the defendant, or to compensation for the improvements made by him to the building; and that there was no presumption of gift in the case.

*Case.*—THIS was an action in form Trover and Trespass to recover from the defendant the sum of Rs. 500 after abandoning an excess of Rs. 106-13-9, and the following is the plaint and the pleas pleaded by defendant:—

"Action on Damage.
Suit laid at Rupees 500.

The defendant, being dispossessed of the Government Aided School premises which is at Koorulgachee under my management, maliciously brought a complaint against me in the Deputy Collectorate of this sub-division in suit No. 19 of 1865, and obtained possession on the 14th Maugh 1272 under a decree of the said Court; and while in the month of Maugh aforesaid the school premises were in his possession, he took the undermentioned bricks, wood, lime, and soorkee which were stored for the purpose of erecting the verandah of the school and roof, &c., of the hall therein, and having broken down the roof of the 4 east and west side-rooms, took all the wood thereof, and also broke down and destroyed 14 verandah pillars. An appeal having been made by me, the decree of the Lower Court was revers-

ed on the 13th March 1866; and, in conformity with the orders of the Court, I had on the 15th of Bysack 1273 got possession of the broken walls of the four-sides of the aforesaid school premises, irrespective of the roof of the 4 rooms, as well as of the hall. Then on the 21st Bysack of 1273, many of the defendants' people appeared and forcibly broke the said walls and levelled to the ground, therefore the value of the aforesaid materials in stock, as well as of the wood which the defendant had taken on breaking the roof, amounts to Rs. 210-5-6, and the cost of re-building the school premises will amount to Rs. 396-8-3, making an aggregate of Rs. 606-13-9; and after relinquishing Rs. 106-13-9, this action is brought for the recovery of the amount of damages from the defendant to the extent of Rs. 500."

*Pleas.*

"Plaintiff has no right of action, as he is not the owner of the school, but only the manager.

The school was not built for the purposes of the Government Aided School.

That Mr. Furlong, the manager of the defendant, built the school with defendant's funds.

That neither plaintiff as manager, nor the Government, have any right to the school or to the things belonging thereto, but defendant has the right, and therefore this action cannot be maintained.

That no right of the plaintiff or of the Government is disclosed in the plaint, therefore action cannot be heard.

That, as the expenses for repairing the school has not been incurred, hence action premature.

That defendant obtained possession of the school under the decree of a competent Court, and hence no action can lie against him by the plaintiff.

That plaintiff complained in the Fouzdarry against Gobind Chunder Mozoomdar and others for breaking the school, therefore the present action for damages cannot be sustained by plaintiff against the defendant.

Not guilty.

Damages excessive.

That plaintiff was never put into possession of the school by defendant or any body on plaintiff's behalf, and therefore the application made to the Assistant Collector of Chooadangah for ejectment of plaintiff was an error on the part of the defendant's mooktear."

On the evidence adduced, I found, as a fact, that the building mentioned in the plaint was built by Mr. Furlong, the manager of the defendant, with defendant's funds and for the express purposes of a school in the year 1265 (corresponding with 1858); that the Police and some Deputy Collectors occupied it for a short period, and that Government aid was not obtained till 23rd June 1863, when the school was established in the said building; that there was no possession given by defendant to plaintiff or any other party on his behalf of the said building; that plaintiff entered into possession of the said building without the leave and license of the defendant, but that the defendant by his conduct and acts acquiesced in such possession; that after the Cyclone, when the plaintiff was repairing the school, defendant obstructed him in doing so; that, notwithstanding such obstruction, plaintiff much improved the value of the same; that from the acts of the defendant or his people, plaintiff was well aware that his possession was considered unlawful by the defendant; that no rent was ever asked for by, or paid to the defendant by plaintiff or any other person for the said building: that defendant ejected the plaintiff from the said building under the provisions of Section 25, Act X. of 1859, and with the assistance of the Assistant Collector of Chooadangah on 24th January 1866; that the plaintiff on the 13th March 1866 was again put into possession of the walls, the remains of the said building under orders of the Collector, he having held that the Assistant Collector acted without jurisdiction in the matter; that during this interval defendant's people broke down the said building and removed the materials, &c., mentioned in the plaint; that plaintiff was the Manager and Secretary of the said school; and as such the proper party to maintain this action as regards the materials which were not attached to the school, and which were the property of the school; that defendant according to the maxim "respondant superior" was liable for the acts of his servants or agents who removed the said materials, and I, accordingly, hold that he was liable for the value of the same, *viz.*, Rs. 90. I therefore give judgment for this sum, in plaintiff's favor, with costs thereon subject to the opinion of the High Court on the following points:—

*Firstly.*—Whether the plaintiff, as Manager and Secretary of the said school, is the proper party to maintain this action.

*Secondly.*—Whether the plaintiff, on the facts as found, is entitled to recover greater damages than that awarded him.

*Thirdly.*—Whether the plaintiff, on the facts as found, is entitled to any compensation for the improvements made by him as Manager and Secretary to the said school; and—

*Fourthly.*—Whether any presumption as to a gift on the facts as found arise in this case.

It was argued on the part of the plaintiff that bare possession is sufficient to entitle him to maintain this action against the defendant, and to recover the full damages mentioned in the plaint; but, if this is not sufficient, a presumption arises on the evidence that the school was built for the purposes of a school by Mr. Furlong, and from the fact that the Government Aided School was established therein not unknown to the defendant; and from the fact that the school was greatly improved in value by the plaintiff, that the defendant by his conduct and acts made a gift of the building, and that this is confirmed by an application filed by the defendant in the Sudder Ameen's Court at Kishnaghur to withdraw from his suit.

No doubt in trespass and trover bare possession in the plaintiff without a legal title is sufficient as against a wrong-doer, but not as against the real owner, and the difference between trover and trespass is this, that trespass will be for a wrongful taking of goods, although they may have been returned—trover will not, unless they have been previously used or otherwise converted or treated in a manner equivalent to it; and trover will lie where there is a wrongful taking—trespass will not. But, when the defendant disputes the title to the land or messuage in which the trespass is alleged to have been committed, both the possession and title are in issue, and the defendant may show that the plaintiff is the trespasser, and not the defendant.

Now, in the present case, the defendant could, if he chose, according to the ruling in Browne *vs.* Dawson, 12 Ad. and E. 629, have removed the plaintiff by main force when he took possession of the messuage as a trespasser, cannot, by the very act of trespass, immediately and without acquiescence on the part of the owner, become possessed of the land or house upon which he has trespassed. and which he tortiously holds; but if he is allowed to continue on the land or house, and the owner of the same sleeps upon his rights, and makes no effort to remove him, he will gain a possession, wrongful though it be, and cannot be forcibly ejected. A mere intruder upon land who has been allowed to run up a hut and occupy it, has no right to the hut or to the possession thereof, and the landlord may enter and pull down the hut about the ears of the occupants, and remove the materials, Davison *vs.* Wilson, 11 Q. B. 890, 17 Law J. Q. B. 196; Burling *vs.* Read, 11 Q. B. 904. The rightful owner cannot, in any case where he has a right of entry, be made responsible in damages for a trespass upon his own lands, for he is not a trespasser if he has a right to go upon it; but, if he assaults and expels persons who, having originally come into possession lawfully, continue to hold unlawfully after their title to occupy has been determined, he may be made responsible for the assault, and be indicted for the forcible entry, Newton *vs.* Harland, 1 Sc. N. R. 492, but he cannot be made responsible in damages for the expulsion, Pollen *vs.* Brewer, 7 C. B. N. S. 373; 6 Jur. N. S. 509.

"Where a breach of the peace," observes Parke B, "is committed by a free-holder, who, in order to get into possession of his land, assaults a person wrongfully, holding possession of it against his will, although the free-holder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. It is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant who was owner, and that the defendant entered upon it accordingly." Harvy *versus* Bridges, 14 M. and W. 442; 1 Exch. 261; Davison *versus* Wilson, 11 Q. B. 890; Meriton *versus* Coombs, 9 C. B. 787; Law J. C. P. 336.

In the present case it appears that plaintiff, prior to the ejectment under Act X., had no title at all, and that he was possessed of the messuage only as a trespasser, and his again being put into possession under orders of the Collector did not give him a better title; he is therefore still to be considered a trespasser, consequently he cannot recover more than the value of the materials which were the property of the school, and which were not attached to the messuage. He cannot also recover any thing for the improvements, as he was conscious that he was a trespasser, and with that conviction in his mind made the improvements; this was also done in direct opposition to the orders of the defendant. I think the remarks of Lord Chancellor Clare in Kinney *versus* Browne, 3 Bridgw. Par. Cas. 462, 519 cited, Argument; Austin *versus* Chamber, 6 Cl. and Fin.

31; See, per Lord Brougham C. Perrott *versus* Palmer, 3 My. and K. 640, apply with peculiar force to the present case as regards the improvements.

"As to the equity arising from valuable and lasting improvements, I do not consider," His Lordship remarked, "that a man, who is conscious of a defect in his title, and with that conviction on his mind expends a sum of money in improvements, is entitled to avail himself of it. If the person really entitled to the estate will encourage the possessor of it to expend his money in improvements, or if he will look on, and suffer such expenditure, without apprising the party of his intention to dispute his title, and will afterwards endeavour to avail himself of such fraud upon the ground of fraud, the jurisdiction of a Court of Equity will clearly attach upon the case."

It has also been held that a tenant can only obtain nominal damages, unless he gives evidence of the time for which he is entitled to occupy, Twentyman *versus* Knowles, 13 C. B. 222.

Some evidence was adduced on the part of the plaintiff to prove that Mr. Furlong built the school, partly with aid of donations and materials, but the evidence was any thing but trustworthy, and this point was not much pressed on the argument. But, granting that this was so, the maxim "*quicquid plantatur solo solo cedit*" applies, as the rule is that, if the materials of one person are united to the materials belonging to another by the labor of the latter who furnishes the principal materials, the property in the joint produce is in the latter by right of accession. This rule of the Roman and English Law was acknowledged in Merritt *versus* Johnson, 7 Jons. Rep. 473, and it has been applied by Molloy De Jure Maritimo b. 2, ch. 1, Sec. 7, to the case of building a vessel. According to the doctrine of the Pandects, Dig. 6, 1, 61, if one repairs his vessel with another's materials, the property of the vessel remains in him; but if he builds the vessels from the very keel with the materials of another, the vessel belongs to the owner of the materials. The property is supposed to follow the keel, *proprietas totius navis carinæ causam sequitur*. If *A* builds a house with his own materials upon the land of *B*, the land, said Pothier, is the principal subject, and the other is but accessory; for the land can subsist without the building, but the building cannot subsist without the land on which it stands; and therefore the owner of the land acquired by right of accession the property in the building. It is the same thing if *A* builds a house on his own land with the materials of another, for the property in the land vests the property in the building by right of accession, and the owner of the land would only be obliged (if bound to answer at all) to answer to the owner of the materials for the value of them. By the French Civil Code the general principle is that the property of the soil carries with it the property of all that which is directly above and under it (Art. 552); this covers all erections and works made on or within the soil; and if made by a third person with his own materials, the owner has a right to keep them by the right of accession, on reimbursing to the owner the value of the materials and price of workmanship without any regard to the value which the soil may have acquired thereby. Miller *versus* Michond, 11 Rob. &c. 225, Section 2, Kent's Coms., pages 462, 463.

Lastly, as to the presumption arising in this case as to a gift.

I am certainly at a loss to find that any such presumption arises either on the evidence before me or from the conduct and acts of the defendant; on the contrary, I think that the presumption is wholly the other way, *viz.*, that it was an act of accommodation or toleration on the part of the defendant to acquiesce in the possession of the plaintiff, and no presumption can arise on the petition filed by defendant in the Sudder Ameen's Court, as a storm did take place in April, and it is not surprising that the bare walls of the school should have been blown down, as it is proved in the present case that the school had been prior thereto broken down by defendant's people, and the materials of the same removed therefrom; in order to get over this ugly part of the business, the action was brought, and the petition subsequently filed to withdraw from the suit.

On the subject of presumption, Goodeve on Evidence says, pages 626, 627: "The presumption arising out of possession is conclusive or otherwise, according to the circumstances. But in such cases as those of trespass on real property, the mere possession as against the wrong-doer would constitute an absolute presumption; as in a case of injury to personal chattels would the presumption, coupled with proof of some special property in the chattel, constitute a complete title for the purpose of the action.

"Of course, were the rightfulness of the possession itself the subject of the litigation, as in the case of an action of ejectment brought for recovery of land, the mere fact of possession could not defeat the action.

"Where the question is one, not of the mere existence of a presumption, but of the strength attachable to it, this of course would be very much increased by the length of the possession; since, if things are ordinarily presumed to have been rightly transacted, *à fortiori* would they be so after a lapse of time, and which is expressed by the maxim, *Ex diuturnitate omnia presumuntur rite et solemniter esse acta.* The greater the lapse of time, the greater the probability of regularity the law assumes, and the absence of disturbance of the possession would obviously add strength to the presumption.

"But not only is possession a presumption in favor of a rightful ownership, but we have seen that, in all cases of a sustained possession, under a beneficial ownership, wanting only some collateral matters to make it legal in point of form, all sorts of presumption will be made to supply the formal defect and complete the title; and particularly in the instance of matters constituting an original creation of title, whether public or private. Thus, in the absence of their production, there have been presumed Acts of Parliament, Grants or Letters Patent from the Crown, Endowments, Conveyances of Legal Estates, Inquisitions, Fines, Recoveries, Bye-laws of Corporations, and in fact almost every foundation of title."

The principle of presumption is not only confined to the support of a rightful title, but it has been allowed to prevail to defeat an unrighteous defence. *See* Cherry *versus* Herring, 4 Exchequer Reports, page 630.

So in the appeal case of Rajah Pedda Vencatapa Naidoo Bahadur *versus* Aroovalee Roodrapa Naidoo and another, reported at p. 13, No. 3, Vol. 6, Suth. W. R. Privy Council Cases, it was held that the zemindar could not eject his officers from their house of which they had long possession without clear proof of title on his part, and that in India the title of possession must prevail until a good title is shown to the contrary. Mr. Baron Parke, in delivering the judgment of their Lordships, says: "It appears that both parties proceeded to show their title to this house; but neither party was able to give satisfactory evidence of title; and the Court of Sudder say, and say very properly, that the long possession which the respondents have had in the house is a sufficient proof of title in the first instance; and that, as the appellant was not able to give satisfactory proof that he has the title in him, the possession on the part of the plaintiffs must prevail; and that principle is a perfectly just principle. It is for them to judge who are much more competent to do so than we are, whether the possession under such circumstances as took place in this case was a satisfactory proof of title. Probably in this country we, who are well acquainted with the customs here, should say that, if a servant lived in a house appropriated to a servant, we should rather draw an inference from that, that the possession of the servant was the possession of the master; but the customs and usages in the East Indies may be different in that respect; and, as the Court have drawn an inference from the possession, that that is evidence of title, we are not in the position to say the contrary. We think, in the absence of any proof to the contrary, we must suppose the inference to be correct, that they were possessed in their own right. The principle upon which the Court has proceeded is perfectly correct. The title of possession must prevail until a good title is shown to the contrary."

*The judgment of the High Court was delivered as follows by—*

*Peacock, C.J.*—As to the *first* question submitted to us by the Judge, we answer that the plaintiff, as Manager and Secretary of the school in question, is the proper party to maintain this action for the benefit of the school.

On the *second* we think that the plaintiff on the facts as found is not entitled to recover greater damages than those which have been awarded to him, *viz.*, Rs. 90.

*Thirdly.*—That the plaintiff, on the facts as found, is not entitled to any compensation for the improvements made by him as Manager and Secretary to the said school.

*Fourthly.*—We think there is no presumption of gift. The decree of the Judge should stand.

The 8th December 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

**Jurisdiction—Suit for wrongful appropriation—Acquittal by Criminal Court.**

*Reference to the High Court by Baboo Doorgapersad Ghose, Judge of the Court of Small Causes of Kishnaghur.*

Doorga Dass Laha, *Plaintiff*,

*versus*

Doorga Churn Sha, *Defendant*.

Claim for Rupees 81 forcibly taken on the 2nd Bysack 1273.

A suit for money forcibly taken from the plaintiff by the defendant is maintainable in the Civil Court, notwithstanding the defendant's acquittal in the Criminal Court on the charge of robbery.

*Case.*—THE plaintiff stated that, on the 2nd Bysack 1273, he went to Koolbaria to purchase cocoons. The defendant meeting him there asked him to pay back his (defendant's) money, which the plaintiff alleged he never took from him. An altercation ensued, on which the defendant assaulted him, and snatched from him the money claimed in the suit.

The defendant pleaded that he was not liable, and that the case was not cognizable in the Civil Court, as the plaintiff's complaint in the Criminal Court, charging the defendant with robbery of the money, had been dismissed.

It appears from the proceedings of the Criminal Court, filed by the defendant, that the plaintiff brought a complaint in the Criminal Court of Kishnaghur of assault and robbery against the defendant. The Deputy Magistrate, after examining witnesses of the plaintiff, and instituting a local investigation into the matter, fined the defendant Rupees 10 for the assault, and dismissed the charge of robbery.

Now, the issue to be adjudicated in this suit was whether a charge of felony, after having been dismissed by a criminal authority, could be turned into a cause of action cognizable by a Civil Court.

Holding that the defendant, when acquitted of the charge of robbery by the Criminal Court, was not liable to be sued for the amount in the Civil Court, I have dismissed the suit contingent upon the opinion of the High Court.

*The judgment of the High Court was delivered by—*

*Peacock, C.J.*—We are of opinion that, if the defendant be found to have taken the money, he is a trespasser, and is liable to plaintiff for what he took. The fact of the defendant's having been acquitted on the charge of robbery does not at all affect the case.

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The 8th December 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

**House-Rent—Set-off—Unauthorized repairs by tenant.**

*Reference to the High Court by Moulvie Syud Imdad Ali, Judge of the Court of Small Causes of Mozufferpore.*

Musst. Zummeerunnissa, *Plaintiff*,

*versus*

Mr. E. Gayer, *Defendant*.

In a suit for house-rent, the tenant cannot be allowed to set-off a sum expended by him in repairing the house without authority from the plaintiff.

*Case.*—THE plaintiff sues the defendant for Rs. 491, together with interest due on account of house-rent, commencing from March to August 1866, on a lease executed on the 24th November 1864.

The defendant admits that Rs. 480 is due from him on account of house-rent, but raises two objections: *1st*, that he was prepared to pay the rent of the house monthly; but, in consequence of the mooktear of the plaintiff failing to furnish him with a receipt duly stamped (though he was repeatedly desired to do so), he was unable to liquidate the amount; hence plaintiff's claim for interest and costs cannot be entertained; *2nd*, that he having expended Rs. 366-9-6 in repairing the house, he therefore claims a set-off of that amount from Rs. 480 due to the plaintiff, and is willing to pay the balance Rs. 113-6-6.

I am of opinion that the *first* objection raised by the defendant is admissible. With regard to the *second* objection, Baboo Ram Bahadoor Sing, pleader of the plaintiff, argues, *firstly*, that, with reference to Section 121, Act VIII. of 1859, a set-off may be claimed, if the amount claimed by the defendant be a "debt;" *secondly*, that the amount claimed on account of repairs of the house cannot be entertained in a Small Cause Court under Section 6, Act XI. of 1865. Even if a claim of this nature be cognizable in this Court, the point for adjudication will be, can the defendant's claim to a set-off on account of the repairs done to the house, without the sanction of the plaintiff, be entertained?

Mr. Lingham for the defendant argues that the meaning of the word "debt" mentioned in Section 121 of the Code of Civil Procedure, according to Shakespeare's Hindoostanee Dictionary, is "dain," which has reference to every description of monetary transaction; that the translation of the Act in the *Oordoo Gazette*, having reference to debt only, *i e.*, "kurja," is certainly wrong; that, according to the terms of the lease, the *onus* of repairing the house seems to rest with the plaintiff by way of contract; hence the claim of set-off in this case must be looked at in the light of a contract, and is, therefore, cognizable in this Court.

As defendant has admitted the claim of the plaintiff, *viz.*, Rs. 480, on account of house-rent which, it appears, he was ready to pay, had the plaintiff granted him receipts with the proper stamps affixed to them, a circumstance which has also been proved by the deposition of the witnesses examined on behalf of both the parties; and as the plaintiff's vakeel had not objected to the correctness of the amount expended in repairing the house, besides the correctness of the amount of the repairs has been sworn to by the defendant himself and his two witnesses, I have therefore given the plaintiff a decree for the full amount of Rs. 480 without costs and interest, on the understanding that, should the set-off claimed by the defendant be allowed by the High Court, the sum of Rs. 113-6-6 will be given to the plaintiff after deducting Rs. 366-9-6 on account of repairs of the house.

I am of opinion that the meaning of the word debt is "kurja," as has been used in the translation of the Act in the *Oordoo Gazette*. It also appears to me that any fixed or liquidated amount should, in its legal acceptation, be considered a "debt." The terms of the lease do not authorize the deduction of the amount, if any, expended by the defendant towards the repairs of the house from the rent. On the contrary, it stipulates that the repairs will be executed by the plaintiff. Hence the plea of set-off of the expenses of the repairs of the house, which is a disputed point, and stands in need of proof, cannot, under Section 6, Act XI. of 1865, be entertained and disposed of in this Court; consequently, I think that the sum of Rs. 366-9 6 cannot be given credit to in the rent of the house.

At the request of Mr. Lingham, pleader of the defendant, I beg respectfully to solicit the opinion of the High Court on the above point of law.

*The Judgment of the High Court was delivered as follows by—*

*Peacock, C.J.*—We are of opinion that the Judge was right in refusing to allow the defendant to set off the amount expended by him in repairing the house. He had no authority to expend that sum and to debit the plaintiff with it.

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The 8th December 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

**Executors (Liability of).**

*Reference to the High Court by Baboo Punchanun Banerjee, Judge of the Small Cause Court of Hooghly.*

Mr. L. J. Paul, *Plaintiff*,

*versus*

Mr. J. S. Donohoy and others, *Defendants*.

No one for Plaintiff.

*Baboo Debendro Narain Bose* for Defendants.

Although the executor defendants first gave orders for a third-class funeral for the deceased, yet, as they by their conduct induced the plaintiff to furnish a second-class funeral, they were held liable to pay for the same, whether they had assets or not.

*Case.*—THE plaint sets forth that, on the death of Mr. Mullens, the husband of defendant No. 3, the defendant No. 2, Mr. E. R. Gonsalves, one of the executors to the estate of the deceased, sent for the plaintiff; and with the consent of the defendant No. 1, the other executor, and the defendant No. 3, the wife, and the defendant No.

4, the son of the deceased Mr. Mullens, gave orders for a coffin and other articles for the funeral of the deceased, in accordance with which orders the plaintiff supplied the same. The plaintiff therefore sues both the executors Messrs. Donohoy and Gonsalves, and Mrs. Mullens, the wife, and Mr. H. W. Mullens, the son of the deceased, to recover Rupees 298, being the cost of the said coffin and articles and the amount of his fees. The defendant No. 1, Mr. J. S. Donohoy, pleads that he is not liable for the plaintiff's claim, as he is no longer an executor to the estate of Mr. Mullens, deceased, having rendered his accounts to the Judge of the district of Hooghly, and that he gave verbal orders only for a third-class funeral. The defendant No. 2, Mr. E. R. Gonsalves, also pleads non-liability, alleging that he is only a nominal executor to the estate of the deceased, whose assets have not yet been found out; that he and the other executor, Mr. J. S. Donohoy, ordered a third-class funeral, and he has no objection to pay for a third-class funeral; that on the grave-yard the wife and the son of the deceased said that the estate was well able to bear the expenses of a better funeral than had been ordered; and that he, being a nominal executor, stood silent, and that he cannot say who undertook the funeral. The defendants Nos. 3 and 4, the wife and the son of the deceased, Mr. Mullens, respectively, have not appeared.

From the pleadings of both parties, the following issues of law arise:—

*1st.*—Whether the defendants Nos. 1 and 2, the executors to the estate of the deceased Mr. Mullens, having stood by when the defendants Nos. 3 and 4 gave orders for a second-class funeral, and such funeral having been furnished by the plaintiff, the defendants Nos. 1 and 2 are liable to pay for the same, though they at first gave orders for a third-class funeral?

*2nd.*—Whether the executor defendants are liable beyond the assets of the deceased taken charge of by them; and in the event of their not using due diligence in finding out the assets of the deceased, they should be personally liable to the extent of the assets they have neglected to ascertain and take charge of?

*3rd.*—Whether the executor No. 1, Mr. J. S. Donohoy, having rendered his accounts to the Judge of Hooghly, as alleged by him, is exempt from liability to the plaintiff's demand?

*4th.*—Whether the defendants Nos. 3 and 4, Mrs. Mullens and Mr. H. W. Mullens, the wife and son of the deceased, who ordered a second-class funeral, and to whom the deceased left all his property by his will, are liable along with the executor defendants?

With regard to the *first* issue, I am of opinion that, as the defendants Nos. 1 and 2, the executors to the estate of the deceased, Mr. Mullens, did not object to the plaintiff's furnishing a second-class funeral, and accepted the same, they are liable to pay for such a class of funerals.

With regard to the *second* issue, I think that there can be no question that, when an executor neglects to ascertain and take charge of the assets of a deceased person, he must be held liable to any one entitled to be paid out of the assets. In this case the defendant No. 1, Mr. J. S. Donohoy, one of the executors, has filed an account showing that the sum of Rupees 201-15-9 has been realized from the estate of the deceased, and that he has paid away Rupees 153-1-3, leaving a balance of Rupees 48-14-6, and the defendant No. 2, Mr. E. R. Gonsalves, has filed a list of the effects of the deceased taken charge of by him, the value of which he alleges does not exceed Rupees 40, and which he says are still in his hands; he also alleges that a horse of the deceased has been taken charge of by the Magistrate of Hooghly. From an authenticated copy of the will of the deceased filed by the plaintiff (copy whereof is hereto annexed), which the defendants do not object to as spurious, it appears that the deceased left all his property to his wife, the defendant No. 3, to be enjoyed by her during her lifetime, and to devolve after her death on his son, the defendant No. 4, and that the defendants Nos. 1 and 2 were appointed executors to pay all legal expenses. The executor defendants do not allege that there is no more money due to the estate of the deceased than that of which the defendant No. 1 has filed an account, nor any other effects of the deceased than those specified in the list filed by the defendant No. 2, while the will discloses the existence of more assets. In any view of the case, as the defendants Nos. 3 and 4 ordered a second-class funeral, and the defendants Nos. 1 and 2 by their conduct induced the plaintiff to furnish such a funeral, and as Section 279 of the Indian Succession Act provides that funeral expenses must first be defrayed out of the estate of a deceased person, I am of opi-

nion that all the defendants are liable to the plaintiff, who is entitled to have his claim satisfied out of the estate of the deceased through the executor defendants.

As to the *third* issue I believe that the mere fact of rendering an account to the District Judge, of monies alleged to have been received by an executor, does not exonerate him from liability as against any person who is entitled to have his claim to which the law gives priority over other debts, satisfied from the estate of a deceased person. In the present case it appears that the account filed by the defendant No. 1 does not show that there is no other money due to the estate of the deceased. On the contrary, it appears from the examination of the defendant No. 2, Mr. E. R. Gonsalves, that the defendants Nos. 3 and 4, the wife and son of the deceased, distinctly stated on the burial-ground, in the presence of the executors, that the estate could well afford to meet the expenses of a better funeral than a third-class one. The defendant No. 1, Mr. Donohoy's putting in before the Judge an account, which does not itself purport to be an exhaustive one, but which simply shews certain monies which he chose to recover, cannot at all exempt him from liability.

The *fourth* issue has already been disposed of in determining the *second* one, and it is unnecessary to enter into it separately.

*The Judgment of the High Court was delivered as follows by—*

*Peacock, C.J.*—We think that the Judge is right in holding that the defendants are liable. He says that defendants Nos. 3 and 4 ordered a funeral of the second class, and that defendants Nos. 1 and 2, by their conduct, induced the plaintiff to furnish the funeral. It does not matter whether they had assets or not. If they induced the plaintiff to furnish the funeral, they are in either case liable to pay for it.

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The 8th December 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

**Mooktars—Section 13, Act XX. of 1865—Jurisdiction.**

*Reference to the High Court by Mr. C. D. Field, Officiating Judge of the Principal Court of Small Causes at Jessore.*

Muddun Mohun Biswas, *Mooktar.*

The mere bringing a plaint to a vakeel for his signature by a mooktar, not duly qualified, is not an acting as a mooktar which renders the party liable to a fine under Section 13, Act XX. of 1865.

The Judge of a Court of Small Causes has no jurisdiction in such a matter, unless the plaint was one to be presented to that Court.

*Order of Judge, dated 22nd August 1866.*—MUDDUN Mohun Biswas in my presence brought a plaint belonging to Shushee Mookee Dossee to the vakeel Joy Kishto Roy Chowdhry for signature, and admits to me that he is acting as a mooktar under a general power of attorney from Koonj Beharee Biswas, her husband. The plaint is a Civil Court plaint, and the man admits that he has no certificate authorizing him to practise as a mooktar in a Civil Court. I impound the papers, and direct the man to show cause why he should not be fined for acting without authority as a mooktar in this Court.

*Order of Judge, dated 23rd August 1866.*—The defendant asks to have two days allowed to show cause. I grant the request.

*Order of Judge, dated 25th August 1866.*—The defendant Muddun Mohun Biswas has filed a written statement, and has orally shewn cause why he should not be dealt with under the provisions of Act XX. of 1865 (Section 13) for practising as a mooktar, without having obtained a properly stamped certificate authorizing him to practise as such in a Court of Small Causes. He does not wish me to enter into the question, whether or not his acts amounted to "practising as a mooktar." He desires to admit this point, and to obtain the decision of the Court on the following question, *viz.*, "Can he practise as a mooktar without a certificate in the Civil Courts until such time as arrangements have been completed for conferring Civil Court certificates?" He has obtained a certificate authorizing him to practise in the Criminal Courts. He urges that he wishes to obtain a certificate for the Civil Courts also, and that he is willing to present himself for examination in order to qualify for such certificate; that there are no *laches* on his part, and that he should not be debarred from following his former profession, until he has been shewn unfit and wanting in qulification under the new rules.

I think, however, the question he wishes to be decided must be answered in the negative. Act XX. of 1865 came into operation on the first day of January 1866. The defendant was, notwithstanding its pro-

visions, enabled, by Section 1, Act XXIX. of 1865, to continue to practise for a further period of six months, *viz.*, up to the end of June; but on the 1st day of July last, he ceased to enjoy any exception from the provisions of Act XX. of 1865; and, as the law allows me no discretion in the matter, I apprehend that I cannot permit him to practise as a mooktar, without his rendering himself liable to the penalty prescribed by Section 13 of the Pleaders and Mooktars Act. Whether, until arrangements be made for granting Civil Court certificates, that liability should in all cases be enforced, is a question of some difficulty, looking at the express prohibitions contained in Section 5, and one which I do not now decide. Individually I would not enforce it in the case of a mooktar of whose character I was assured, if I was satisfied that I could permit him to practise without its being my duty to enforce it.

Deciding the question raised by the defendant in the negative, I hold him liable to the penalty prescribed by Section 13, Act XX. of 1865, for that he did, on the 22nd day of August 1866, practise as a mooktar in this Court, without having obtained a properly stamped certificate authorizing him to practise as such, and I direct that he pay a fine of one rupee.

*Reference by the Judge.*—Under Section 42, Act XX. of 1865, my order is subject to revision by the High Court. I think, therefore, that this petition should properly be presented to the High Court, who would then call for the papers, if it appeared proper to do so. But, as there may be some doubt as to whether the petition ought not to be presented through, and forwarded by, this Court, I think, on the present occasion, I shall scarcely act wrongly in forwarding the papers of the case with this petition for the order of the High Court.

*The Judgment of the High Court was delivered as follows by—*

*Peacock, C.J.*—By Section 11, Act XX. of 1865, mooktars duly admitted and enrolled may, subject to the conditions of their certificates as to the class of Courts in which they are authorized to practise, appear and act in any Civil Court. This is an authority which they did not possess previously to the passing of that Act. They are not authorized to exercise such functions until duly qualified under the provisions of the Act. In the present case the mooktar merely brought a plaint to a vakeel for his signature. We think that that was not acting as a mooktar, and that the person in question did not thereby render himself liable to a fine.

It is stated by the Judge that the plaint was a Civil Court plaint. But it is not stated that it was a plaint to be presented in the Court of Small Causes. Unless it were a plaint to be presented in that Court, the Judge had no jurisdiction, as the proceeding could not be in any sense said to be practising in the Court of the Judge of Small Causes who imposed the fine.

It is said that the mooktar did not wish the Judge to enter into the question whether or not his acts amounted to practising as a mooktar, and that he desired to admit that point, and obtain the decision of the Court. But, although he was willing to admit that the facts found did amount to practising as a mooktar, the Judge could not properly fine him without holding that they did so.

This is not a question of law submitted under the Small Cause Court Act, and we should have had difficulty in answering it, but for the provisions of Section 42 of the Pleader's Act, XX. of 1865. By that Section every order for imposing a fine passed under the Act is subject to revision by the High Court, if the order shall have been passed by a Court subordinate to that Court. As the order has been brought before us, we think that, for the reasons above given, the fine ought to be remitted. The order must be set aside, and the fine, if paid, refunded.

It also appears that the papers were impounded by the Judge. They must be given back to the mooktar, if they have not already been returned to him.

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The 8th December 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

**Municipal—House tax (due by tenant)—Liability of owner of land.**

*Reference to the High Court by Baboo Doorga Pershad Ghose, Officiating Judge of the Small Cause Court of Kishnaghur.*

Wooma Nundo Roy, *Plaintiff*,

*versus*

Lord H. Ulick Browne, *Defendant.*

The owner of the land is not liable for the tax assessed on a house built upon the land by his tenant.

*Case.*—THE plaintiff stated that the amount of house-taxes realized from him by the Chairman of the Kishnaghur Municipality was not due by him. He, as zemindar, was in the receipt of rent from Ramnath, who lived in a house built by his ancestor on land leased from his (plaintiff's) ancestor. This person, being the owner of the house on which the tax has been imposed, was liable for it, and the tax ought to have been realized from him, and not from the plaintiff, for the simple reason of his receiving rent from him.

The defendant pleaded—

*1st.*—Non-liability.

*2nd.*—The defaulter was plaintiff's tenant, therefore the plaintiff was liable as owner.

The point to be tried in this case was, whether the plaintiff, as owner of land, was liable for house-tax due by his tenant.

It transpired in the trial of the case that one Ramnath Dobey had a *pucka* house built on a piece of land belonging to the plaintiff, and for which Ramnath used to pay him an annual rent. This house and the land on which it stood were not separately assessed. In the Register Book of the Kishnaghur Municipality, Ramnath has been made as owner of the *pucka* building with 8 *cottahs* of land and one clump of bamboos. When the tax of this property fell into arrears in consequence of Ramnath's selling the house, notice of demand was issued to the plaintiff as zemindar of the land for the house-tax due by Ramnath. The purchaser to whom the house had been sold did not purchase it for living in it, but pulled it down, and sold its materials. As there was nothing left but the land from which the arrears of Ramnath's house-tax could be realized, the plaintiff, as the owner of the land, was consequently made to pay the tax of the property owned by Ramnath.

Now, the word "owner," as defined in the District Municipal Act, shall mean the person for the time being receiving the rent of land and buildings, or either of them, whether on his own account, or as agent or trustee for any other person, or who would so receive the same if such land were let to a tenant.

And Section 26 of the Act provides that "it shall be lawful for the Municipal Commissioners to impose an annual rate not exceeding seven and a half per centum of their annual value upon all houses, buildings, and lands, and such rate shall be paid by the *owners* of such houses, buildings, and lands by quarterly instalments."

I understand the word "owner" as given in the Act to mean the actual proprietor of any property that brings any kind of profit to him. The house-tax which was realized from the plaintiff could not be considered to constitute his property, as it yielded him no profit whatsoever. Moreover, the bill issued by the Municipality was for the tax of the house owned by Ramnath, and not for the land on which it stood. It would be putting to great hardship the owners of lands leased out by them (perhaps in perpetuity) if they are primarily made liable for the taxes of houses built by their tenants on their lands. The plaintiff was, therefore, not the real owner of the house, but of the land on which it had stood. The land, as has been observed above, was not separately assessed, and the tax realized from the plaintiff was not for the land, but for the house possessed, and enjoyed by Ramnath as his property.

These circumstances induce me to think Ramnath as the owner liable for the tax, and not the plaintiff from whom it has been illegally realized. The plaintiff is entitled to recover the amount paid by him as house-tax due by Ramnath. The case has, accordingly, been decreed contingent upon the opinion of the Hon'ble Judges of the High Court.

*The Judgment of the High Court was delivered as follows by—*

*Peacock, C.J.*—The point submitted to us is whether the plaintiff, as owner of the land, is liable to the house-tax due by his tenants. We are of opinion that the Judge was right in holding that the plaintiff, as the owner of the land, was not liable for the tax assessed upon the house which belonged to Ramnath.

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The 8th December 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

**Res judicata—Tipperah Rajah's Court.**

*Reference by Mr. H. Richardson, Judge of Tipperah.*

Sreemuttee Modhoo Bibee, *Plaintiff,*

*versus*

Ram Manicko Dey and others, *Defendants.*

Suit to recover Rupees 150, being the value of buffaloes.

The Tipperah Rajah's Court is a Court of competent jurisdiction within the meaning of Section 2, Act VIII. of 1859. A decision given there bars a fresh suit in respect of the same matter in a British Court.

*Reference.*—THE following proceeding, held by the Principal Sudder Ameen of Tipperah, is forwarded to the High Court, for the Court's information and orders on the points therein mooted.

*Proceeding of Principal Sudder Ameen.*—The plaintiff states that she kept some of her buffaloes in the dominion of the independent Rajah of Tipperah, which the defendants took away, and thus deprived her of her right thereto; that both the plaintiff and defendants are the subjects of the British Government, and hence the plaintiff instituted this suit in the Government Court. The defendants plead that the plaintiff once instituted a suit for the same before the Tipperah Rajah, which, however, was dismissed for want of sufficient proof. The following issues were fixed by the Moonsiff:—

*1st.*—Whether Doodijalla is in the province of British territory, or whether in ndependent Tipperah?

*2nd.*—Can or cannot this suit be instituted in the British Court, when it has once been decided by the officials of the independent Tipperah Rajah?

After careful investigation, and taking evidence of the Dewan of Rajah and others, the Moonsiff held that Doodijalla is comprised in the Tipperah Rajah's independent territory. Such being the case, the plaintiff first brought a suit in the Rajah's Court, which was dismissed by Mr. Campbell, the Rajah's agent. The Moonsiff therefore, under the provision of Section 2, Act VIII., was of opinion that this suit does not lie within his jurisdiction, when it has once been decided by a competent Court.

Under this view of the case, the Moonsiff dismissed the same.

Now, the Moonsiff's decision as to the point referred to is, in my opinion, unlawful. The legal arguments of this case are very difficult to comprehend. The principal arguments of the pleaders on both sides are as follows: The appellant's vakeel urges that, when both the plaintiff and defendants are the subjects of the Government, the decision passed by the Rajah's agent cannot be reckoned as such from a competent Court, since the suit concerns the parties alluded to. According to the meaning implied by Section 2, Act VIII., the decision passed by the Tipperah Rajah will not bar the decision of this Court.

The defendant's vakeel urges that, under the provision of Section 5, Act VIII., the plaintiff was at liberty, either to bring his case within the limits of the jurisdiction, where the cause of action arose, or where the defendants at the time of the commencement of the suit dwelt; and when the plaintiff had, of his own accord, once brought his suit in the Court of the Tipperah Rajah, where the cause of action arose, and failed to establish his claim thereto, he (plaintiff) cannot now again bring his suit in the Civil Court constituted by Government; and, consequently, as provided by Section 2, the Court of the Tipperah Rajah may be called a competent Court, for the Government has invested the Rajah of Tipperah with independent power over his dominion, and it is for this reason that criminal and civil cases are disposed of there.

After hearing the pleadings on both sides, I am of opinion that, when the plaintiff, under the provision of Section 5, has had recourse to one of the two courses open to him, that is, when she (plaintiff) preferred the decision of the Rajah's Court to that of the Government, she is not now entitled to do the same in the Queen's Court. The arguments brought forth by the vakeels are so very intricate that, under the provision of Section 28, Act XXIII., I cannot but refer the following questions to the High Court, with the view to dispel all doubts about them:—

*1st.*—Whether the suit relating to moveables, the cause of action of which arose beyond the jurisdiction of the British Court, and in the dominion of an independent Rajah, falls within the meaning of Section 5, Act VIII. of 1859?

*2nd.*—Can or cannot, under Section 2 of Act VIII. of 1859, the decision passed by a Court, constituted by an independent Rajah, bar this suit, when such foreign Court tries the suit in compliance with the plaintiff's request?

It is hereby ordered that a copy of this roobocarree be sent to the Judge of the District, with the request that he will be kind enough to refer the questions alluded to before the Honorable High Court.

*The Judgment of the High Court was delivered as follows by—*

*Peacock, C.J.*—We are of opinion that the Tipperah Rajah's Court was a Court of competent jurisdiction, and that, a decision having been given there, the plaintiff could not bring a fresh suit in the Moonsiff's Court.

The 22nd December 1866.

*Present:*

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

**Limitation—Servant's wages.**

*Reference by Baboo Russick Lall Bose, Officiating Principal Sudder Ameen of Rungpore, dated the 27th June 1866.*

Kalichurn Mitter *versus* Mahomed Soleem.

Where a servant is appointed on a fixed monthly salary, and there is nothing to show that the salary is to be paid in advance, the limitation as to each month's salary commences from the time at which the salary became due, *i. e.*, the end of the month, and not from the date of the dismissal of the servant.

THE question submitted for the opinion of the High Court in this case was whether, in a suit for servant's salary, one year's limitation should be calculated from date of dismissal of such servant, or in respect of salary of every month, from the first day of the succeeding month.

*The Judgment of the High Court was delivered as follows by—*

*Peacock, C.J.*—In this case it appears that it was admitted that the plaintiff was appointed on a fixed monthly salary, from which the Principal Sudder Ameen infers that the salary was payable at the expiration of each month. That was a correct presumption, as we have nothing to show that the salary was to be paid in advance. Consequently, the Principal Sudder Ameen was right in holding that limitation as to each month's salary commenced from the time at which the salary became due, namely, the end of each month. He was also right in holding that limitation did not begin to run at the time at which the plaintiff's services were ended.

# IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The 15th February 1841.

*Present:*

Lord Brougham, Mr. Justice Bosanquet, Mr. Justice Erskine, Dr. Lushington, and Sir E. H. East.

**Hindoo Law of Inheritance.—Widow's Life-Estate—Practice of Privy Council (as to matters of form in appeals from India)—Wusseeyutnamah—Gift—Proclamation (under Section 13, Regulation III., 1793)—Onus Probandi (indivisibility of Raj).**

*On Appeal from the Sudder Dewanny Adawlut of Bengal.*

Ghirdharee Sing

*versus*

Koolahul Sing, Neemdharee Sing, and others.

A widow is entitled by law to a life-estate in her husband's property.

In reviewing proceedings of the Courts in India where the Hindoo and Mahomedan Laws are the rule, and where the forms of pleadings are wholly different from those in use in Courts where the Law of England prevails, the Privy Council will look to the essential justice of the case, not considering whether matters of form have been strictly attended to.

Where a suit for possession is brought upon an alleged wusseeyutnamah or deed of gift, and the Court directs, in conformity with Section 13, Regulation III., 1793, proclamation to be made for all persons having claims to the property to come in, the plaintiff cannot be allowed, after the decree is pronounced giving him but a small share of the property he claims, to object to the proceedings on the ground that the rights of the parties entitled to the property were not put in issue, and that he was prevented from adducing evidence in support of his case.

Where a party alleges a Raj to be indivisible, and that he is, as heir, entitled to succeed to the whole, the *onus* of proof is on him.

*Right Honorable Dr. Lushington.*—Raja Juswunt Sing was the last male possessor of this property, which forms the subject of the present appeal. He died in the year 1801. Upon his death the Ranee, his widow, obtained possession, being entitled by law to a life-estate. In 1818, October 26th, she also died, and then commenced the litigation which has produced the appeal now to be decided.

Their Lordships have already disposed of another appeal relating to the same property, to the particular circumstances of which it will not be necessary to advert, though some of the facts must be stated to render the judgment now to be given more intelligible.

Upon the Ranee's death, several persons preferred claims to the property. Keerut Sing founded his title on an alleged wusseyut or deed of gift from the deceased Ranee, averring also that he was a near relation. He, being mookhtar, and resident with the Ranee at the time of her death, immediately took possession of her estate and property. Some of the other claimants having disputed Keerut Sing's right, disturbances arose. The Judge of the city of Patna, by decree dated 26th December 1818, attached the property, giving to any of the parties permission to bring a suit; but in September 1821, such decree was reversed, and Keerut Sing again put into possession, the other claimants being left to their remedy by regular suit.

On the 20th of December 1821, Koolahul Sing filed his plaint in the Provincial Court of Patna against Keerut Sing, and in this proceeding he alleged the hereditary right of succession to the property attached to the descendants of Lal Sing, his grandfather, and to the descendants of Kulal Chund, the grandfather of the grandfather of Ghirdharee Sing, in proportion of a moiety to each branch.

On the 31st December, in the same year, 1821, Ghirdharee Sing filed his plaint against Keerut Sing, and therein he claimed the whole by descent, alleging also a wusseyut made to him by the Ranee, transferring the property. On the 23rd of May 1822, the suit of Ghirdharee Sing having been called before the Court, the Judge issued an order that proclamation should be made for all persons pretending to have any claim to the property of the deceased Ranee to appear in six weeks, and prosecute their claims, such order purporting to be made in pursuance of Section 13, Regulation III. of 1793.

On the 24th of August 1822, Neemdharee Sing filed his plaint against Keerut Sing, and therein he stated himself to be the youngest brother of Ghirdharee Sing; he alleged that, according to the custom and rule of the family, the youngest brother ought to succeed to the raj and musnud, and further averring that, if his claim on the ground of custom should be rejected, the property should be divided equally among the heirs. In those three suits each of the plaintiffs produced documentary evidence, and Ghirdharee Sing also examined witnesses. Keerut Sing, the defendant, also filed many documents, and examined some witnesses.

In February 1823, the Collector of Behar filed a claim for the property on behalf of the Government, on the presumption that none of the claimants could establish a title. On the questions of law which arose in the various suits, the Court took the opinion of the Pundits, and on the 19th February 1823 proceeded to deliver judgment in all the three suits. By such decrees the Court pronounced against all the pretensions of Keerut Sing, the defendant, and divided the property into two parts, giving one part to the descendants of Mya Ram, and the other to the descendants of Doolab Sing. The effect of this decree was to give an eighth part of the whole to Ghirdharee Sing, another eighth part to Neemdharee Sing, and one quarter to Koolahul Sing and others who were the heirs of Mungul Dutt.

From these decrees there were four appeals to the Sudder Dewanny Adawlut; three by Keerut Sing against each of the three original plaintiffs, and one by Ghirdharee Sing against Koolahul Sing and others entitled to shares by the decrees of 19th February 1823.

The decrees last mentioned were affirmed by the Sudder Dewanny Adawlut, and these decrees form the subject of the present appeal.

The first objection raised on behalf of the appellant is, that in the Court below some of the questions which have been determined by the decree were never put in issue, and that in consequence the appellant is aggrieved, not by this omission only, but by being deprived of the opportunity of producing evidence material to support his case. But their Lordships are of opinion that this objection is in both respects void of any solid foundation. In reviewing the proceedings in India, whence the appeal is brought from the Courts where the Hindoo and Mahomedan Laws are the rule, and where the forms of pleading are wholly different from those in use in Courts where the law of England prevails, this Court must look to the essential justice of the case, not considering whether matters of form have been strictly attended to.

The objection is, that in the Court below the only questions really put in issue were, whether Keerut Sing, the appellant in the former appeal, was entitled to the raj by virtue of the deed of gift or otherwise, and that the claims of the parties to the present appeal were not directly put in issue. But it is quite manifest, from the whole course of the proceedings, that all parties well knew and acted upon the knowledge that the suits were not only to decide upon the claims of Keerut Sing, but to determine also what parties were entitled to the property, the subject of the suit. The parties legally must be presumed to know the regulations of the East India Company on this subject. But the case is not left to that presumption, for, on the 23rd of May 1822, as has been already stated, the Court, in the very suit where the present appellant was plaintiff, directed, in conformity with Section 13, Regulation III. of 1793, proclamation to be made for all persons to come in who had any claim to prefer to this property. It is wholly impossible, therefore, that the appellant could be ignorant of the nature of the proceeding, nor do we find any objection raised by him until after the decree had been pronounced giving him but a small share of the property he claimed. Nor does the objection, that the appellant was prevented from adducing evidence which might have supported his case, stand upon any more solid foundation; for, even supposing that he or his advisers labored under any mistake whilst the proceedings were pending in the inferior Court, it is manifest that the decree of the inferior Court at once brought

the matter to their knowledge, from their own complaint that, when the cause got into the superior Court, the Sudder Dewanny Adawlut, they were well aware of all possible difficulties arising from any omission; and yet, though the Court is in the habit of receiving fresh evidence, and actually did receive it in this case, the appellant, though in the petition of appeal he has stated this as a ground of complaint, never petitioned the Court to admit any additional evidence, nor has at any time attempted to specify what evidence could be brought forward.

These objections, then, being of no weight, the points in the case are few and simple.

It has been contended that this raj is an indivisible raj, and that the appellant is, as heir, entitled to succeed to the whole. Now, both the Courts below were of opinion that the evidence produced wholly failed to establish the position that this raj was indivisible, the *onus* of proof, under the circumstances, clearly lying upon the appellant. The course of possession and enjoyment is most distinctly opposed to such a claim. The property had been held jointly, or, as it is termed in the judgment of the Court below, in co-parcenery, and Mya Ram, through whom the appellant makes his claim, had himself, upon a former occasion, set up a title to the property entirely inconsistent with the judgment of the Court; nay, even the appellant himself, at the commencement of these proceedings, filed a document in conjunction with the respondent, setting forth a joint claim. Any claim on the ground of adoption falls to the ground for nearly the same reasons, as well as for defect of proof. Under these circumstances, their Lordships are of opinion that the appeal must be dismissed with costs.

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The 15th February 1841.

*Present:*

Lord Brougham, Mr. Justice Bosanquet, Mr. Justice Erskine, Dr. Lushington, and Sir E. H. East.

**Mahomedan Law—Endowment—Wukf property not alienable.**

*On Appeal from the Sudder Dewanny Adawlut of Bengal.*

Jewun Doss Sahoo

*versus*

Shah Kubeer-ood-deen.

According to Mahomedan Law, *wukf* or endowed property is not alienable. *Wukf* property is not the less *wukf* property, because of the use of the words "inam" and "altamgha" in the grant, provided the grant clearly appears to have been intended for charitable purposes. A *mutwallee* or superintendent of an endowment is not barred by limitation if he sues to recover possession of endowed property within twelve years from the date of his appointment.

*Bosanquet, J.*—The respondent in this case, on the 17th of September 1822, commenced a suit against the appellant by plaint in the Provincial Court of Patna, to recover certain villages alleged to have been inalienably appropriated by royal grant to the support of a Khankah or religious house of which the plaintiff was a superior or Sijjada Nashin.

These villages, on the 27th of January 1807, were transferred to the defendant by Shah Shumsh-ood-deen, the plaintiff's father, then the Sijjada Nashin, as a security for the repayment of a loan of Rs. 23,501, which transfer was absolute in form, but of which a defeazance (meadi-ikrarnamah) was executed on the same day by the defendant, and provided that, if the sum advanced should be repaid on or before May 1809, the sale should be void; if not, that the villages should become the absolute property of the defendant. On the 2nd of February 1810, Shah Shumsh-ood-deen, in consideration of a further sum of Rs. 5,000, executed another instrument (ikrarnamah) purporting to convey the villages to the defendant absolutely; and on the 5th of the same month, Shah Shumsh-ood-deen died.

On the part of the plaintiff, it was contended that the property in question, being granted for the maintenance of a religious establishment, was to be considered as *wukf* or appropriated, and therefore inalienable; that, if not inalienable, the transfer of 1807 was conditional in the nature of a mortgage, which, by the Bengal Regulation XVII. of the year 1806, could not be foreclosed or made absolute without taking certain proceedings which were admitted not to have been taken in this case; that the transfer of 1810, which purported to be absolute in consideration of the payment of Rs. 5,000, was fraudulent and void, having been made by Shah Shumsh-ood-deen in his last illness and shortly before his death, and conse-

quently that the transfer of 1807, which was originally conditional, had never become absolute.

On the part of the defendant, it was contended that the property in question was not *wukf*, but a proprietary interest given by royal authority to the grantees and their heirs as hereditary property which they were at liberty to dispose of; that the transfer of 1807, admitted to be conditional, had by the sale of 1810 become absolute, notwithstanding the omission to take the proceedings prescribed by Regulation XVII. of 1806, such sale of 1810 being *bonâ fide;* and further that, having been made by Shah Shumsh-ood-deen, the heir of the persons named in the royal grant as grantees, the right of the plaintiff to sue for the recovery of the villages was barred by lapse of time, more than twelve years having elapsed from the time of the sale in February 1810, to the commencement of the suit in 1822, for which Regulations III. of 1793 and XI. of 1805 were relied on.

The plaintiff appears to have been under age at the death of his father in 1810, but in 1819 he was appointed by the Government to be Mutwalee, or manager of the establishment, and Sijjada Nashin, or superior thereof, at which time it is to be presumed that he attained his majority.

The villages in question were granted by two royal firmans, the first by Mahomed Feroksir, 14th March 1717, the second by Shah Alum, 13th October 1762.

The first of these instruments states that a firman has been issued that one lakh of dams from Pergunnah Havily Suhseram in Sooba Bahar, which yields the sum of about Rupees 1,179 to the royal treasury, are endowed and bestowed for the purpose of defraying the expenses of the Khankah of Sheikh Kubeer Dervish as an altamgha grant, and that it shall be established according to the specification made therein. The children of the Sovereign, the Ameers, and those who transact the affairs of State, and the jaghiredars and their successors, are enjoined to relinquish the said dams to the aforenamed individual for him to manage and control, and to descend to his heirs in succession from remove to remove, and they are required to consider the grant in every respect exempt from all contingencies, and not to demand from the said person a fresh sunnûd annually. Upon this instrument, a memorandum is endorsed that one lakh of dams have been granted by His Majesty as an altamgha for the use and expenses of the Khankah of Sheikh Kubeer Dervish.

In 1744, on the petition of Sheikh Gholam Shurf-ood-deen, the grandson of Sheikh Kubeer, who had succeeded him as the Sijjada Nashin, a perwanna was granted by Mahomed Shah enjoining the chowdries, cultivators, &c., to consider the said one lakh of dams as an altamgha-inam by virtue of the perwanna of His Majesty for the purpose of being appropriated to the charge of the travellers to and from the Khankah of the said Sheikh Kubeer, as it stood before, to descend to the offspring in succession, and to refrain from taking from the said Gholam Shurf-ood-deen, as was the rule before, the true and fair revenues payable to the State and the Dewanny taxes, and enjoining them not to deviate from what may be for the benefit of the person in question.

The terms expressing the grant to have been made for the purpose of meeting the charges of the Khankah, and the travellers who frequent the Sheikh Kubeer Dervish, are repeated several times in the endorsement.

A similar perwanna was granted on the petition of Sheikh Kiam-ood-deen, the son of Sheikh Gholam Shurf-ood-deen, after the death of his father; and it is declared that Sheikh Kiam-ood-deen is established in the Sijjada Nashin in the same manner as his father and grandfather were.

The second instrument of the third year of Shah Alum, about the 18th of October 1762, is a grant, nearly similar in form, of two lakhs and eighty-one thousand dams, the produce of which is Rs. 3,000, to be fixed as an altamgha-inam to the sanctified Sheikh Kiam-ood-deen, for the purpose of defraying the expenses of the frequenters to and from him, exempting the lands from the present assessment and from all that may be realized thereout by his good management; and the children and viziers, &c., of the Sovereign are enjoined always to maintain and uphold the said order, and to relinquish the aforesaid dams to them, to descend to the offspring in succession to be enjoyed by them; and deeming this grant free from the contingency of alteration or change, the public officers are not to demand anything from them upon the score of revenues or charges, and to consider the grant free of all dewanny taxes, or for any writings whatever made on account of the State; deeming this a full and positive injunction, they are not to demand

a fresh sunnud annually, nor deviate from these royal and munificent orders.

Upon this instrument a memorandum was endorsed, that 2,81,000 dams have been granted by His Majesty in pergunnah Suhseram, &c., as an altamgha-inam to Sheikh Kiam-ood-deen for the charges of the Fakirs.

The proceedings in another suit, commenced by the plaintiff on the 6th of April 1821, against Mussumat Beeby Ismut, the widow of Shah Shumsh-ood-deen, to recover from her certain other villages comprised in the same royal grants, and claimed as *wukf* property, were put in with the decree of the Sudder Dewanny Adawlut of the 24th of August 1824 therein, in which proceedings were set forth certain opinions of native law officers respecting the nature of *wukf* property taken under the authority of the Court.

The present cause being brought before Mr. Fleming, Third Judge of the Provincial Court of Patna, on the 29th of December 1825, he determined that, as the disputed villages had been sold conditionally, and the conditions of the Regulation XVII. of 1806 not fulfilled, the transaction could not be considered a *bonâ-fide* sale; that the second ikrarnamah executed by Shah Shumsh-ood-deen, the date of which (he said) was one day only before the death of the said Shah, which fact, he says, the defendant does not deny, is invalid: in addition to which, according to the decision pronounced by the Sudder Dewanny Adawlut (*i.e.*, in the suit against Beeby Ismut), a conveyance like this is not legal. On consideration, therefore, of all the circumstances, he considered the conditional sale to stand in the character of a mortgage, that it was therefore necessary to make up an account of the produce of the villages, and of the principal and interest received by the defendant, and therefore ordered him to file the wasilat papers.

On the 2nd of February 1826, the defendant presented a petition to the Provincial Court, that witnesses might be examined in regard to the second ikrarnamah. The cause coming on again before Mr. Fleming, on the 19th of September 1826, he determined that, as the grounds on which the ikrarnamah in question had been rendered null and void had been recorded in the proceedings holden on the 29th of December 1825, no further orders could be passed on that head, but, on the plaintiff stating that the accounts of the defendant were erroneous, it was ordered that the proceedings should be suspended; and Mr. Fleming having, on the 18th of November 1826, expressed suspicion respecting the genuineness of the accounts, thought proper to give time to the plaintiff to falsify them, and as he was going the circuit, he directed the cause to be brought on before the Fourth Judge, before whom another cause connected with the present was pending.

On the 25th of April 1827, Mr. Steer, the Fourth Judge, ordered that an enquiry into the accounts should be made through the Collector of the Zillah Shahabad, and a return was made by the Collector, the particulars of which it is not necessary to notice.

On the 25th of June 1827, Mr. Steer pronounced the following judgment: That, if the conditional sale-writing had stood, in that case a *bonâ-fide* sale could not have been effected without acting up to the provisions of Regulation XVII. of 1806, but as the conditional sale did not stand by, Shah Shumsh-ood-deen having taken a further sum of Rs. 5,000, and returned to the defendant the ikrarnamah which this individual had executed, which circumstance had taken place more than fifteen years, reckoning to the period the suit was brought, justice demanded that, after the lapse of so long a time, the defendant should not be deprived of the full and final *bonâ-fide* sale; that after the period of limitation had gone by, the plea that the ikrarnamah, dated the 2nd of February 1810, was written only one day before the demise of Shah Shumsh-ood-deen, could not be admitted; that the villages had been sold in the character of a *bonâ-fide* sale after the period of a conditional sale expired; and that the grounds on which these lands were deemed not to be a *wukf* endowment had been recorded in the proceedings holden in a cause, No. 803. For these reasons, he ordered that the plaintiff's claim should be dismissed with costs of suit.

The plaintiff having appealed from this judgment to the Sudder Dewanny Adawlut, the appeal came on before Mr. Ross, Judge of the said Court, on the 30th of January 1830, who after stating the conditional and absolute bills of sale to the defendants, the death of Shah Shumsh-ood-deen, and that, after his death, his widow, Mussumat Kadira (Beeby Ismut), held possession of the villages mentioned in the two firmans till 1819, together with other property of the deceased, as malikeh or proprietress; that in 1819 the local agents,

knowing the villages mentioned in the two firmans to be (wukf) property appropriated to religious purposes, appointed the plaintiff to their management as procurator, who instituted a suit against her for these villages and others acquired by the profits of them; and that, having proved their appropriation to religious endowments (wukf), he obtained a decree, which decree, as proof of the property being an appropriation (wukf), was affirmed by the Sudder Dewanny Adawlut, and after stating the proceedings instituted in the present suit, he proceeded thus: "As the villages in dispute were of the number mentioned in the two firmans, according to which firmans on proof of the villages being (wukf) appropriated, the case No. 2340 (Mussumat Kadira, Appellant, against Shah Shumsh-ood-deen, Respondent) was decided by this Court on the 24th of August 1824:" hence, in this case two points demand consideration—1st, whether Shah Shumsh-ood-deen, the villages in question being wukf (appropriated) property, had or had not the right of alienating such wukf (appropriated) property, either by bye-bil-waffa (conditional sale), by bye-meady (absolute sale), or by any other sort of assignment. As to which he says: "The futwa (law opinion) of the law officers of this Court makes this point clear and manifest, *viz.*, that a mutwalee (procurator) has no right to alienate wukf (or appropriated) property by bye-bil-waffa (conditional sale) or by any other kind of transfer."

"Secondly," he says: "That from the 2nd of February 1810, the date of the ikrarnamah (agreement-bond) executed by Shah Shumsh-ood-deen, more than twelve years had elapsed; that Mussumat Kadira, his widow, as malikeh (proprietress), held possession of the property that had been seized of the aforesaid Shah, and that Shah Kubeer-ood-deen, in the month of April 1819, had been appointed mutwalee (procurator) agreeably to the orders of the local agents."

Under these circumstances, he states the question to be, whether the suit of the plaintiff is or is not worthy of being entertained by the Court; and pronounces his opinion that, if from the date of the seisin by a person who believed the seller to have power to sell, and no usurpation or fraud was imputable to the seller, the right of the person seized would be well founded agreeably to Section 3 of Regulation II. of 1805; and he states that Section 14 of Regulation III. of 1793 would apply to his case: that the absolute sale of 2nd February 1810 was fully proved, and neither the plaintiff, nor any one for him, during the twelve years, demanded his right, nor did defendant admit it or promise payment, nor did the plaintiff advance his claim in any Court; that the plaintiff did not appear to have been prevented by minority, having attained the age of majority in 1819, when he was appointed to the superintendence of the wukf property, three years before the commencement of the suit; and that, with reference to Section 14 of Regulation III. of 1793, his claim was beyond the limit of cognizance. As in this case, however, Government was neither plaintiff, nor had the appellant its sanction for instituting the suit, hence, in his judgment, Section 2 of the Regulation II. of 1805 cannot be applied to this case; still, although the Government was not plaintiff, yet in consequence of the property in question being wukf or appropriated property, and the plaintiff appointed mutwalee (procurator) by Government for the management of the wukf (appropriated) property which is consecrated for the entertainment of travellers, he thought there was reason to question whether the provisions of Section 2, Regulation XI. aforesaid, could affect such a case or not; that up to the present period no case of the kind has ever been tried by the Court, consequently the passing of a final order in this case by one Judge did not appear expedient. It was therefore ordered that the papers for the final order should be laid before the two other Judges of the Court.

Mr. Turnbull, another Judge of the Sudder Dewanny Adawlut, before whom the cause was brought, having differed in opinion from Mr. Ross, on the 11th February 1830, ordered the papers to be laid before another Judge; accordingly, it came before Mr. Leicester and himself on the 18th February 1830, who, after stating their opinion that Mr. Steer had no power to decide the case singly in opposition to the opinion of Mr. Fleming, but that he ought either to have postponed the case till the return of Mr. Fleming, or if he thought the enquiry by Mr. Fleming incomplete, to have recorded his opinion, and referred the case to the final order of another Judge; that his decision, founded on the authenticity of the ikrarnamah of the 2nd of February 1810, which he pronounced to be authentic without evidence, and of the verity of which strong suspicions appeared, was indeed extraordinary; since, therefore, the decree of

the Provincial Court could not be sanctioned, it became necessary to enquire into the merits of the plaintiff's claim, and with that view to consider, "First, whether an inquiry in regard to the ikrarnamah of the 2nd February 1810, in order to remove the objection of the respondent by calling for evidence of its authenticity, was or was not necessary?" As to which they say, "In our opinion, an enquiry in regard to the instrument in question is neither necessary nor beneficial to the cause of the defendant, for in the event of the instrument in question on enquiry proving valid and authentic, yet the sale by the late Shah Shumsh-ood-deen of the villages mentioned in the instrument in question is altogether improper and illegal, for the villages in question are proved to be of the number of the wukf or appropriated villages. In such a case the deceased Shah had no power by law to alienate them."

"Secondly, whether the claim of the plaintiff, considering the lapse of twelve years from the date of the ikrarnamah, was cognizable by the Court." On this question their opinion was, "That, independently of the circumstance that, up to the present date, the ikrarnamah of by-bat (absolute sale) has not been proved in such wise as to change the aspect of the first or bye-bil-waffa case (conditional sale), and that there appears no necessity to take evidence in regard to its authenticity, in consideration of Shah Shumsh-ood-deen having no power to alienate the villages in dispute, yet the ikrarnamah in question, even if it were proved authentic, could not bar the claim of the appellant, because the appellant was appointed by the local agents to the offices of the mutwalee (procurator) and sijjada-nashin (superior) of the khankah or monastery of Sheikh Kubeer Dervish (hermit) in 1819." It is obvious, therefore, they say, that, from the date of his appointment, only the superintendence of the wukf (appropriated) villages appertaining to the khankah in question devolved to his care, and previous to that time he had no concern whatever with that matter. In such a case, agreeably to the intentions of Section 14 of Regulation III. of 1793, the claim of the appellant in every way appears worthy of being entertained by the Court.

"Thirdly," they say, "although according to usage in cases of bye-bil-waffa (conditional sale) it behoves that the purchase-money of bye-bil-waffa should be caused to be paid by the plaintiff to the defendant after the latter shall have accounted for the wasilat (mesne-profits) of the villages in dispute, yet, as the estate in question was lakheraj, or rent-free, and a profitable one, and has, moreover, been in the possession of the respondent ever since the year 1806-7 up to the present time, a period of sixteen years, it is presumable that in such a length of time the purchase-money (principal and interest) must have been realized by the defendant from the mahal (district) in question. For this reason, and also in consideration of the seisin of the defendant in the property in question being illegal and the payment not lying in the plaintiff, who is the mutwalee (procurator) and superintendent, an ascertainment of the wasilat (mesne-profits) is deemed unnecessary, but rather with a view of putting an end to the dispute and the suffering of the parties, it is deemed proper that neither the purchase-money be caused to be paid by the plaintiff to the defendant, nor the wasilat (mesne-profits) money be demanded of the defendant by the plaintiff.

The Court, therefore, decreed in favour of the plaintiff's claim, reversing the decision of the Patna Court, and directed the costs of the parties in both Courts to be defrayed respectively by each.

Such being the determination of the Court of Appeal, their Lordships are to consider whether that Court has determined rightly. *First*, that villages contained in the royal grants were to be considered as wukf, and therefore inalienable in any manner whatsoever. *Secondly*, that, notwithstanding the lapse of time, the plaintiff, in the character of mutwalee, to which he had been appointed by Government in 1819, was entitled to recover those villages. *Thirdly*, that, as the possession of them by the defendant was illegal, and as the plaintiff was not the debtor of the defendant, he was not bound to repay the money advanced. With respect to the determination that the plaintiff ought not to have any account of the mesne-profits, as the plaintiff himself has made no complaint, it is unnecessary to consider it.

The question whether the property mentioned in the two royal grants was to be considered as wukf, or as a proprietary right, was much discussed in the above-mentioned case of Kubeer-ood-deen (the present plaintiff) against Mussumut Kadira, and the opinions of the native law-officers taken in that cause being found to be contradictory, it became necessary to consult the futwas of

lawyers in cases formerly decided by the Court respecting wukf endowments, and the decision of the Sudder Dewanny Adawlut, of the 1st of March 1814, in the case Kulla Ali Hossein *versus* Syf Ali, together with a futwa of a former Kazi-ool-kouzat of the Sudder Dewanny Adawlut, and of the Mufti of that Court, were referred to.

The terms of the firman of Aulum Geer in that cause ran thus: "As it has come to the knowledge of His Majesty that, agreeably to a sunnud furnished by the Hakims, certain mouzahs situate, &c., have been appropriated for the purpose of meeting the charges of fakirs and students of the Madrissa, and the Khankah, and Musjid of Moolla Dervish Hossein, son of Moolla Gholam Ali, and the aforesaid individual is hopeful for the royal munificence and favor, His Majesty's royal commands are that, in the event of the aforesaid mouzahs being in the occupation and enjoyment of that individual, the whole of their mouzahs shall continue as they formerly were at a jumma of 15,000 dams from (such date), in the character of a maddad mash (aid for subsistence), according to the tenor of the grant, and in order that he may apply the produce of these lands to meet the charges of the students of his Madrissa and Musjid, and the present and future Hakims, the Amils, &c., are enjoined to relinquish the mouzah in question to that person's occupation, to deem them maaf (exempt from tax), and blotted with the pen in every respect, and not to require of him a fresh sunnud annually. Should that individual occupy anything in any other way, they are not to countenance him." Upon reading the firman, the Kazi-ool-Kouzat and the Mufti gave their futwa as follows: "As in the firman it is written that the produce of the lands specified therein is to be applied to meet the charges of students of the Madrissa and Musjid of Moolla Dervish Hossein, and, as it is not written that the said Moolla shall appropriate the produce to meet the charges of his family and children, or that he shall enjoy the same with his family and children, it therefore appears to us that the lands in question have been fixed as wukf in the character of maddad mash, and are not liable to sale or gift."

Agreeably to the above futwa, the Judges of the Sudder Dewanny Adawlut decreed that the litigated lands contained in the firman in question were a wukf endowment, and were not disposable by sale or gift, the grounds of which judgment (it is said) are fully stated in the decree of that Court, under date March 1st, 1824.

It is to be observed that the word "wukf" was not mentioned in the firman, and that the individual on whose application the grant was made Moolla Hossein, was expressly named. In the Report of this Case II., Macnaghten IV., it is said that the terms of the firman declared that the general superintendence of the resources should be confided to Dervish Hossein, and should remain vested in him, his heirs, and successors for ever, and that the law-officers declared that the appropriation of land or other property to pious and charitable purposes is sufficient to constitute wukf without the express use of that term in the grant, and that the alienation of such property from the purposes intended is illegal.

After referring to this case, and the opinions of the law-officers, the Court of Sudder Dewanny Adawlut, in the case of Kubeer-ood-deen *versus* Mussumat Kadira, appear to have determined that, notwithstanding the use of the words "inam," and "altamgha," in the royal grants, and the mention therein of persons upon whose petition the grants were made, yet as these grants appeared clearly to have been made (as expressed in the petitions) for the purpose of maintaining a charitable institution, the persons named were not to be considered as proprietors, that the establishment (the khankah) was the real donee, and the persons named were only mutwalees of the khankah, that a mutwalee has no right to alienate, and consequently that the transfer by gift or otherwise by Shah Shumsh-ood-deen was illegal.

This decision is in accordance with the doctrine laid down in the Hidaya Book XV. of wukf or appropriation, Hamilton's translation, page 334, where it is said "wukf" in its primitive sense means "detention." In the language of the law (according to Haneefa) it signifies the appropriation of any particular thing in such a way that the appropriator's right in it shall continue, and the advantage of it go to some charitable purpose in the manner of a loan. According to the two disciples, "wukf" signifies the appropriation of a particular article in such a manner as subjects it to the rules of divine property, whence the appropriation right in it is extinguished, and it becomes a property of God by the advantage of it resulting to his creatures. The two disciples

therefore hold appropriation to be absolute, though differing in this, that Aboo Yoosaf holds the appropriation to be absolute from the moment of its execution, whereas Mohammed holds it to be absolute only on the delivery of it to a mutwalee (or procurator), and consequently that it cannot be disposed of by gift or sale, and that inheritance also does not obtain with respect to it. Thus, the term "wukf" in its literal sense comprehends all that is mentioned both at Haneefa and by the two disciples.

Again, p. 334, it is said: "Upon an appropriation becoming valid or absolute, the sale or transfer of the thing appropriated is unlawful according to all lawyers; the transfer is unlawful, because of a saying of the prophet: "Bestow the actual land itself in charity in such a manner that it shall no longer be saleable or inheritable."

If the decision in the case of Kubeer-ood-deen *versus* Mussumat Kadira was correct, it follows that the transfer in this case, whether conditional or absolute, by the same person (Shumsh-ood-deen) to the defendant was illegal. Also, secondly, with respect to the lapse of time, the plaintiff, not being the proprietor, had no right to sue for the recovery of the villages as his own; accordingly, he preferred his suit as Sijjada Nashin, having been appointed mutwalee in 1819. Had he succeeded as heir of his father to a proprietary right in the villages, he might have been barred by the lapse of twelve years, according to Section 14 of Regulation III. of 1793; but, having no right except as mutwalee, he stood in a very different situation. The superintendence of the wukf villages devolved to his care from the date of his appointment only. The mutwalee is the procurator of the donor, which in this case was the sovereign; and it appears by Regulation XIX. of 1810 that it is the duty of every Government to provide that the endowments for pious and beneficial purposes be applied according to their real intention; that local agents are appointed to ascertain and report the names of trustees, managers, and superintendents, whether under the designation of mutwalee or any other, and all vacancies, and to recommend fit persons where the denomination devolves on the Government; that the Board of Commissioners may appoint such persons, or make such other provision for the superintendence, management, or trust as may be thought fit. The plaintiff, therefore, upon his appointment as mutwalee, became the authorized agent of the Government for the performance of the acknowledged duty of the Government to protect the endowment from misapplication; for, as it is said in the opinion of the Mahomedan Lawyers, Appendix, page 21: "The endower and the mutwalee are one and the same;" the endowment in this case was a perpetual wukf endowment, and the duty of the Government to preserve its application to the right use was a public and perpetual duty. By Regulation II. of 1805, Section 2, it is provided that the limitation of twelve years for the commencement of civil suits shall not be considered applicable to the commencement of any suits for the recovery of the public revenue, or for any public rights or claims whatever which may be instituted by or on behalf of the Government with the sanction of the Governor-General in Council, or by direction of any public officer or officers who may be duly authorized to prosecute the same on the part of Government. The plaintiff, who was neither heir nor personal representative of his father in respect of wukf property, had no right of action against the defendant till his appointment in 1819, and the defendant could acquire no right against the Government, whose procurator the plaintiff was, at least until twelve years had elapsed from his appointment.

Thirdly, the endowment being a perpetual wukf, and the alienation consequently illegal, and it not having been shewn that the purchase-money was applied to the use of the khankah, the plaintiff cannot be required to account for it, even supposing the defendant not to have been fully repaid by his long possession of the property.

Their Lordships are therefore of opinion that the judgment of the Court of Sudder Dewanny Adawlut ought to be affirmed.

The 24th February 1841.

*Present:*

Lord Brougham, Lord Denman, Mr. Baron Parke, Mr. Justice Bosanquet, Dr. Lushington, and Sir E. H. East.

**Hereditary Office.**

*On Appeal from the Sudder Dewanny Adawlut of Bombay.*

Babun Wullad Raja Kartick

*versus*

Davood Wullud Nunnoo.

Dismissal of claim for the exercise of a hereditary office, upheld for want of evidence of any descent of the office in the family of the plaintiff.

*Lord Brougham.*—THEIR Lordships are of opinion that, considering the evidence in this case, and the whole matters that have been argued before them on either side, the plaintiff below, the present appellant, fails in making out even a *primâ facie* case. The evidence taken amounts really to no more than this, that the witnesses, with various degrees of accuracy, two or three of them, particularly the older ones, speak to the exercising of this office by Babun calling him the grandfather of the plaintiff, which mode of speaking respecting Babun and the plaintiff is really the only proof that there is in the cause of the right of the plaintiff, the present appellant. Then, admitting the office to exist, and admitting the office to be hereditary, in which both parties seem to be agreed, there is no evidence whatever of any descent of the office in the family of the plaintiff who now claims it. Their Lordships are of opinion, taking the whole case together, that this is a ground upon which his claim ought to be rejected, and the decision of the Sudder Adawlut Court in the last instance affirmed. That decision reversed the previous decision which had reversed the one before it, which again had reversed the original decision; there were, therefore, two decisions on each side, and their Lordships are of opinion that this is a ground quite sufficient to support the decision of the Sudder Adawlut in the last instance.

Their Lordships do not think it necessary to take into consideration the question with respect to the length of time except in so far as to observe that the length of time during which the office has been exercised by another party, and not by these parties, explain it how you will, very much strengthens the observation that arises upon the defect of proof on the part of the plaintiff. It is not necessary to consider it as a bar, but as going very much to strengthen the presumption against the case of the plaintiff, which case can only rely upon presumption to a considerable extent admitted in his favor.

Their Lordships also do not think it necessary to say anything respecting the grant by Scindia to Nunnoo, through whom the respondent might be supposed to claim. Their Lordships have no evidence before them of the grant of Scindia; and no evidence of the grant appears to have been before the Court below. If such a grant were made by that authority, it is quite unnecessary to say whether it would or would not have been a valid grant. In all probability, it might have been, being a grant by the Supreme Power of the State, in whatever way the office might have been granted before in the family of Babun. But that is not before their Lordships; there is no evidence on the subject, and therefore this affirmance of the decree of the Court below is wholly irrespective of, and does in no way proceed upon, any grant by Scindia.

Their Lordships, therefore, are of opinion that the decision of the Court in the last resort in India must be affirmed, but nothing said as to the costs of the appeal.

Decree affirmed.

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The 24th February 1841.

*Present:*

Lord Brougham, Mr. Baron Parke, Mr. Justice Erskine, Dr. Lushington, and Sir E. H. East.

**Mortgage—Attachment—Partnership.**

*On Appeal from the Sudder Dewanny Adawlut of Bombay.*

Jugjeewun-Das Keeka Shah

*versus*

Ram-Das Brijbookun-Das.

A mortgage of the revenues of a village was executed by a firm, and the deed stipulated that the mortgagees should station a *mehta* or clerk of their own in the village to make the collections, who was to receive his monthly salary and daily food from the mortgagors, whilst the property remained in mortgage. A *mehta* was accordingly appointed, who received the rents and

profits of the village for a year or two, but afterwards permitted the mortgagors to receive them for 4 or 5 years. The respondent, who was one of the partners of the firm, did not execute the mortgage, but was cognizant afterwards of the execution of it, and he sued his co-partners, and obtained a decree for his share of the assets of the firm. In execution of his decree, an attachment issued against the estate. The mortgagee sues for the removal of the attachment.

HELD that the mortgage was valid up to the time of the notice of the respondent's claim (*i. e.*, when he proceeded to enforce that claim by attachment and when he became in the situation of a second incumbrancer); and that, if after that time he permitted the mortgagors to receive any portion of the produce of the estate, he ought, with respect to the monies so received, to be postponed to the subsequent incumbrancer.

*Mr. Baron Parke.*—THIS is an appeal from a decree of the Court of Sudder Dewanny Adawlut which reversed a decree of the Zillah Court of Surat, and the appellant prays Her Majesty to reverse the decree of the Court of Sudder Dewanny Adawlut, and to affirm the decree of the Zillah Court of Surat.

The question arises principally upon the construction of a mortgage-deed by which the revenues of the village of Muzeegaum were mortgaged by the firm of Lal Kishen, in which the respondent was a partner, though he did not actually execute the bond.

The revenues of this village were mortgaged upon these terms. An advance had been made by the appellant and another person, not a party to this deed, to the amount nominally of 18,000 rupees, but actually 16,000 were advanced, and that advance was made for the purpose of paying the partnership-debts of the respondent and his co-partners, and then the deed was executed by two of the co-partners, upon which the question in this case arises.

By that deed it is stipulated that the village of Muzeegaum and the house in Surat should be mortgaged for the sum mentioned, 18,000 rupees and upwards. "The profit of this money is settled for 12 annas, on these conditions, that the holders of the mortgage are to receive in redemption the whole of the produce of the said village, about 3,000 or 3,200 rupees, and after allowing for interest, the remainder will go for the purpose of liquidating the principal, and they shall continue so to receive and appropriate the annual produce until the whole of their demand be liquidated. The risk of collecting the income, and of any deficiency in the revenue, is upon our heads, 'that is the mortgagors;' and we do further declare that the holders of the said mortgage shall station a mehta or clerk of their own in the said village, for the purpose of making the collections; and we, the mortgagors, so long as this property remains in mortgage, do agree to give him a monthly salary of 5 rupees and his daily feed so long as we can afford to do so."

This instrument was not executed by the respondent, but there is no doubt that it was executed on the partnership account. There is no doubt that he was cognizant afterwards of the execution of this bond, and that he is bound by the contents of that bond, and he must be considered for the purposes of this suit as being a mortgagor.

There has been some dispute as to what was done by virtue of this bond afterwards. Whether or not actual possession was taken of the property—and their Lordships think the conclusion they ought to come to upon the facts in evidence in the case is, that actual possession was taken by virtue of the mortgage—it is clear that there was a mehta appointed who was paid by the mortgagors, and who might have received the rents and profits of the village, and he probably did receive the rents and profits of the village for a year or two, but afterwards permitted the mortgagors to receive them for four or five years afterwards.

Now, the question will be, in what way the mortgagee's rights are affected by this conduct; and that will depend, *first*, upon the construction of the instrument itself. If this is a binding contract—binding between him and the mortgagors—binding him to apply the rents and profits to the payment of the debt—he might be considered as having forfeited his right to payment in consequence of having allowed the mortgagors themselves to take possession of the rents and profits during some of the years during which his mehta was in possession. But their Lordships are of opinion that that is not the true construction of the deed, but that it is merely a power to satisfy himself, just as an English mortgagee may, by taking possession of the rents and profits of the estate; and if an English mortgagee chooses to forego the benefit of receiving the rents and profits, and permits the mortgagor to take them, it would have no effect as between him and the mortgagor; he would have a full right to recover his debt by reason of the mortgage. The only effect would be, when some subsequent incumbrancer came in, and he had notice of that claim. In that case the rule and law in England would be that, if, after notice, he permits the mortgagor to receive the rents and profits, he exposes himself to the claim

of the second incumbrancer; and that is the principle which their Lordships think ought to be applied to the present case.

That being so, there is no doubt that this transaction was valid up to the time of the notice of the respondent's claim, that is, up to the time when the attachment was served by being delivered to the officer of the village, or in whatever way it was executed; but, until that attachment was executed, there was no notice to the mortgagee of any adverse claim on the part of the respondent. The claim did not arise till the suit for the termination of the partnership was adjusted, at which time the estate became the property of the other partners, and the respondent became entitled, by virtue of that decree, to a claim against his co-partners for the amount of 19,000 and odd rupees. When he proceeded to enforce that claim by attachment, he became in the situation of a second incumbrancer, and not before; and therefore their Lordships are of opinion that, though possession was taken by the mortgagee by means of his mehta, and though he might have received the proceeds of the village from 1819 to 1824 or 1825, yet he is not to be charged in account with more than he actually received during that time. But when the attachment was placed upon the village, he had notice of an adverse claim, and if after that time he permitted the mortgagor to receive any portion of the profits of that estate, then he ought, with respect to the monies so received, to be postponed to the subsequent incumbrancer.

Therefore their Lordships are of opinion that the account ought to be taken upon that principle. The effect of that will be, that it will be clear that the mortgagee is unpaid the full amount of the principal and interest. The principal and interest amount to more than 25,000 rupees from the date of the bond down to the period at which the attachment was placed upon the village. During that period it appears that he had received only between 7,000 and 8,000 rupees, and therefore there would be a large balance due to him. But then he is to be charged for about two years during which time he permitted the mortgagors, after the attachment was placed, to receive the rents and profits of the village. But still that would not be anything near the payment of the principal and interest due upon the bond.

Their Lordships will give a direction to enable the respondent to enforce his claim against the estate subject to the account so taken, reserving to the mortgagee his claim for the balance against the house in Surat, and also against those who are personally responsible to him for the amount of the money originally advanced, and further also against the proceeds of the estate, as soon as the respondent's debt is satisfied, provided it turns out that the proceeds are sufficient to discharge his debt, and to leave a surplus.

Therefore the form of the minute which their Lordships will make as to the mode in which the account shall be taken is this: "Judgment to be reversed. Account to be taken of the principal and interest due on the mortgage of the village of Muzeegaum, and the sums actually received by the appellant prior to the time when the attachment issued, and that the appellant be charged in that account with the amount which he might have received after the attachment but for his wilful default." If the attachment prevented him from receiving at all, of course he will not be charged, but if the attachment was only initiative, in order to ground an execution upon it, and still permitting the person in possession to receive the rents and profits and if he has permitted the mortgagor to receive them, he will be charged—so the words will be: "That the appellant be charged with the amount which he might have received after the attachment but for his wilful default; and that, after taking the account, he be permitted to continue in possession of the village until the balance due on that account, with interest, be fully paid; that, after the same is paid, the respondent be permitted to proceed under an attachment to satisfy his demand, reserving to the appellant right to come against the balance of proceeds of the estate, after satisfying the respondent's claim, and against the house at Surat, and against such parties as are personally liable to him for the balance of his claim."

Then the only remaining question will be the question of costs. Their Lordships are of opinion that, as it is perfectly clear that he must be entitled to hold the estate for some time to come, he will be entitled to his costs—that is, the costs of the proceeding in the Court below, to be calculated upon the principle adopted in the Zillah Court—that part of the suit was wrong, and part was right; and he will also have the costs in the Sudder Dewanny Adawlut, and the costs of the appeal.

*Mr. Lloyd.*—Costs out of the estate?

*Mr. Wigram.*—No. Costs against you.

*Mr. Baron Parke.*—Personal costs.

*Lord Brougham.*—The first judgment is set up upon the 10,000 rupees excluding the other, thinking that he has gone erroneously for the house, and then the costs are given in the Sudder Court, and the costs of the appeal.

*Mr. Lloyd.*—There is one point which your Lordships will allow me to draw your attention to; your Lordships seemed to state in the minute you read that the appellant was to remain in possession till he was paid, out of the proceeds of the estate, the amount of the balance found due upon the account. Now, it appears that the respondent was always very desirous to pay off the amount to redeem; your Lordships will give him liberty, upon the balance of the account being ascertained, to redeem and himself to get into possession.

*Mr. Wigram.*—There is no necessity to specify that; every mortgagor may redeem.

*Mr. Lloyd.*—Your Lordships will allow that to be introduced into the minute of the decree, because otherwise some difficulty may arise.

*Mr. Wigram.*—I cannot object, and, if I could, I would not. It is quite reasonable.

*Mr. Baron Parke.*—Dr. Lushington says that somewhere in the proceedings it appears that there is a difficulty about doing that.

*Dr. Lushington.*—The other parties say that they know this cannot be done without the consent of the mortgagors. How far that may be true or false I do not know.

*Mr. Jackson.*—It was upon the petition presented after the Zillah Judge's decree at page 57.

*Dr. Lushington.*—It is at page 33—"I agreed to pay the whole of the money, and if the Sirkar will direct me to pay, I have no objection, but without the permission and consent of the mortgagors it cannot take place."

*Mr. Baron Parke.*—The mortgagor ought to consent. You have no objection to that, Mr. Wigram?

*Mr. Wigram.*—It is very hard upon the mortgagee that he may not take payment of his debt if he can get it. There may be a question about whom he is to convey the estate to, but I should be sorry, on behalf of my client, that he should not get payment of his debt if he can.

*Mr. Baron Parke.*—Then we will say with liberty to redeem the mortgage by payment of the principal and interest.

*Mr. Wigram.*—With respect to the costs of the appeal, your Lordships give us those?

*Mr. Baron Parke.*—Yes.

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The 2nd July 1841.

*Present:*

Lord Brougham, Mr. Baron Parke, Sir H. Jenner, Dr. Lushington, and Sir E. H. East.

**Adverse possession—Zemindar—Restraint—Ejectment.**

*On Appeal from the Sudder Dewanny Adawlut of Bombay.*

Rajah Pedda Vencatapa Naidoo Bahadur

*versus*

Aroovala Roodrapa Naidoo and another.

A zemindar has no right to restrain the persons of his officers. If he does so, he is liable to more than merely nominal damages. Nor can the zemindar eject his officers from their house of which they have had long possession, without clear proof of title on his part. In India, the title of possession must prevail until a good title is shown to the contrary.

*Mr. Baron Parke.*—Their Lordships do not think it necessary to trouble the Counsel for the respondents in this case. It appears to their Lordships, who have had an opportunity of considering the ingenious objections that have been made to the decree of the Adawlut, that there is really no sufficient foundation for them; and that they cannot see their way clearly to reversing the present decree.

With respect to the first objection, which was Mr. Miller's last objection, and upon which he relied the most, that the proceeding was informal, inasmuch as it was a suit instituted under Regulation XXXII. of 1802, and was not brought within the time within which, by the construction of this Regulation, it ought to be brought—that is, within a year after the injury sustained—the Court have already given an answer to that, namely, that that part of the statement in the plaint is really superfluous; and that, the plaint having been framed upon the legal title to redress, both for the injury to the person and for the injuries to the land, and for taking away personal property, and the suit having been subsequently conducted as a regular suit, the objection is wholly unavailing; that it is improperly stated in the plaint to have been a suit founded upon this Regulation, which is to

give redress to persons whose goods have been taken away without their producing a proof of their title. This case has proceeded all along upon the ground of title in the plaintiff, both as to his claim of compensation for personal injury, and for injury done to his land.

Now, let us just examine, very shortly, the different heads according to which compensation has been awarded by the decree of the Sudder; and it will be found, upon looking at them, that each of the grounds taken in that decree is perfectly well sustained. The first question is with regard to the injury done to the person. There certainly is ample evidence that the plaintiffs below, that is, the now respondents, had their persons put under restraint by order of the Rajah; and for that restraint there has been an award of three hundred rupees each, which appear to the Court below to be a proper compensation. And we certainly are not in a condition to say that that compensation is improper. It is not merely for the inconvenience which they sustained; but probably that sum was awarded by way of letting the zemindars know that they ought not to exercise any supposed authority which they had in contravention to the law. There seems to have been an impression that the zemindar had a right to restrain the persons of his officers in case he thought proper so to do; and to do away that impression, it was right that there should be more than merely nominal damages for that restraint, in order that the zemindars might know henceforth that they could not proceed upon any such supposed custom. It appears, therefore, to their Lordships, that there is no impropriety in the award of the sum of three hundred rupees each, as compensation for the injury which they thus sustained.

The next question is with respect to the damages for ejecting the plaintiffs below, the now respondents, out of their house at Calastry. It appears that both parties proceeded to show their title to this house; but neither party was able to give satisfactory evidence of title; and the Court of Sudder say, and say very properly, that the long possession which the respondents have had in the house is a sufficient proof of title in the first instance, and that, as the appellant was not able to give satisfactory proof that he has the title in him, the possession on the part of the plaintiffs must prevail; and that principle is a perfectly just principle. It is for them to judge, who are much more competent to do so than we are, whether the possession under such circumstances as took place in this case was a satisfactory proof of title. Probably in this country, we, who are well acquainted with the customs here, should say that, if a servant lived in a house appropriated to a servant, we should rather draw an inference from that that the possession of the servant was the possession of the master; but the customs and usages in the East Indies may be different in that respect; and, as the Court have drawn an inference from the possession that that is evidence of the title, we are not in position to say the contrary. We think, in the absence of any proof to the contrary, we must suppose the inference to be correct that they were possessed in their own right. The principle upon which the Court has proceeded is perfectly correct. The title of possession must prevail until a good title is shown to the contrary. That disposes of the second head of objection.

The third is the claim for the house and garden at Poondy; and it is insisted that there was no proof, in the first place, that the defendant below, the now appellant, ever took possession of the house. With respect to the garden, there is unquestionable proof; but I think it will be found in the evidence at page 41, that there was sufficient proof also that the appellant took possession of the house; and, if so, he took possession both of the house and garden without any title; and we are by no means in a condition to say that the sum which has been awarded as a compensation to the respondents in respect to the occupation of the house and garden is an improper amount.

Then the next is the large amount of compensation given, namely, eight thousand rupees. The Court below certainly, as well as ourselves, feel that the evidence which has been given upon this subject is somewhat vague and unsatisfactory. The amount demanded in the plaint exceeds twenty-four thousand rupees, and the sum awarded for damages is eight thousand rupees. The Court below had much better means than we have of forming an estimate of what the plaintiffs' damage really was. They have given a much smaller sum than was claimed, and it is enough for us to say that we cannot see that they came to a wrong conclusion. There was unquestionably evidence for their consideration to prove that the Rajah, and other persons by his authority, had seized property to a very considerable amount. It appears clearly from the parol evidence adduced on the part

of the appellant, the three witnesses mentioned in this decree, although they have not given satisfactory evidence as to the seizure, yet the general complexion of their testimony shows that the Rajah did seize some of the property belonging to the respondents. The Court, upon this part of the case, do not feel that they have any ground to dispute the propriety of the decision at which the Court below has arrived in awarding the compensation of eight thousand rupees.

The same observation also may be made with regard to the fifth head, under which a small sum has been awarded for compensation for the inconvenience to which one of the respondents was put in appearing before the Magistrate. There does not seem to be any reason why that amount should not be allowed. We think, therefore, upon the whole, that there is no ground for the appeal against the decree, and that the decree ought to be affirmed with costs.

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The 6th July 1842.

*Present :*

The Lord President, Lord Brougham, Mr. Justice Erskine, Dr. Lushington, Sir E. H. East, and Sir A. Johnston.

**Unauthorized sale by Collector for arrears of Revenue (of whole Talook in one lot)—Unauthorized confirmation of sale by Board of Revenue—Estoppel (Acquiescence of proprietor)—Accounts—Costs.**

Maharajah Mitterjeet Singh Bahadoor, for himself, and as guardian of Rajah Mood Narain Singh, Meer Abd-oollah, and Lala Bunwaree Lal,

*versus*

The Heirs of the late Ranee, widow of Rajah Juswunt Singh, deceased.

The sale by a Collector of a whole talook in one lot for arrears of revenue, without specific authority previously conferred by the Board of Revenue, was held to be an act unauthorized by the general rules and principles of the Regulations, and not rendered valid by the subsequent unauthorized confirmation of it by the Board, and by the appropriation of the surplus proceeds of the money by the defaulting proprietor. The proprietor's acquiescence in a sale made, as the proprietor believed, by the authority of the Board of Revenue, did not give legal efficacy to a sale altogether void for the want of such authority or bar the proprietor's claim to annul the sale on that ground.

The Courts below, without entering into any investigation of the profits made by the purchaser during his occupation of the estate, assumed that he had re-imbursed himsef the amount of the purchase-money and interest out of the profits of the estate. The Privy Council, however, saw no ground for such an assumption, and directed that an account should be taken of the principal and interest due to the purchaser in respect of the purchase-money paid by him, and also of the net profits made by him out of the estate during his occupation, and that, on payment to him of whatever may appear due to him on taking such account, possession of the talook should be delivered to the proprietor.

The Privy Council further, acquitting the purchaser of all blame in the transaction, reversed so much of the decrees of the Courts below as condemned him in costs, and ordered each party to bear his own costs in all the Courts.

*Erskine, J.*—This appeal arises out of a suit originally instituted in the Provincial Court at Patna, in December 1817, by the late Ranee, the widow of Rajah Juswunt Singh, against the Government of Bengal, and also Maharajah Mitterjeet Singh (for himself, and as guardian of Rajah Mood Narian Singh), Meer Abd-oollah, Gokul Chund, and Baboo Byjnath Sahoo, for the purpose of annulling the sale of the talook of Belkhuruh, in the pergunnah of Urol, formerly the property of the Ranee, but which had been seized for arrears of revenue by the officers of the Government, and by them sold to the appellant, Maharajah Mitterjeet Sing, for the sum of 1,10,000 sicca rupees.

The grounds upon which the sale was impeached by the Ranee were in substance as collected from her plaint. That the sale was the result of a fraudulent conspiracy between the purchaser, Maharajah Mitterjeet Sing, and Baboo Byjnath Sahoo, the cash-keeper of the Government, and Meer Abd-oollah, and also the officers of the Collector. That a larger extent of property than was necessary to produce the arrears due was put up for sale and sold. And that, for the purpose of enabling the purchaser to obtain the Ranee's property at an inadequate price, the whole of the talook of Belkhuruh had been unnecessarily and improperly put up to sale in one lot, and that the advertisement did not sufficiently apprise those who might be expected to become bidders at the sale, what was the extent and nature of the property to be sold. That the sale having been postponed, no sufficient advertisement of the day fixed for the sale had been published, according to the Government Regulations. And that, by these means, property of the Ranee which was worth 5 lacs of rupees had been purchased by the appellant, Maharaja Mitterjeet Sing, for the inadequate price of 1,10,000 sicca rupees.

The Ranee further complained that the purchase was made in fictitious names, and that in reality it was a purchase for the use

of the Government officers, contrary to the Regulations, and that the sale was in fact of 210 villages, whereas the advertisement stated it to be of 74 villages only. And further that the balance of arrears was incorrectly stated; that, in truth, no balance was due for any arrears of the talook that was sold, and that no notice of the advertisement had been given to the Ranee.

After filing her plaint, and before any further proceedings were had, the Ranee died, and the suit was afterwards carried on by her heirs. The officers of the Government put in no answer to the plaintiff's complaint.

After instituting certain inquiries into the circumstances of the sale, the Board of Revenue appears to have come to the conclusion that the sale had been irregularly conducted, and to have wished that the purchaser should give up the estate to the Ranee; but the purchaser having declined to acquiesce in their view of the case, the Government took no part in the defence.

The other defendants, however, having put in their answers, and the pleadings having been brought to a close, a mass of evidence, both documentary and oral, was produced on both sides, and on the 19th of November 1825, the Provincial Court of Patna pronounced its decree, and thereby after entering into an elaborate detail of all the circumstances of the case, and after stating that the sale was fictitious and contrary to the Regulations, and was made through the collusion and misrepresentation of the officers of the Collector, and after further pointing out certain irregularities in the conduct of the sale and the issue of the advertisements, ordered the sale to be annulled, and that the heirs of the Ranee should obtain possession of the villages in dispute, and that they should pay into the treasury the sum of 2,716 rupees 6 annas and 5 gundas, the balance after the receipt of 10,026 rupees 4 annas, on account of the balance of malguzary, due to the end of Phalgoon, with interest.

The decree then proceeds thus: "And as it is probable that the purchasers have realized more than the price of the sale, with interest, from the profits of the villages in dispute, it is not thought necessary to give any order to return the sale price in this case—either of the parties who may think there is an excess of money due, may sue to realize it. As the sale was effected by the combination of and misrepresentations of the officers and purchasers, and the Council, upon the report of the Collector, and the letter of the Board, when an answer of Government to the plaint was required, considered the sale improper, and advised the talook to be returned (with which the purchaser would not comply, and on which account Government refused giving any answer to the plaint of the late Ranee), no blame is attached to Government. The whole costs of both parties are therefore to be paid by the purchasers."

The purchasers appealed from this decree to the Sudder Dewanny Adawlut, and further evidence on both sides was taken in the cause by order of that Court, and on the 29th of May 1832, the Court pronounced its decree, affirming the sentence of the Provincial Court, upon the ground that the sale in dispute was unnecessary and improper, and contrary to the Regulations. And after giving its reasons for this conclusion, the Court proceeds to state as follows: "But be it not understood that the sale in dispute has been reversed on account of the sale price of the land much exceeding the arrears of the malguzary due by the proprietor, for according to Section 25, Regulation V. of 1812, it would not be a sufficient ground to reverse the sale; but be it known that the real ground for the reversal of the sale of the talook in dispute is that, although the jumma of every mehal of the talook was separately entered in the settlement of 1197 Fusly, the Collector did not refer to the Board for a sale of a portion of the lands of the defaulter, sufficient to discharge the arrears due to Government, and it is still more wonderful that, in the advertisement for the sale of the entire talook, the name and jumma of each mehal belonging to it was not mentioned, as ordered by the Regulations, and in consequence of which omission a great loss has been sustained by the respondent."

It was therefore ordered that the decision of the Provincial Court should be in every respect affirmed, and all the costs be payable by the appellant, and the respondent be put in possession immediately on paying sicca Rupees 2,716-6-5, the balance due to Government with interest.

Against these decrees the purchasers appealed to the Queen in Council, and Her Majesty having been pleased to refer the case for hearing before the Judicial Committee, it was fully and very ably argued here on the 7th and 11th December last, before the Lord President, Lord Brougham, the Judge of the Admiralty, and myself. And

upon the argument, the learned Counsel for the respondent, feeling that the facts proved in the Court below would not enable them to support the decrees appealed from, on the ground either of fraudulent combination between the purchasers and the Collector, or upon their plea that the sale was fictitious, or that the purchase was made on behalf of Government officers, very properly abandoned those untenable positions; for their Lordships are satisfied, after a careful examination of the evidence, that no such case was made out by the respondents.

But it was upon the argument strongly urged that the sale had been justly annulled, upon the ground that the sale of the whole talook, and especially the sale of it in one lot, was unnecessary and inproper, and contrary to the regulations and without the sanction of the Board of Revenue, and that the advertisements were insufficient in point of form, and had not been properly issued or served.

A short summary of the facts proved will render clearer the view which their Lordships take of the questions before them.

It appears that the talook in question consisted of 210 mouzas or villages, of which 85 were original or principal villages called asli, and 125 were dependent villages or hamlets called dakhili, but these 210 villages were classed for fiscal purposes under the names of 74 of the villages, and a separate sum called the sudder jumma was, by the settlement of 1197 Fusly, assessed upon each of these 74 fiscal villages, the total amount of which was sicca Rupees 24,748-11-10. This constituted the sudder jumma of the whole talook of Belkhuruh.

Besides this talook of Belkhuruh, the Ranee was also the proprietor of four other talooks in other pergunnahs, the assessments for which were entered in the same form, namely, by placing a sudder jumma opposite the several fiscal villages of each talook, and placing the sum total of these jummas as the sudder jumma of the respective talooks, making the sudder jumma of all the five talooks to amount to sicca Rupees 41,451, 4 a. 15 g., which was the amount of revenue payable yearly by the Ranee in respect of these five talooks.

It appeared by the evidence, and by the admission of the parties, that, prior to the year 1801, separate kubooleuts or leases were made in respect of each of the fiscal villages composing the several talooks above mentioned; but that, in the year 1801, in consequence of the inconvenience arisiug from such an arrangement, the different zemindars were required to furnish a general kubooleut and kistbundy for the whole of their villages, and it was notified to the different zemindars that the several adjoining villages composing a zemindary, or held by one individual, were to be considered as one joint estate, and that all the villages of a proprietor would be included in the name of the principal village as one talook.

In pursuance of this requirement and notice, the Ranee, by her agent Puhulwunt Sing, on the 24th of October 1801, executed a kubooleut, by which he undertook, on behalf of the Ranee, to continue to pay the sum of 41,451 rupees 4 annas and 15 gundas, the jumma khiraj or assessment of the villages of the pergunnahs Urol, Mussoora, Shalpoor, Mittam, Sanda, and Gah, that being the annual jumma fixed at the Decennial Settlement, and declared that, if she should not pay the instalments monthly, according to the deed of instalment, the whole of her property and possessions might be sold at the discretion of the chief authorities, and the balance realized. And in a schedule to this instrument, the names of the seventy-four fiscal villages, with the several assessments to each, are inserted, headed by the name of the pergunnah Urol, with the Sudder Jumma of such assessments, followed by a similar list of the other villages and assessments, arranged under similar headings, of the names and sudder jumma of the other pergunnahs to which they respectively belong.

It further appeared by the evidence that, in the month of February 1815, there was an arrear of revenue due to Government from the Ranee, in respect of these five talooks, to the amount of sicca Rupees 12,742-10-5, and that, upon the 2nd of May 1815, the Acting Collector at Behar published an advertisement for the sale of Belkhuruh on Monday the 5th of June at the Collector's sudder cutcherry at Bankipoor, in which the property to be sold was thus described:—1. Mahal Belkhuruh. 2. Malguzar, Ranee of the deceased Rajah Juswunt Sing. 3, Sudder jumma, sicca Rupees 24,748-11-6. 4. Pergunnah Urol. 5. Village for sale, Belkhuruh, and seventy-four mouzas. 6. Balance due to Government, sicca Rupees 12,742-10-5. Evidence was given of the service and distribution of this advertisement, the insufficiency of which, however, formed one of the subjects of complaint by the Ranee, to which it will be necessary more particularly to refer.

It appears that the estates of other defaulters had been advertised for sale on the same 5th of June; but, before that day arrived, orders were received by the Collector from the Board of Revenue, that, with a view of affording to the Malguzars in arrear a further indulgence in respect of time, the sale should be deferred until the 22nd of that month.

No public notice of this postponement had been given before the 5th of June, and a number of persons having assembled on that day expecting a sale, the Acting Collector caused it to be made known to the persons present that the sale was postponed till the 22nd of June, and another advertisement was prepared and delivered for distribution in the following form:—"5th June 1815. Before this, advertisements were published, dated 2nd of May 1815, that the villages of the pergunnahs of Zillah Behar, mentioned in the said advertisements, would be sold on Monday the 5th of June 1815, agreeing with the 13th of Jeyt 1222 Fusly, for arrears of the Government malguzary, but that the sale would be suspended from this date until the 21st June 1815, according to the orders of the Board of Revenue, and that the sale would take place on Thursday the 22nd June 1815, agreeing with the 1st of Asarh 1222 Fusly, at Bankipore, of the villages mentioned in the said advertisement, according to the conditions mentioned in the advertisement. Notice is therefore given that purchasers attend the sale on the 22nd of June of the said year at the sudder cutcherry at Bankipore, and purchase, and if the villages are sold for the arrears, they purchase them on the conditions specified in the former advertisement."

Notice of the postponement was publicly given to the several persons attending for the expected sale, amongst whom was Chumun Lal, the agent of the Ranee, who had herself applied for a postponement of the sale.

A copy of this advertisement was affixed to the cutcherry at which the sale was to have taken place, and copies of the advertisement were affixed at the different Courts in the district, but no copy of this advertisement was served on the Ranee herself, or affixed upon any part of the estate. On the 22nd of June, the talook of Belkhuruh was put up to sale in one lot, and sold to the agent of Mitterjeet Sing for the sum of 1,10,000 sicca rupees, which sum was afterwards, and before the 29th of June, paid into the treasury. On the 29th of June, petitions were presented by Mitterjeet Sing, Gokul Chund, and Meer Abd-oollah, stating that the estate had been bought by Mitterjeet Sing, as to one-half, for his son Baboo Mood Narain; as to one quarter, for Gokul Chund; and as to the remaining quarter, for Meer Abd-oollah; and praying that their names might be inserted as proprietors, according to their several proportions.

On the 4th and 6th of July, petitions were presented by the Ranee, complaining of the sale, and praying that it might be annulled, which were laid before the Board of Revenue; and that Board, after receiving a report from the Acting Collector, to whom the two petitions were referred for an explanation by a letter from their Acting Secretary to the Acting Collector of Behar, dated the 15th of August, declared that the Board was satisfied with the explanation relative to the sale of the estates of the Ranee of the Rajah Juswunt Sing, and considered the sale legal, and accordingly confirmed it; but, owing to circumstances which it is not necessary particularly to mention, possession was not given to the purchasers until the month of March 1816.

It further appeared by evidence, satisfactory to their Lordships though the fact was disputed by the respondents, that the balance of the purchase-money (after deducting the arrears of duty for which the sale was made, and the costs of the sale) was, from time to time, appropriated by the Ranee to the payment of arrears of tribute due from her in respect of other property, and that at the time of the commencement of the suit now under appeal, there remained the sum of 77 rupees 9 annas 10 gundas only unappropriated, and that this small balance was afterwards applied by her to the like purposes.

Under these circumstances, it was contended, on the part of the appellant, that the sale of the whole talook was strictly correct according to the fair import of the Regulations then in force, and that the advertisements were issued and published agreeably to the form prescribed by the regulations. That even if more than was necessary had been erroneously sold by the Collector, and if the form and publication of the advertisements had been defective, the sale could not be thereby invalidated; and that at all events neither the Ranee nor her heirs could now claim to have the sale annulled on such grounds, since the Ranee had, by appropriating the purchase-money after it had been paid into the treasury by the purchaser, adopted and ratified the sale, and waived all

irregularities in the conduct of it; and still less could any irregularities in the form or service of the advertisements supply any ground for annulling the sale after such appropriation of the price.

The respondents, on the other hand, insisted that, as the power of the Collector to sell was a qualified power, the purchaser could only maintain his title under the sale by showing that the power had been duly exercised, and they denied that there was any sufficient evidence of any appropriation of the price by the Ranee, and asserted that, if there was, it could not give efficacy to a sale which was made in defiance of her protest and resistance, and contrary to law.

The first question, therefore, which their Lordships have had to consider is, whether the sale in one lot of the whole talook for arrears of tribute, which might have been paid off by the proceeds of some definite portion of the talook, was within the scope of the Collector's authority. For if the Collector had no authority to sell the whole talook under the circumstances as they stood at the time of the sale, their Lordships' assent to the argument of the respondents' counsel, that no implied adoption of the sale by the subsequent appropriation of the price, will bar the Ranee from reclaiming her estate on the restitution of the purchase-money. The power of the Collector to sell the talook depends upon the different Regulations referred to in the argument, and which are set out in the Supplemental Appendix to the case. The Regulations of 1793, Regulation XIV., after requiring certain preliminary steps, not relevant to this inquiry, declare that the lands of defaulters are liable to seizure and sale by the Collector (without legal process in any Court of Justice) for the discharge of arrears of revenue, but only under the sanction of the Governor-General in Council, previously obtained upon the report of the Collector, and the recommendation of the Board of Revenue, who are to recommend the sale of such a portion of the estate of the defaulter as may be sufficient for the liquidation of the amount.

By Regulation III. of 1794, Section 5, the Collector is required to submit to the Board of Revenue a statement of such lands of the defaulter as he may think it advisable to have sold to make good the arrears. And the Board of Revenue is authorized to cause the lands specified in such statement, or any other lands belonging to the defaulter, to be advertised for sale, and to report the same; but still the sale was not to take place without the previous sanction of the Governor-General in Council.

By Regulation V. of 1796, Section 2, the Collector is directed to be careful to select for sale such land as from the current value of similar lands may appear likely to sell for the amount to be recovered by the sale, and no more.

Now, taking these Regulations together, they declare the power of the Governor in Council to sell the lands of any defaulter for the payment of the arrears of revenue, but also declare that the Governor-General will only proceed upon the recommendation of the Board of Revenue, to whom the Collector is to report, not only the arrears, but also the lands which, in his judgment, ought to be sold for the liquidation. But in forming that opinion, the Collector is required to be careful to select such lands as may appear likely to produce the amount of the arrears, and no more. And then, in order to protect the proprietor from the consequences of any miscalculation on the part of the Collector, the 3rd Section of Regulation V. of 1796 proceeds to direct that, where the lands put up to sale consist of distinct mehals, separately assessed for the public revenue, they are to be sold in distinct lots, or, though not separately assessed, if they be of considerable extent, and may be readily divided into distinct lots, they are to be divided and sold; and then provides that so many distinct lots only shall be sold as may be necessary to produce the amount of the arrears and the costs.

But where the lands are put up in one lot, the whole is to be sold, whether the amount bid for them be more or less than the sum due, and the overplus, if any, paid to the proprietor.

By Regulation VII. of 1799, the sale of the land of defaulters is only to take place once a year, and in the interval the Collector is authorized to attach the lands of the defaulters, and at the close of the year, by the 5th Clause of Section 23, he is required to report to the Board of Revenue the amount of the arrears, and at the same time to transmit a statement of the lands for sale, sufficient to make good the arrear and the interest thereon to the time of sale, to be disposed of according to the rules prescribed for public sales on account of arrears of revenue.

But by Section 30 it is declared that the Board of Revenue are thereafter to conduct the sales of land in the mode prescribed by the Regulations, without any reference to

the Governor-General in Council, except in cases where they require his instructions, and they are required to be particularly attentive to the proper selection of lands for sale by the Collector.

The effect of this alteration is worthy of attention; for as before this time no sale of any lands for the arrears of revenue could take place without the sanction of the Governor-General in Council, and as the Governor-General in Council claimed and exercised an indefeasible right to sell the whole or any portion of a defaulter's land for arrears of revenue, it followed that no sale of land for such purpose, under the sanction of the Governor-General in Council, could be invalidated, on the plea that too much had been selected by the Collector.

But as, by the Regulation last referred to, the Board of Revenue are authorized to conduct the sales in the mode prescribed by the Regulations, without reference to the Governor-General, it would follow that the sale in question, which was made without any reference to the Governor-General in Council, could only be sustained under the Regulation, by showing that it was sanctioned by those former Regulations.

By Regulation I. of 1801, Section 6, after reciting that the unqualified operation of the rule established by Section 2, Regulation V. of 1796, had been found prejudicial to the public interests in the sub-division of small estates, as well as to the proprietors of such estates, by parcelling them into lots so inconsiderable as to prevent a competition for the purchase of them, and after authorizing the Board of Revenue, if they should judge it advisable, to sell in one lot any entire estate, of which the annual assessment did not exceed 500 sicca rupees, the Board of Revenue is thereby authorized, whenever the amount to be recovered by a sale of land shall bear such proportion to the computed value of the whole estate as may be calculated to leave only an inconsiderable surplus on the sale of the entire estate, to sell the entire estate in the manner prescribed by the Regulations, though the total annual assessment should exceed the sum of 500 sicca rupees, above limited. In such cases the value of the lands for sale is to be computed from the best information procurable of their produce and extent, compared with the amount of the assessment upon them, and the current value of similar lands. And by Section 7 it was provided that the rule in Section 3, Regulation V. of 1796, was not meant to require the division and distinct allotment of a pergunnah, or turruf, or other established local division; that, on the contrary, all established local divisions of known limits were, as far as possible, to be preserved entire in every public sale of land, and to regulate in general the sub-division of landed property, when an estate may be divided at the public sales, and a portion disposed of as a distinct estate.

If the authority vested in the Board of Revenue had stopped here, it would have been necessary to show, not only that the sale of the whole talook of Belkhuruh had been made by the directions of the Board of Revenue, but also that such sale was authorized by the terms of the 5th and 7th Sections of Regulation I. of 1801, last referred to. But by Regulation V. of 1812, Section 24, it is declared that the consideration of, and decision on, the expediency of selling the entire estate, or of disposing in the first instance of any particular part of it, resides in the Board of Revenue and Board of Commissioners respectively, subject to the control of the Government.

And by Section 25, after reciting that no means existed by which any certain or accurate computation could be formed *à priori* of the real value of any estate or portion of estate, it was declared that sales made at public auction for that purpose were not liable to be annulled by the Courts of Judicature, on the ground that the proceeds of the sales have materially exceeded the amount of the arrears due from the proprietor of the land to Government, and that the Board of Revenue and Commissioners would be guided by their own discretion, subject, of course, to any instructions from the Governor-General in Council.

By Regulation XVIII. of 1814, Section 2, it was enacted that, whenever any portion of an instalment of revenue payable in any month remained undischarged on the 1st of the following month, the Collector might forthwith, or at any subsequent time (that arrear remaining undischarged), either after service of a written demand, or without such demand, advertise lands, the property of the defaulter, for public sale, without first submitting a statement of those lands for the previous sanction of the Board of Revenue, or Board of Commissioners, supposing the land so advertised to constitute an entire estate, or the whole of the defaulter's right and interest in a joint estate. But in such case he was to report the same to the Board of Revenue, or Board of Commissioners, and to await the Board's sanction, and on no

account to proceed to the actual sale of the lands without the express sanction of the Board; subject to a proviso for apportioning the jumma in cases in which the lot proposed to be sold constituted only a part of the defaulter's property in an estate.

By Section 4, the Board of Revenue are directed, on receipt of the Collector's report of his having advertised lands for sale, or on receipt of any statement of land proposed by him for sale, to proceed, without reference to the Governor-General in Council, to determine whether the sale shall take place.

This was the last Regulation passed upon the subject before the date of the sale in question. At that time, therefore, the law stood thus—the discretionary power of deciding whether the whole of a defaulter's lands, or any or what portion of them, should be actually sold to pay the arrears of revenue, which was originally vested in the Governor-General in Council, was transferred to the Board of Revenue and Commissioners, subject nevertheless to the control of the Governor-General in Council, whenever he thought fit to interpose in his executive capacity.

But in order to assist the Board in this decision, and to prevent delay, it was the duty of the Collector, whenever any revenue fell in arrear, to report the amount of it to the Board of Revenue, or Board of Commissioners, and, either before or after advertising a sale, to send a statement of the particular land of the defaulter which he proposed should be sold to pay off the arrears, but the Collector was in no case to proceed to an actual sale without the express sanction of the Board.

The fact to be ascertained, therefore, with respect to the first question, is whether the Board of Revenue had, before the disputed sale, sanctioned the sale of the whole talook of Belkhuruh, for the liquidation of the arrears due from the Ranee.

Now, it appears from the evidence that, on the 24th of April 1815, the Collector reported to the Board of Revenue that he had advertised certain lands for sale on the 5th of June then next, and transmitted an abstract statement of the lands in Zillah Behar proposed to be sold, for the recovery of arrears of revenue due to Government up to the 1st of Phalgoon, that is, to February and March 1815. But although the Collector in this letter states that he had advertised for sale the lands mentioned in the abstract, there is no evidence in the proceedings of any advertisement of any lands of the Ranee having been published before the 2nd May following, at which date the advertisement already referred to was published. Although this advertisement specifies in the margin that 74 mouzahs were to be sold for the payment of the balance due to Government, of sicca Rupees 12,742-10-3, and states that the sale was to take place in conformity with the order of the Board of Revenue, yet there are no traces in the evidence of any previous notice having been forwarded to the Board of Revenue, of the specific lots that it was proposed to put up for sale, and the abstract contained in the Collector's letter of the 24th of April gives no such information to the Board—neither indeed do the Regulations require that such notice should be sent previous to the advertisement; and as the date of the order of the Board of Revenue is not stated in the advertisement, there is no reason for concluding that any such authority had at that time been given for the sale of any specific lands, for realizing the arrears due from the Ranee; and there is no evidence of any communication to the Board of Revenue, of the intention of the Collector to sell the talook of Belkhuruh in one lot for that purpose. There is no direct proof, indeed, that the advertisement was ever forwarded to the Board before the sale; and, if it had been, without further explanation it would not have apprised the Board that the 74 mouzahs proposed to be sold constituted the whole of the talook, or that the sale of any definite portion would be sufficient to cover the amount of the arrears; neither is there any trace in the evidence that the Board of Revenue at any time before the sale had actually given authority to the Collector to proceed to the sale of the 74 mouzahs in one lot.

It may be indeed fairly assumed that the Board had been informed that the Collector had advertised for sale the 808 mouzahs mentioned in the abstract of 24th April 1815, and that the sale of those mouzahs generally had been sanctioned by the Board, because it is stated that the sale of those estates had been postponed from the 5th June to the 22nd July by the order of the Board—a statement sufficiently sanctioned by the subsequent confirmation of the sale. But there is not only no direct proof of any specific authority from the Board of Revenue, to sell the whole talook in one lot, but there is not even a statement by the Collector that any such authority had been given. On the contrary, the statement by the Collector leads

to the inference that none such had been received by him—for in his report, Appendix, page 95, in answer to the Ranee's complaint that the whole talook had been sold in one lot, he does not plead the specific authority of the Board, but the known general principles of the Regulations, as his justification for having so conducted the sale; a justification amply sufficient if true, for it is only when the general directions of the Regulations are departed from, that the specific directions of the Board can be required.

But as has been already shown by Regulation XVIII. of 1814, Section 11 (Supplemental Appendix 33), the Collector is expressly forbidden to proceed to the actual sale of lands advertised, without the express sanction of the Board, to whom by the previous Regulation of 1812 was entrusted the consideration of and decision on the expediency of selling the entire estate, or of disposing in the first instance of any particular part of it. And even by the earlier Regulations of 1796, when the Collector, as it should seem, conducted the sale upon general rules laid down by the Governor-General in Council, without any specific directions on any particular sale that fell within the scope of the general rules, he was bound to select for sale such lands as from the current value of similar lands might appear likely to sell for the amount to be recovered by the sale, and no more. And the spirit and tone of the whole Regulation require that, where there are separate assessments upon definite portions or divisions of the property, the property should be put up to sale in separate lots, unless it should be the wish of the proprietor, or for his obvious benefit, that the whole estate should be put up in one entire lot, in which case the whole was to be sold, and the surplus paid over to him.

A reference to the Regulations, therefore, shows that the plea urged by the Collector was unfounded, while the adoption of that plea proves that he had no express direction on the subject, and that he acted without any sufficient legal authority.

Other Regulations were passed after the date of the sale, some of which, having a restrospective operation, were cited in the argument. But none of them materially affect the question now under consideration, although one of them tends to confirm the view which has already been taken of the effect of former Regulations. The provision alluded to is in the 3rd Clause of Section 6 of Regulation XI. of 1822, by which it is declared that no sale, whether made before or after the promulgation of that Regulation, shall be liable to be annulled, on the ground of informality or omission in the communications that may have passed between the Collector and the controlling Board, provided that the Board shall have actually given authority to proceed to the sale of the specific lot sold. Now, for the reasons already given, this Clause will not protect the sale in question, and its terms seem to imply that previous authority by the Board to proceed to the sale of the specific lot sold was essential to the validity of all sales.

In the course of the argument, much reliance was placed upon the kubooleut executed by the Ranee's agent by which she subjected the whole of her property and possessions to sale, for any arrears that might be due. But this kubooleut, which was executed on the 24th of October 1801, was given at a time when by the Regulations the Board of Revenue itself had only a limited power in the sale of an entire estate, and the kubooleut purports at the most to give a more extended power to the Board; for the words "chief authorities" could not fairly be taken to vest any discretion in the Collector. But as at the date of the sale, the Board of Revenue had, as we have seen, legislative authority for the exercise of an unlimited discretion, no additional sanction could be acquired for the Board from this kubooleut, and none is given by it to the Collector.

From the whole evidence in the case, therefore, their Lordships are of opinion that the sale by the Collector of the whole talook in one lot was an act unauthorized either by the general rules and principles of the Regulations or by any specific authority previously conferred by the Board of Revenue.

It remains, therefore, to be seen what effect ought to be given to the subsequent confirmation of the sale by the Board, and the supposed adoption of it by the Ranee. In considering the effect of the subsequent confirmation of the sale by the Board, it must be remembered that the Board had not the supreme but only a delegated authority, and that, by the terms in which that authority was conferred, they were expressly required to exercise their discretion before the sale took place, and that there is no power conferred on them to adopt and confirm an unauthorised sale by the Collector.

As their Lordships, therefore, are of opinion that the sale was illegal and void in the months of June and July, so they think that it was not rendered valid by the unauthorized confirmation of it by the Board of Revenue in the month of August. This would clearly be the case in respect of any sale since the promulgation of Regulation XI. of 1822, by the express provisions of Section 25. But, as that Section is not retrospective, no authority can be derived from it in this case, but the principle which dictated the Regulation will supply the rule without it. And, although their Lordships would have been prepared to hold that all mere irregularities in the improper and unnecessary sale of the whole talook in one lot, in the form of the advertisement, and the manner of their service, had been sufficiently weighed by the Ranee when she appropriated the surplus purchase-money to her own purposes, so as to deprive her of all claim to annul the sale on the ground of such irregularities, yet their Lordships cannot consider the Ranee's acquiescence in a sale, made, as she had every reason to believe, by the authority of the Board of Revenue, as giving legal efficacy to a sale altogether void for the want of such authority. It is true that this case is also provided for by the Regulation of 1822, Section 27; but this Regulation does not in terms refer to cases of money received before the promulgation of that rule, and in justice ought not to be so extended; and though as a positive Regulation it may be considered as an useful amendment of the law, there is no known general principle of law upon which such a rule could be held to exist independently of express enactment.

Their Lordships, therefore, feel themselves constrained to uphold the judgment of the Court below so far as they annul the sale of the talook.

But their Lordships cannot approve of the manner in which those Courts have disposed of the pecuniary questions between the parties, either as to the purchase-money or the costs. In the view that their Lordships have taken of the case, the appellant stands wholly free from blame; he purchased the talook at a public auction, which to all appearances was regularly held under the sanction of the proper authorities; he paid the purchase-money into the treasury, and, after some delay, got possession of the estate. The purchase-money was appropriated in part to the payment of the arrears due from the Ranee in respect of that estate, and as to the residue, applied by the Ranee herself to the payment of other arrears due from her upon other accounts. The Court below, without entering into any investigation of the profits made by the appellant during his occupation of the estate, has assumed that he had reimbursed himself the amount of the purchase-money and interest out of the profits of the estate.

Their Lordships see no ground upon which the Court could found such an assumption. According to the Ranee's account, the talook for some years before the sale had not enabled her to pay the revenue, and there are no facts stated to show that it had been more productive in the hands of the appellant. Their Lordships, therefore, are of opinion that an account should be taken of the principal and interest due to the appellant in respect of the purchase-money paid by him into the treasury, and also of the net profits made by him out of the estate during the occupation, and that, upon payment to him, by the respondents, of whatever (if anything) may appear to be due to him on taking such account, possession of the talook should be delivered to the respondents. And as, in their Lordships' view of the case, the appellant stands acquitted of all blame in the transaction, their Lordships think that so much of the decrees of both the Courts below as condemn the appellant in costs should be reversed, and that each party should bear his own costs, both in the Courts abroad and in this country, and they will advise Her Majesty accordingly.

*Mr. Jackson.*—Will your Lordships allow me to observe that there is an allegation of improvements on the property; the allegation is, that the purchasers have expended very large sums in improvements: I trust your Lordships will direct all just allowances in respect of improvements.

*Mr. Justice Erskine.*—Certainly, that is fair matter of allowance.

The 6th July 1842.

*Present:*

Lord Brougham, Lord Campbell, Mr. Justice Erskine, Dr. Lushington, Sir E. H. East, and Sir A. Johnston.

**Limitation—Distant Residence.**

Sheikh Imdad Ali and others

*versus*

Mussumat Kootby Begum.

Where the party in possession of an estate is a *bonâ-fide* purchaser for valuable consideration without notice, and the real owner had neglected for 25 years to assert her right to the estate, mere distant residence was held not to be a sufficient cause to preclude the owner from making an earlier assertion of her right so as to save her from limitation by bringing her within the exceptions of Section 14, Regulation III., 1793, and Section 3, Regulation II., 1805.

*Erskine, J.*—The original proceedings in this case were instituted by the present respondent, Mussumut Kootby Begum, in the Provincial Court at Patna, to recover 64 shares out of 160 shares of an altumgah mehal, in the zillah of Patna, comprising several villages, which she claimed as her inheritance, derived from her mother, Mussumut Saleha Khanum, the widow of Nawab Enayet Khan.

In the Court below two questions were raised and decided: *first*, whether the mehal in question was originally the estate of the Nawab, or of his widow, Saleha Khanum; and, *secondly*, whether the claim of the plaintiff, Kootby Begum, had been barred by lapse of time, according to the Bengal Regulations.

The Provincial Court, without giving any opinion upon the first point, dismissed the plaintiff's suit, with costs, upon the ground that, whatever her right might have been, her remedy by suit was barred by lapse of time, and that her claim was not entitled to a hearing by the Court.

Against this decree the plaintiff appealed to the Sudder Dewanny Adawlut, and that Court, after hearing the appeal on the 31st December 1831, decided, *first*, that the villages in dispute had been proved to have been the property of Saleha Khanum, and that the plaintiff as her daughter, was entitled to one-half as her inheritance; and, *secondly*, that, although as to some of the villages the claim of the plaintiff had been barred by lapse of time, as to the rest, her remedy had not been taken away by the Regulations relied on. The Court therefore modified the decision of the Provincial Court by affirming its decree as to a part of the estate, and decreeing to the plaintiff the remainder, and apportioning the costs between the parties.

The present appellants, who had defended the suit below, as purchasers, were dissatisfied with this decision of the Sudder Adawlut, and appealed to the Queen in Council against that part of the decree that affirmed the plaintiff's right to recover a portion of the property claimed by her; and Her Majesty having been pleased to refer such appeal to the Judicial Committee, the case was argued before Lord Brougham, Lord Campbell, the Judge of the Admiralty, and myself; when, on the part of the appellants, it was insisted that, whatever might have been the original title of the plaintiff below, her right to recover any part of the property had been altogether barred by the lapse of time, and that the decree of the Provincial Court ought to have been wholly affirmed. Their Lordships acquiesce in this conclusion, and are of opinion that the decision of the Provincial Court was right, and that the decree of the Sudder Adawlut, modifying it, is wrong.

In order to explain the ground upon which their Lordships have founded this opinion, it will be necessary to refer more particularly to the facts established by the evidence, and to the language of the regulations upon which the question arises. It appeared by the evidence that Saleha Khanum was the wife of the Nawab Enayet Khan Rasikh, and that they had three children, two sons and one daughter. It is clearly proved by the admissions of those under whom the appellants claim as purchasers, as well as by other evidence, that the mehal in question was the property of Saleha Khanum, and that she, having survived her husband, held possession of it until her death in 1801.

The two sons died in their mother's lifetime; the daughter, the present respondent, and the plaintiff below, was living with her mother at Paniput at the time of the mother's death. The eldest son, Izzat Oollah Khan, had died without issue. Hafiz Oolla Khan, the second son, had died only a few months before his mother, and had, down to the time of his death, managed the estate for his mother. He left three children, two sons and one daughter. Under these circumstances, by the Hindoo Law of Inheritance, the plaintiff below became entitled to one-half of her mother's property, and the other half would descend to the children of her brother Hafiz. These children were Kulb Ali Khan, Amin Oolla

Khan, and Mussumat Gusety Begum. Upon the death, however, of Saleha Khanum in 1801, Kulb Ali Khan and Amin Oolla Khan took possession of the whole of the estate, and dealt with it as if it were entirely their own, and, until the year 1812, neither their aunt nor their sister preferred any claim to any part of the inheritance.

On the 4th of March, in the year 1812, Mussumat Gusety Begum, the sister, instituted proceedings in the Patna Provincial Court against her two brothers, to recover a fifth share of the mehal, and by the decree of the said Court, which was afterwards, in the year 1828, confirmed upon appeal by the Sudder Dewanny Adawlut, she recovered one-fifth of the whole estate as her share of the inheritance from Saleha Khanum. It is to be observed that the claim of the sister and the resistance on the part of the brothers proceeded on the assumption that the whole inheritance had descended from Saleha Khanum to the children of Hafiz Oolla Khan, and that no allusion was made, in the course of the suit, to any claim of their aunt, the present respondent, although her name is stated to have been registered in the Collector's office. It appeared that, long prior to the commencement of this suit, namely, in the year 1801, Kulb Ali Khan had settled one-half of the property, which he claimed as his share, upon his wife, Beejy Begum, and Amin Oolla Khan had, in 1805, transferred his share to his son Azim Oolla Khan; but neither of these transfers appears to have been acted upon further than by having the names recorded in the Collector's office, and the two brothers had continued to deal with the property as their own. For in the year 1807, Kulb Ali Khan, acting for himself and his brother, sold a part of the estate to Baboo Byjnath Jahoo, and although, in the years 1813 and 1814, Beejy Begum assumed the power of selling portions of the estate, there is no evidence that Azim Oolla Khan ever acted as owner of any part of the estate under the alleged transfer to him, but, on the contrary, Amin Oolla Khan, his father, continued to dispose of the estate as if no such transfer had been made, and the appellants, at the trial below, rested their claim entirely upon purchases made from Beejy Begum and Amin Oolla Khan. The dates of those sales, as proved in the progress of the suit, were in the years 1813-14, within twelve years from the commencement of the respondents' suit, and these dates formed the foundation of the decree of the Sudder Adawlut, which decided that the plaintiff's remedy had been barred as to Mohi-ood-deen, sold by Kulb Ali Khan in 1807, more than twelve years before the commencement of the suit, but was not barred as to the residue, which did not appear by the evidence to have been sold before the years 1813 and 1814.

After the decree had been pronounced, the appellants petitioned to have the cause heard again, and to be allowed to put in evidence other deeds to prove that, as to another portion of the estate, the remedy of the plaintiff had been barred by a sale beyond the twelve years, namely, in 1812, to Boorham Ali Khan, from whom the appellants purchased that portion in 1824. The Court, however, refused, and, we think, properly, to re-open the case for the purpose of admitting evidence which ought to have been produced in the first instance, and there is no appeal from that refusal; and the question, therefore, for decision is whether, under the circumstances of the case, the remedy of the plaintiff had been barred by the adverse possession of Kulb Ali Khan and Amin Oolla Khan from the year 1800 to 1825.

The answer to this question depends upon the construction of the Bengal Regulations, namely, Regulation III., 1793, Section 14, and Regulation II., 1805, Section 3. By Regulation III., 1793, Section 14, Zillah and City Courts are prohibited hearing, trying, or determining the merits of any suit whatever, against any person or persons if the cause of action shall have arisen twelve years before any suit shall have been commenced on account of it, unless the complainant can shew by clear and positive proof that he had demanded the money or matter in question, and that the defendant had admitted the truth of the demand or promised to pay the money, or that he had directly preferred his claim, within that period, for the matters in dispute to a Court of competent jurisdiction to try the demand, and shall assign satisfactory reasons to the Court why he did not proceed in the suit, or shall prove that, either from minority or other good and sufficient cause, he had been precluded from obtaining redress.

Now, in this case, the plaintiff's cause of action arose twenty-five years before the commencement of this suit, and no other suit was ever instituted by her on account of it. Her claim, therefore, is clearly barred, unless she can by proof bring herself

within one of the exceptions. The only exception under this Regulation from which any protection has been claimed is the last, namely, that she has been precluded from obtaining redress by a good and sufficient cause, and the cause relied on is the distance of her residence from the estates in dispute and from the tribunal before which alone she could have preferred her claim. It appears by the evidence that the plaintiff lived at Paniput, several hundred miles from Patna; but as this distance in 1800 could have afforded no greater impediment to the appointment of a Mookhtar to enforce her rights than it did in 1825, the only way in which it can be said to have precluded her from obtaining redress would be by keeping her in ignorance of the manner in which her rights had been usurped by her nephews; but it must be remembered that her mother died at Paniput, and that her right to one-half the estate devolved upon her immediately upon her mother's death, and that her not receiving any remittances on account of the estate must have afforded sufficient notice to her that some one must be usurping her rights, and this not for one or two years only, but for a series of more than twenty years, during which time she appears to have made no inquiry, nor to have instituted any proceeding to assert her claim, but permitted her nephews to hold themselves out to the world as the sole owners of the estate.

When, therefore, the question arises between the purchasers of an estate, from persons who had been thus permitted to hold themselves out to the world as the proprietors for more than twelve years before the purchase, and an owner, by whose neglect they had thus been enabled to assume the character of proprietors, the Court ought to have some other facts than mere distant residence to make out the proof of some good and sufficient cause that had precluded an earlier assertion of a right that must have been well known to the claimant from the beginning. The appellants had every reason to assume that the two nephews were the owners, not only from their long and undisputed possession, but also from the circumstance that, when a claim to some share was, in the year 1812, asserted by the sister, no suggestion of the plaintiff's claim was interposed by her, or in her behalf.

Let us then see whether there is anything in the Regulation of 1805 that opens to the plaintiff the doors of the Zillah Court, which the Regulation of 1793 had closed.

By Regulation II. of 1805, Section 3, it is declared that the limitation of twelve years, fixed by the Regulation of 1793, shall also not be considered applicable to any private claims of right to lands, houses, or other permanent immoveable property of the person or persons in possession of such property, when the claim of right thereto may be preferred in a competent Court of Judicature, shall have acquired possession thereof by violence, fraud, or any other unjust, dishonest means whatever; or if such property shall have been so acquired by any other person or persons from whom the actual occupant or occupants may have derived his or their title, and shall not have been subsequently held under a just and honest title (such as inheritance, purchase, fair donation, or any other fair title, believed to have conveyed a right of possession and property) during a period of twelve years antecedent to the time of preferring a claim of right thereto in a competent Court, provided that such violent, fraudulent, unjust, or dishonest acquisition be established to the satisfaction of the Court in which the claim may be preferred, or if the suit be appealable, to the satisfaction of the proper Court of Appeal.

And by the third Clause of the same Section, after prohibiting the Courts from taking judicial cognizance of any suit preferred after sixty years' non prosecution, the Regulation proceeds to declare that, although the property claimed may have been acquired by an insufficient title within the period of sixty years, if the property so acquired shall have descended by inheritance to the person in possession, when the claim is preferred, or if such person shall have obtained just and honest possession thereof by purchase, fair donation, or by any other title believed to be just and valid, and not appearing to be in any respect collusive for the purpose of depriving the plaintiff of his right, and either such occupant himself or any other person in his behalf, or from whom the property may have been obtained under any of the titles aforesaid, or the whole in succession, shall have held quiet and unmolested possession under a title believed to be just and valid, during a period of twelve years antecedent to the claim thereto being preferred in a competent Court, the provisions made in the first and second Clauses of that Section shall not be considered applicable to any private claims of property so circumstanced, which are therefore to be deemed inadmissible, as heretofore,

after twelve years from the origin of the cause of action, unless the same be cognizable under the exceptions and provisions already in force.

Under this Regulation, the plaintiff contends that, although her claim was not preferred to any competent Court till more than twelve years after her cause of action had arisen, yet that, as her nephews had acquired possession of the property by unjust and dishonest means, and as the purchase by the appellant, however fair and just, had been made within twelve years, neither they nor any person under whom they claimed, had, during a period of twelve years antecedent to the time of her preferring her claim, held under any fair title, believed to have conveyed a right of possession and property. The prohibition contained in Regulation III., 1793, Section 14, was not applicable to her case.

In considering the provisions above referred to, it must be kept in mind that one main object of these Laws of Limitation is to protect an honest purchaser from the consequences of an owner's neglect to assert his rights, and thus giving to an usurper the semblance of a title which he did not really possess, and that, by the express words of the Regulation, the proof of the fraudulent, unjust, or dishonest acquisition is thrown upon the plaintiff. It is necessary, therefore, to ascertain what is meant by an unjust or dishonest acquisition. It is obvious, from the third Clause of the Section, that it is not intended to include every acquisition without a just title, for by that Clause acquisitions are protected that have been obtained by any title believed to be just and valid, though in reality insufficient. It must be necessary, therefore, for a plaintiff, in the first place, to shew that the person under whom an occupant, by just title acquired within the twelve years, derives his title, had acquired his possession by a title which he did not at the time believe to be just and valid.

The plaintiff in this case contends that, as her nephews must have known that one-half of the inheritance belonged to her, and as they must have known that she was still alive, their assumption of the entire property was a dishonest acquisition, and could not have been claimed by them under any title which they believed at the time to be just and valid.

It cannot be denied that there are many circumstances leading to a strong suspicion that this was the case, and the Sudder Adawlut appears so to have considered it. But strong as the grounds of suspicion undoubtedly are, their Lordships do not consider the facts proved as sufficiently establishing to their satisfaction that the nephews knew that they had no right to the whole estate. They may have originally taken possession under the belief that their father, Hafiz, had acquired a title to the property, of which he had been in possession up to his death. They may have been ignorant of the existence of their aunt or of her title to any share of the property; there is no evidence of their being aware of either; that they were so could only be matter of conjecture; but fraud and dishonesty are not to be assumed upon conjecture, however probable. But, to avoid the effect of the lapse of time, the plaintiff must establish the existence of conscious injustice in the acquisition by proof. Their Lordships think this has not been done, and therefore they will advise Her Majesty to reverse the decree of the Sudder Dewanny Adawlut, and to affirm the decree of the Provincial Court, with costs of both the Courts below, but without costs of this appeal to Her Majesty.

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The 8th August 1842.

*Present:*

Lord President Wharncliffe, Lord Brougham, Vice-Chancellor Knight Bruce, Dr. Lushington, Sir E. H. East, and Sir A. Johnston.

**Sale for arrears of Revenue.**

*On Appeal from the Sudder Commissioners of Bengal.*

Baboo Deep Narain Sing

*versus*

Lal Chutterput Sing.

Suit brought in 1821 to annul the sale of a zemindary in Allahabad, which took place in 1802, for arrears of revenue. The Privy Council concurred in the conclusion come to by the Mofussil and Sudder Commissions constituted by Regulation I., 1821, that the sale ought, notwithstanding the great lapse of time, to be set aside; but, considering the *bonâ-fide* character of the sale, awarded compensation to the purchaser.

*Vice-Chancellor Knight Bruce.*—This case has been properly argued on the merits. The doubt suggested by one of the learned

Counsel for the appellant, whether the district to which the zemindary or pergunnah in question belongs is within the operation and powers of the Commissioners whose judgments are before us, has not been insisted upon, and seems to us excluded from our consideration by the whole state of the cause.

We think also that the argument has rightly laid no stress on the circumstance of the son of Lal Juggut Raj, and not Lal Juggut Raj himself, though alive, having been the complaining party in the proceedings below. Having regard to the nature of the jurisdiction and question, the petition of Lal Juggut Raj, printed in page 21 of the Appendix, and the course taken by all parties, we could not have given effect to the objection, if pressed.

The length of time also that elapsed between the sale, of which complaint is made, and the commencement of these proceedings, though very properly urged as matter of grave consideration with reference to the judicial discretion to be exercised, and the mode of exercising it, has, with equal propriety, been admitted, on the part of the appellant, not to form an objection to the jurisdiction, or a bar to relief in a case such as the present.

The rejoinder, indeed, of Deep Narain Sing, before the Mofussil Commission, is thus expressed upon the subject of time in the same Appendix, page 18: "That, as the "special pleas urged by this defendant, in "his reply filed in the Court of Appeal for "the Division of Benares, to shew that "plaintiff's action was not cognizable by "that Court, owing to the expiration of the "period of limitation, &c., are considered "incapable to the Special Commission with "reference to the provisions of Regulation "I., 1821, the defendant will not, therefore, "dwell upon them any longer in this "place."

The first point in question is, or rather was, whether this case could correctly be considered as coming within either of the predicaments enumerated in the second Clause of the third Section of the Regulation of January 1821, under which the proceedings arise. For, if not, the Commissioners might well have been contended to be without authority in the matter.

It was, however, conceded, on the appellant's part, in an early stage of the discussion, that, whether the Rajah of Benares or Deep Narain Sing was the real purchaser, the case fell within one of those predicaments; that, namely, of the purchaser having been an officer on the Collector's establishment, or employed in the collection of the public revenue within the district, or in the private service of the Collector, or the surety of such officer, or a relation, dependent, or connexion of such officer or surety—a conclusion inevitable from the documents set forth in pages 31, 32, and 33 of the Appendix.

It may be true that the written pleadings below do not suggest this pointedly, or do not suggest it at all. The terms, however, of the Regulation, and of the Resolution or Order of the Governor-General in Council, dated 27th February 1821, the nature of the jurisdiction, and the simplicity of the fact, render the omission for the present purpose not material. Nor are we to be understood as meaning to express, or intimate an opinion, that there is not any other (we think, on the contrary, that there is at least one other) of the described predicaments within which the case is plainly brought. This, however, only establishes that the Commissions had legal authority to set aside the sale—not that the power ought, in the particular case, to have been exercised. The question, then, arises whether, as the Commissions were not of necessity bound to exercise it, though legally vested in them, the respondent's pleadings before them stated, and the documents and facts in evidence proved, a case upon which it was a right and sound exercise of discretion to set aside the sale.

The pleadings are, in our opinion, sufficient for the purpose, even independently of the enlargement from form and technical rules which is conceded to proceedings under the Commissions, perhaps by the Regulation of January 1821, but certainly by the Resolution or Order of the 27th of February in that year.

The documents and facts properly in evidence, whether we reject the doubtful and suspicious part, or consider it in connexion with what is authentic and worthy of reliance, appear to us, upon an authentic consideration of them, assisted materially by the able discussion to which they have been subjected from the bar, to warrant the conclusion to which both Commissions have come, that the sale of the zemindary or pergunnah in question ought, notwithstanding the great lapse of time, to be set aside.

But in agreeing thus far as we do with each of the tribunals below, we desire not to be understood as adopting or acceding to

all the conclusions of fact, or as following or assenting to the whole of the reasoning upon which either Commission appears to have proceeded. And especially we think it right to say that a perusal of the letter or despatch from Lord Wellesley of the 8th of March 1802 satisfies our minds that the clause or passage on which reliance has been placed, as if it contained a positive prohibition of such a sale as that in question at the time when it took place, does not bear that interpretation; that it was one of advice and recommendation, and not part of the orders or directions which the document contained.

Though differing, however, from the mandatory construction which has been put on this passage, and which the context does not allow, we are far from saying that it is a circumstance in the case not deserving attention; on the contrary, it tends to show that the Supreme Government recognized the general correctness and propriety of the views suggested by the Lieutenant-Governor in his despatch of the 7th of January preceding.

The printed extracts from the two documents are thus at pages 40 and 41; the extract from Lord Cowley's despatch is as follows: "In realizing arrears of revenue "in the Company's provinces where other "means fail, recourse is had to a sale of the "land, and within the last eleven years this "Regulation has occasioned the sale of a "large proportion of the land, and the "dispossession of a great number of the old "zemindars. Some of these may have "become inferior cultivators, and some may "have sought other means of livelihood, "but, under a Government so long and so "well established, few have ventured, or, if "they have ventured, few have been able, "to maintain themselves in a state of insur-"rection. But from the temper, disposition, "and character of the inhabitants of the "ceded countries, particularly of the province "of Rohilcund, I have no doubt that they "would rather submit to the varied modes "of oppression to which they have been ac-"customed under the Nabob's Government, "while their zemindary titles should be "continued to them, than endure to be "dispossessed of their lands in the most re-"gular and legal mode under new regulations. "The former grievances they would think "supportable under the hope, however "slender, of future redress, but the latter "would drive them to despair; and from the "neighbouring countries, to which they "might easily resort, they would continually "infest their alienated lands. Though not "prepared to give any specific detail on "this subject, I am satisfied that, where co-"ercion is necessary to realize the dues of "Government from defaulters, some mode less "offensive should be devised, and a sale "of the land only resorted to in the last "extremity."

The printed extract from the answer of the Governor-General to that despatch is this: "No sales of land for the recovery "of rent due to Government should be "authorized within the ceded provinces "until a more effectual settlement of the "country shall have taken place."

The sale under consideration, which took place in the very year in which these important papers were written, and in the countries to which they relate, was one of that very kind which Lord Cowley was satisfied should be only resorted to in the last extremity, as being a measure less tolerable in the estimation of the inhabitants of these provinces, so recently added to the British empire, than the different oppressions which they had borne under their native rulers, and as calculated to drive them to despair, but which Lord Wellesley considered should not take place at all before a more effectual settlement of the country—a settlement that, according to our view of His Excellency's meaning, had not taken place at the time when the sale was made.

It may be said that it was made with the sanction of the Local Government, of which Lord Cowley was a prominent member, or the chief under the supreme Government. The sale, however, was not at Bareilly, but at Allahabad. The authority for it, if, upon the whole view of the circumstances, authority there was, which proceeded from Bareilly, was consequent upon the representations of the case made to the provincial Government, then by Mr. Ahmuty, the Collector at Allahabad—representations which, as they appear to us, placed the defaults and conduct of Lal Juggut Raj in a light stronger and more unfavorable to him than the facts, so far as we are enabled to judge of them, really warranted. The Government at Bareilly may have been led to think that the case was one of the last extremity. We do not see grounds for holding that it was of that character.

Considering the circumstances under which Roy Madary Lal had obtained the increased jumma from Lal Juggut Raj; the

large amount of that increase; the position in which himself and his property had been placed when the subsequent documents obtained from him were obtained; the questionable and doubtful state of his accounts before and at the time of the sale, as appears from Mr. Ahmuty's Report of 4th of November 1802 (page 44 of the Appendix), and from other sources, the high degree of probability, if not certainty, that, had Lal Juggut Raj been allowed all that ought to have been allowed to him, the balance claimed from him would at least have been greatly reduced; considering the harsh measures used towards him, the pressure under which he was placed during the earliest period of a Government and an administration of public affairs which were altogether strange and new to the country, not forgetting also the kind of notices by which the sale was preceded, and the circumstances generally by which it was accompanied and immediately followed, we cannot, consistently with the declared object and intention of the Regulation of January 1821, avoid saying that the sale, if not protected by length of time, ought not to stand; and that, having regard, on grounds of private justice, to the state of embarrassment, difficulty, and distress to which Lal Juggut Raj was reduced, as well as to the powerful adversaries opposed to him, and on grounds of general policy, to the motives and spirit of the Regulation of 1821, it would be inequitable and publicly inexpedient to permit such a title to be protected by the lapse of time that has taken place.

The effect that it ought to have as to the terms and conditions which should accompany the appellant's deprivation of the property is open to very different considerations.

Without entering into a more minute detail than is necessary or may be expedient, we consider it right to add that, among the evidence which has most strongly influenced our minds with regard to the character of the sale, the conduct of those concerned in it, and the manner in which it should be treated, are the following documents to which it may be as well to refer in a chronological order, commencing at a time less, we believe, than two months after the cession by the Nawab Vizir.

*1st.* The perwanna to Juggut Raj of the 4th of January 1802, page 240; the ikrarnamah of Baboo Nek Sing, dated the next day, in the same page; the letter and advertisement for Juggut Raj's apprehension, both also dated the 5th January 1802, page 241, coupled with the Collector's despatch to Bareilly, also of the 5th January 1802, page 41, stating thus as to Juggut Raj's property—"I have deputed a sazawal "(Baboo Nek Sing) to make the collections "from the zemindars, and as Juggut Raj's "profits were considerable, these pergunnas "will still yield sufficient assets to ensure "the revenue of the current year, to its "full extent;" stating also this: "I have "issued the necessary orders for the attach-"ment of Juggut Raj's property, and have "directed the several officers to be vigilant "in apprehending his person, should he "attempt to enter the Company's jurisdic-"tion."

His despatch also to Captain Worsley, of the same date, at page 42, is in these words: "Sir, I am just informed by one "of my sowars that Juggut Raj was safely "lodged in the fort of Loundeh, with a "party of three hundred followers. On the "supposition that this account is correct, "I think it will be advisable, in the first "instance, to summon Juggut Raj to deli-"ver up the fort, offering him the protec-"tion of Government in the event of his "settling his wasilat for the current year. "Should Juggut Raj make any resistance, "you will be pleased to adopt the neces-"sary measures for securing the fort, if you "conceive, from local investigation, that "such an event is practicable with the small "force at present under your command, "otherwise I could wish you to prevent his "escape, if possible, till further assistance "can be afforded. In the meantime, you "will report to me, should Juggut Raj de-"cline to deliver up the place, the strength "of the fort, the force that is likely to be "opposed to you, as well as the addi-"tional troops you will require for obtaining "possession and securing the person of "Juggut Raj. If the immediate aid of the "detachment of police is required, you are "authorized to withdraw that company for "the present service."

I will next notice the Collector's letter of the 9th of January 1802, four days after, at page 22; then the several perwannas to Baboo Nek Sing and to Juggut Raj and his dewan, of various dates in January and February 1802, pages 241, 242, 243, and 244; the Collector's letter to Mr. Mercer of the 9th of February, and the kowlnamah of Baboo Nek Sing, of 21st of February 1802, at pages 22, 42, and 25; then the bond and petition of Lal Juggut

Raj, of the same 21st of February 1802, at pages 24, 244, and 245; the perwannas to Baboo Nek Sing, Baboo Ram Kishen, and Juggut Raj, of the 23rd and 24th of February 1802, at pages 246, 247, and 25; the several perwannas and petitions of various dates between the 24th of February and the 16th of April, both inclusive, of which some are set forth and the others mentioned in pages 248, 249, 250, 251, and 252; the Collector's narrative or order, pages 253, 254, and 255, containing a statement on the subject of Lal Juggut Raj's affairs and transactions from the 20th of December 1801, to the 10th of April 1802; the perwanna to Ram Kishen Sing, of the 17th of April 1802, mentioned at the top of page 256; the notice perwannas and advertisements of various dates in May and June 1802, at pages 259, 260, and 261; the petition of Lal Juggut Raj, with the Collector's answers or orders upon it, dated the 17th of June and 2nd of July 1802, at pages 30 and 49; the estimate, memorandum, or sketch of account on which the bond dated the 29th of June 1802 was founded, the bond itself, and the surety or bail-bond of the 2nd of July following, at pages 28, 29, 261, and 262, these three documents being all substantially contemporaneous with the petition and the answers or orders upon it just mentioned.

Next, the letter of introduction and recommendation of Chittoo Sing from the Rajah of Benares, of the 25th of July, at page 30. The documents of 14th of August and 5th of September already mentioned with respect to the suretyship.

Then the letter to the Board at Bareilly from Mr. Ahmuty, dated 1st September, more than three weeks before the period appointed by the bond dated the 29th of June, for the payment of the instalment of 32,206 rupees 15 annas 3 pice, but silent as to that transaction; between which letter and the date of the answer to it (the answer being dated 11th September) occurs the advertisement of 8th September, for the sale of the zemindary on 30th October; these documents are in pages 32, 33, and 270.

The answer of 11th September, the time of the receipt of which does not appear, is thus at page 33—it is to Mr. Ahmuty from the Board of Commissioners: "Sir,—I have "the honor to acknowledge the receipt of "your letter of the 1st instant, and am "directed by the Honorable the Lieutenant-"Governor and Board of Commissioners to "inform you that, as it appears from your "letter that Juggut Raj still continues to "persist in declining to pay the balance due "from him, they authorize you to issue a "proclamation, setting forth that, unless "Juggut Raj shall appeal and agree to a "fair and equitable adjustment of his "accounts, his estate will be publicly sold "at a period to be fixed by you, which the "Board are of opinion should be rather "later than the 30th of September, in order "to afford sufficient time to Juggut Raj to "avail himself of the opportunity now "afforded to him for a satisfactory and ami-"cable adjustment of his account."

We would then notice the advertisement of 18th September, fixing 10th of October as the day of sale, and the contemporaneous perwanna to Juggut Raj of the 25th of September, the last instalment day not having yet arrived. Those are at pages 270 and 271.

Then the advertisement of the 5th of October is in these words: "On the 18th "of September 1802 A. D., an advertise-"ment was published, stating that, on the "10th of October proximo, pergunna "Barah, the zemindary of Lal Juggut Raj, "would be sold by public auction for the "recovery of a Government arrear. It is "now ordered that the said advertisement "be cancelled, and, in lieu of it, another "advertisement be issued, in conformity "with the orders of the chief Board, under "date the 11th of September ultimo, to this "effect: that, whereas the said Juggut "Raj withholds the payment of a large "amount of revenue justly due to Govern-"ment, and contumaciously and fraudulent-"ly evades its discharge, should the afore-"named, therefore, personally attend, and "pay up the arrear justly due by him into "the public treasury by the 30th of Octo-"ber instant, good; else the pergunna of "Barah, the zemindary of the aforenamed "person, will be sold by public auction on "the aforesaid date, in liquidation of the "Government balance, and the auction-"purchaser of the said pergunna will be "entitled," and so on.

This advertisement may, or may not, be the same with that which is found in page 273, nor is it very material to insist upon any difference between the two.

Then comes the Collector's letter to Bareilly of the 6th of October, at page 44, which is this: "I have to acknowledge "the receipt of your letter of the 11th "ultimo, and have to request that you will

"be pleased to report to the Honorable the "Lieutenant-Governor and Board of Com-"missioners that, in conformity to their "order, I issued, on the 1st instant, a "proclamation, setting forth that, unless "Juggut Raj shall appear and agree to a "fair and equitable adjustment of his "accounts, his estate will be publicly sold "on the 30th of the present month," and so on. "I have, further, had conveyed to "Juggut Raj, who resides at present in "Bundlecund, a copy of the proclamation, "together with a perwanna from myself "encouraging him to return to his estate."

Lastly comes the record of the proceedings of 30th of October, the day when the business was completed, the day of sale, closely followed by Mr. Ahmuty's despatches to the Board of Bareilly of 4th of November and 30th of November 1802, between which, and probably after which, that Board communicated with him, though to what effect is not disclosed, and seems not to be known. These despatches exhibit not only uncertainty as to the amount of the debt due or to be considered as claimable, but a want of accuracy on the part of the Collector. These are in pages 35, 36, 44, 45, 46, 274, 275, 276, and 277.

We are not unaware of the propriety and expediency, in general, of giving great weight to acquiescence or delay on one side, and to long possession on the other, or of the generally questionable policy of discrediting or lessening the public faith in transactions having the sanction of the Government or its officers. These and similar considerations were, however, in the cognizance of the framers of the Regulation of 1821, and by them it was decided to be, on the whole, just and expedient that, in the peculiar position in which the inhabitants of this part of India were placed at the commencement of the British rule, there should not be applied to the investigation of the peculiar transactions, and the redress of the peculiar hardships which then took place, merely ordinary principles.

The Regulation of 1821 was preceded by Mr. Stuart's Minute of 1820, containing these passages: "I solicit the attention of "the Board to a matter of considerable "importance. During the first six or seven "years which followed the acquisition of "the provinces ceded to us by the Newab "Vizir, the mal-administration of Allaha-"bad, and some of the neighbouring "districts, combined with the intrigues and "influence of certain opulent and powerful "natives, and the poverty and ignorance of "the zemindars and talookdars, led to the "abusive alienation, to a great extent, of "landed estates within those districts, and "to the consequent ruin and extreme "misery of the proprietors. For a full "detail of those transactions I refer to the "report from the Board of Commission-"ers," and so on.

He then refers to certain documents which are mentioned, and he proceeds to say: "From those documents, of which, "for convenience of reference, extracts are "annexed to this paper, the Board will "observe that a Special Commission was "strongly recommended by the Board and "Mr. Fortescue for the purpose of investi-"gating the alleged abuses, and affording "redress to the injured parties. The con-"sideration of the measure was postponed "for the time, and has not been since "resumed, owing probably to the suspension "of the introduction of a Permanent Settle-"ment into the Ceded Provinces. Now that "the measure of Settlement in the Ceded "and Conquered Provinces, upon fixed and "permanent principles, is again under con-"sideration, I venture strongly to recom-"mend to the Board the institution of a "Special Commission, as formerly suggested, "for the purpose of investigating the abusive "alienations in question. I beg accordingly "to submit to the Board the accompanying "paper, comprising an outline of the plan "upon which the Commission should be "instituted. The investigation of these "cases, with any hopes of success, will "require a thorough research into volumin-"ous and complicated Revenue accounts. "It will require local enquiries, and free and "constant communication with the parties "themselves and with the local officers. "The delays and forms of the Courts of "Justice oppose great obstacles to their "conducting investigations upon those "principles, and the parties injured are "equally incapable of supporting the expense "of protracted litigation, and of defending "themselves in that course of proceeding "against the arts and intrigues of their "opulent and powerful adversaries. These "reasons I have no hesitation in urging as "fully justifying a special deviation from "the ordinary system of our judicial ad-"ministration. The delay which has occur-"red is unquestionably to be regretted, but "I cannot think that it is a sufficient ground "for excluding the injured parties from "redress. It is a noble principle of the

"English Law that no time shall avail in "favor of fraud, and I believe that there "never were transactions to which the "maxim was more justly applicable. It "would indeed be an afflicting reflection "that men who have acquired estates by "the basest means should enjoy all the ad-"vantages of a Permanent Settlement, whilst "their victims should have their misery "heightened by being the hopeless witnesses "of the increasing value of the property "of which they have been so iniquitously "despoiled."

The preamble of the Regulation of 1821, so far as it is material now to quote it, was thus expressed at pages 3 and 4 of the Supplemental Appendix: "It has appeared "that, in the first seven or eight years after "the acquisition of the Ceded Provinces by "the British Government, the native officers "of Government, their relations, connections, "and dependants, taking advantage of the "novelty of the British rule, of the weakness "and ignorance of the people, and (in some "cases) of the culpable supineness and mis-"conduct of the European functionaries "under whose authority they were employed, "contrived, by fraudulent and iniquitous "practices, to acquire very extensive estates "in several of the Provinces in question, "more especially in the districts of Allahabad, "Cawnpore, and Goruckpore, thus wrongfully "depriving of their just rights a great number "of the ancient land-owners, and reducing "them and their numerous dependants to "ruin and misery. These abuses have been "chiefly practised through the perversion, to "the purposes of chicanery and fraud, of the "rules enacted for the collection of the "Government revenue, more especially the "provisions relating to the public sale of "land for arrears. Under cover of these "rules, but contrary to the true intent and "meaning of the law by which (though a "considerable discretion was left to the "Revenue authorities) the measure of a "public sale was principally designed for "cases of embezzlement, contumacy, or "fraud; many estates were sold from which "no balance (or a very trifling balance) was "due, or on which the arrear accrued with-"out any embezzlement or wilful default on "the part of the Sudder Malgoozar, and "others were disposed of without an observ-"ance of the prescribed forms;" and then other circumstances are alluded to.

In a subsequent part of the Preamble it is said: "The persons who have suffered by "the aforesaid abuses are, for the most part, "poor and ignorant men, unaccustomed, "under the former Government, to any re-"gular system of law, little acquainted "with the principles of the British Code, "or the regular forms of British judicial "proceedings, incapable of availing them-"selves of the protection it was designed "to afford, and possessing not the means "of securing the aid of individuals better "informed, while those opposed to them "are, for the most part, men of wealth and "power."

He then goes on to make other important observations with reference to that subject, and proceeds thus: "The proceedings "of the established Courts must necessarily "partake of any defects belonging to the "law which it is their duty to administer, "and it would be obviously inconsistent "with every sound principle to grant a "general discretion to those Courts to "deviate from the law on individual views "of expediency or justice," and then, after some further remarks, it is thus expressed: "In consideration of the above cir-"cumstances, it has appeared to the Go-"vernor-General in Council to be essentially "necessary to the ends of justice that a "Special Commission, with large discretion-"ary powers and with full authority to "regulate its proceedings according to the "exigencies of the cases brought before "it, should be constituted for the purpose "of investigating the cases above described, "of restoring to their just rights the zemin-"dars and other proprietors who have been "wrongfully dispossessed," and so on, and the rules are there laid down.

The subsequent Resolution or Order of February 1821 had these passages: No. 13—"In cases, however, in which the Com-"mission may adjudge compensation not "exceeding Rs. 1,000, or in which they may "adjudge the repayment, by Government, "of the purchase-money of any mehal of "which the sale may be annulled, or in "which they may direct the price of the "stamped paper used for a plaint or petition "of appeal, in lieu of the institution-fee, to "be returned to the party by whom the "amount may have been disbursed, an "order, signed by the Commissioners, and "specifying the nature of the charge, shall "be sufficient authority for the Collector "of the District immediately to pay the "amount."

No. 22. "With regard to the rules of "practice and forms of proceedings to be

"followed by the Commissioners, His Lordship in Council presumes that it will not "be necessary materially to deviate from "the course followed by the Civil Courts, "with this important exception, that it shall "be specially their duty to institute an active "enquiry into all the circumstances of the "cases brought before them, and to take "their own course for the investigation of "the truth, without confining themselves to "the points stated by the parties, or by any "technical forms of pleading or management."

Nos. 25 and 26 are of the same character.

No. 32 is this—"It is not, however, the "personal character of the officers entrusted "with the administration of civil justice that "has chiefly led to the institution of this "official tribunal. In determining on the "measure, His Lordship in Council has been "still more influenced by the persuasion that "the system under which those officers have "to act, and the laws which they were bound "to administer, are seriously defective in "their application to the Ceded and Conquered Provinces, while the principles of "Revenue management were very imperfectly settled; the Revenue authorities have "been compelled to decide on the most important points relative to private rights "amidst the uproar of a general settlement, "and under the urgency of securing the "revenues of inordinately extensive districts. "That they should have frequently erred, "can excite no surprise; that their errors "were extensively injurious, it would "be preposterous to doubt. In many "instances those errors admitted of no "legal remedy by the Courts, because "they were committed in the exercise of a "discretion which the Courts could not "legally control; and that the ordinary "tribunals should, among a people new to "our rule and accustomed to the arbitrary "domination of native amils, have failed "to protect the agricultural community from "the consequences of the acts of the officers "of Government, even where those tribunals were competent to interpose, is assuredly no impeachment of the individual "functionaries by whom they were filed, "nor any conclusive proof that they are "not generally well adapted to secure the "impartial distribution of justice between "individuals, and in territories long settled "under our Government."

Some time afterwards, the Regulation of 1823, printed at page 8 of the same Appendix, provided that—"First, such part "of Clause 1, Section 3, Regulation I. of "1821, as restricts, or can be construed to "restrict, the cognizance of the Commissioners acting under the provisions of "that Regulation in the matter of suits to "recover possession of lands lost through "public sales to cases wherein such sales "have been effected by the undue influence "of a public officer, is hereby rescinded. "Second, in the several cases specified in "Clauses 2, 4, 5, and 6, Section 3, Regulation I. of 1821, as well as in all cases "wherein it may appear that any plaintiff "has been deprived of his rights by an "illegal sale made within the period specified in the 1st Clause of the said Section, "it shall and may be lawful for the Commissioners acting under the provisions "of that Regulation to take cognizance "of any suit preferred to them, and to "pass judgment on the same, although there "may be no proof that undue influence was "exercised by any public officer to the "injury of the plaintiff. Third, provided "also that in the cases specified in Clause "3 of the aforesaid Section, if there shall "be proof or strong presumption that the "purchase or acquisition of the property "sued for was effected by violence, extortion, oppression, or fraud, it shall not be "necessary for the plaintiff to plead or "establish that undue influence was exercised."

It is in the spirit mainly of these portions of the important documents to which reference has just been made, that we have deemed it right to construe the letter of the Regulation of January 1821; upon that construction, we consider that the Mofussil Commission rightly held it to be within their competency to set aside the sale upon the terms of a payment to be made by the party succeeding in the contest, to the party dispossessed by the decision, and rightly also held that the present was a case which the terms of the 2nd Clause of Section 4 of the Regulation of 1821 might not improperly be held to include.

That Clause is thus, in page 6—"In "cases in which the Commission may deprive any person of rights legally vested "in him, under the existing Code, or may "make award upon doubtful claims, or in "which the title of any person, though "invalid, may have been acquired by him "*bonâ fide* under an express or implied "assurance of its validity on the part of "the Board, the Collector, or Judge of the "District, it shall be competent to the Com-

"mission to adjudge compensation in money "from the Treasury of Government; pro-"vided, however, that, in cases in which the "compensation assigned to any individual "shall exceed the sum of Rs. 1,000, the "sanction of Government shall be necessary "to authorize the disbursement."

A prior Clause, the 8th of Section 3, had provided thus: "The operation of the "foregoing Clauses shall not be confined "to cases in which lands or rights connect-"ed with land sold, transferred, alienated, "or usurped as above, may be held by the "person originally benefiting by the sale, "transfer, alienation, or usurpation, but "shall equally extend to those in which the "said lands or rights may be held under a "title derived from such person; provided, "of course, that in cases in which it may "appear that the person so holding under "a derivative title was in no degree concern-"ed in, or cognizant of, the original wrong, "the claims of such person to compensation "for any loss he may sustain under the "operation of the present Regulation shall "be held entitled to a very liberal consi-"deration."

We do not, on the whole, think it an undue extension of the 2nd Clause of Section 4 to say that this case may be held to come within one of the predicaments which it describes; nor can we agree with the Sudder Commission in their conclusion that justice or policy did not in this case require the power of directing a payment by the successful party to the party deprived of possession, or the power conferred by the second Clause of Section 4 to be exercised. It being our opinion, having regard to the benefit which, to a certain extent, Lal Juggut Raj derived from the purchase-money; to the course of conduct, not certainly altogether justifiable, which previously to the sale he had pursued; to the great length of time that was suffered to elapse before the sale was judicially questioned; to the part which those entrusted with the functions of the Local Government took in the sale, and to the nature and extent of the allegations and evidence by which it has been endeavoured to impeach the conduct of the late Rajah of Benares in respect of it, that both justice and policy required each of these powers to be called into action.

We think also, upon a review of all the circumstances of the case, especially those to which reference has just been made, that it was, on the whole, proper to leave the appellant and the late Rajah of Benares free from any account or charge in respect of the income and profits of the purchased property, from its acquisition in 1802 to the date of the Mofussil decree, proved, as we think it is, by the conduct of the parties and otherwise, that the clear profits and net income derived from this source by the Rajah and Deep Narain Sing, or one of them, must have much exceeded the amount of the interest for the same time calculated at the rate of 12 per cent. per annum upon the Rs. 93,000 (the purchase-money); we consider it right, under all the circumstances (and, among them, attending to the fact of the pension which the Indian Government for some years paid to the respondent or his family), that any claim on the part of the appellant, or the late Rajah of Benares in respect of interest on that sum should be treated as satisfied, but not as more than satisfied, by the income and profits; and we shall not advise Her Majesty to direct any account in this respect.

With regard to the true state of the accounts between Lal Juggut Raj and the Government, if taken on just and equitable principles, up to the time of the sale, as well as with regard to the mode in which the sum of Rupees 93,000 was applied, it is probably at this time very difficult, if not impossible, to arrive at any exact conclusion. The Mofussil Commission, which appears to have examined and considered the details of the facts of the case with most commendable care and attention, held that, of the Rupees 93,000, the sum of Rupees 26,458-6-6 ought to be considered as the total amount of benefit received by Lal Juggut Raj; nor do we see that the Sudder Commission viewed this particular point differently.

In such a state of things, satisfied as we are that this conclusion, in point of amount, whether precisely and exactly or not precisely and exactly accurate, is not far remote from the truth, and, unable with confidence to pronounce that it is to any extent inaccurate, we do not feel ourselves warranted in dissenting from this part of the decision of the Mofussil Commission.

Our view, however, of the facts, and of the spirit or intention of the 2nd Clause of Section 4, leads us, as has been stated, to the conclusion that, not only the residue of the Rupees 93,000, but a further sum, by way of compensation, ought in this case to be paid by the East India Company to Deep Narain Sing. We had hoped that its

amount, and this portion of the cause generally, might have been arranged by the East India Company and the parties for themselves. As it appears, however, that this cannot be done, we have been obliged ourselves to undertake the duty of fixing the amount of compensation.

Under the various and conflicting considerations to which the case is liable, and with such knowledge as we possess on the subject, we have felt much difficulty in performing this task. But judging as well as we can, after due allowance made in respect of the pension already alluded to, we deem Rupees 27,000 a proper sum. We conceive, therefore, Rupees 1,20,000, with interest at the rate of 5 per cent. per annum (which we think the proper rate) from the date of the Mofussil decree (from which date we consider the respondent as entitled to the enjoyment of the property in dispute as between him and the appellant) should, in respect to the sale being set aside, be paid by the East India Company to Deep Narain Sing, and that the East India Company should, in their accounts with Lal Chutterput Sing and Lal Juggut Raj, charge them, or one of them, with the principal and interest of the above-mentioned amount of Rs. 26,458-6-6—a mode of arranging the matter which we consider due alike to them and to Deep Narain Sing, having regard to the proceedings that have taken place in India since the Mofussil decree, particularly those stated in pages 423, 424, 425, 426, 439, and 440.

We may add that, so far as the East India Company is concerned in this matter, it is far from irrelevant to notice the view taken of it officially by such public functionaries employed in the administration of their affairs, as Mr. Colebrooke and Mr. Deane, who, in the year 1808—a period not far removed from the time of the sale, but when of course the special law introduced by the Regulation of 1821 did not exist—reported on the subject to the Government in Council thus: "We have the honor to submit, "for your Lordship's consideration, a petition "which has been presented to us by the "former proprietor of pergunnah Barah, in "the district of Allahabad, complaining of "the sale made of his zemindary in the year "1802, together with translation of two "documents produced by him, and copies "of correspondence which led to the sale. "You Lordship will observe, from the cor-"respondence, that Raja Juggut Raj had "engaged, during the Vizier's Government, "for the pergunnah of Arael, in addition to "his own zemindary of Barah," and so on.

Mr. Colebrooke and Mr. Deane then gave a short summary of the facts, ending thus: "That, on the 2nd of July, Mr. "Ahmuty admitted the validity of Juggut "Raj's claim to certain items of credit as "deductions from the balance adjusted on "the 17th June, which items Juggut Raj "states, in his account, to have exceeded the "balance charged to him, and which, if ad-"justed in time, might, previous to the "Collector's letter of the 1st September, "have considerably reduced, perhaps entire-"ly extinguished, the arrear. Mr. Ahmuty's "letter of the 4th November, and the "account produced by Juggut Raj, both "agree in making the gross balance, adjust-"ed on the 7th June, Rs. 72,207, and "the net balance on the sudder jumma "Rs. 44,332; the difference, Rs. 27,875. "Mr. Ahmuty calls a deficiency on the assets "of the pergunnah, while the documents pro-"duced by Juggut Raj shew it to have been "those disputed items for which Mr. Ahmuty "promised Juggut Raj a remission in the "event of Government authorizing it, or his "assistance for the recovery thereof from "the parties actually owing the money, if the "remission should not be authorized. It "does not appear, however, that any report "on the subject was ever made to the Lieu-"tenant-Governor, or any measures adopted "for the realization of the amount from "those on whom (and not on Juggut Raj) "the loss should have fallen, or any steps "taken for the adjustment of those items "for which Mr. Ahmuty had promised "to give credit. The sale of Juggut Raj's "estate seems, on the contrary, to have "been resorted to by Mr. Ahmuty as the "readiest mode of settling an intricate ac-"count and of discharging every pledge on "his part."

Then follow two paragraphs which it is unnecessary now to read, and the concluding paragraph is this: "It is too late to regret "that the first measure of the British Go-"vernment on the introduction of its au-"thority into the province of Allahabad "should have been the sale of one of the "largest zemindaries in it, and the extirpa-"tion of an old and respectable family; "and, at this distance of time, the interposi-"tion of Government may, probably, be no "longer of any avail. After a lapse of six "years, it must be scarcely possible to re-"vise the collections of the successive Se-"zawals deputed by the Collector, or to

"revert to the different persons on whom "the Collector had engaged to enforce "Juggut Raj's claims; and from the retire-"ment of the public officer through whose "concealment of some, and misrepresenta-"tion of other, material facts, the sale was "ordered, all redress seems to be precluded; "at the same time, therefore, we sub-"mit the case to Government as one of "peculiar hardship, we confess ourselves at "a loss to frame any specific proposition in "regard to it. Should, however, every other "redress be impracticable, your Lordship "may possibly consider Juggut Raj, under "all the circumstances, entitled to some "provision from Government."

Nor does it end there, since the subsequent papers on the subject, including the grant of the pension of Rs. 5,000 per annum to Lal Juggut Raj, in the following year, 1809, to which reference has already been made, shew that the Supreme Government of India entertained substantially the same view of the case as that taken in the despatch of Mr. Colebrooke and Mr. Deane.

We shall humbly recommend to Her Majesty to affirm the sudder decree, except as to compensation and restitution money, and costs; and to order that the East India Company shall pay to the appellant, Deep Narain Sing, the sum of Rs. 1,20,000, with interest at 5 per cent. per annum, from the date of the decree of the Mofussil Commission, this sum to be considered as in full for compensation and restitution money in respect of seiting aside the sale; and to declare that, by its payment, all claim for interest on one hand, and for rents and profits on the other, between the appellant and the late Rajah of Benares and the respondent, is to be considered as extinguished, and that the debt, if any, between the Government and Lal Juggut Raj at the time of the sale, and all claim against the Government in respect of having made the sale, are to be deemed, in like manner, to be extinguished. But that the sum of Rs. 26,458-6-6, part of the sum of Rupees 1,20,000, is, with the interest from the date of the decree of the Mofussil Commission at the rate of 5 per cent. per annum, on the Rs. 26,458-6-6, to be made good to the East India Company by charging, and they are accordingly to be at liberty to charge, the respondent in account therewith, and they are to be at liberty to deduct the same from what may be coming from them in respect to the zemindary, its profits, or revenues.

*Lord Brougham.*—In what way is the question raised before the Sudder of the compensation of the Rs. 93,000? The Sudder reversed the Mofussil decree as far as regarded the Rs. 93,000. In what way was that question raised before it?

*Mr. Wigram.*—I consider the appeal to the Sudder to have been simply an appeal against the sale altogether.

*Lord Brougham.*—Of course, if there was a cross-appeal, it would be only an appeal against the sale; unless the party who was ordered to pay the Rupees 90,000 cross-appealed, that point could not be raised upon the appeal. How did the respondent below raise that question as to the Rs. 93,000 in the Sudder Court?

*Mr. Wigram.*—I conceive, my Lord, that the Sudder Court considered that the whole case was open before them, as there had been an appeal.

*Lord Brougham.*—They considered it as if there had been a cross-appeal.

*Mr. Wigram.*—Under the Regulation the Sudder Commission had absolute discretion to do what they thought right.

*Lord Brougham.*—Each party must pay their own costs, both before the Mofussil Commission and on the appeal to the Sudder. The doubt we have is about the terms in which the Sudder dealt with the question of costs. They say, in a very awkward way, and apparently contradictory to the Mofussil decree: "Let the appellant be liable to costs according to the Mofussil decree." Now, when you look at the Mofussil decree, you find that he is not liable, nor is the other party liable, to costs, but that each party is to pay his own costs. So that saying "Let the appellant be liable to costs according to the Mofussil decree" means "Let the appellant be liable to pay his own costs, and let the respondent be liable to pay his own costs." So that in each stage each party is to bear his own costs from the beginning.

*Vice-Chancellor Bruce.*—Each party is to pay his own costs in every stage of the proceedings.

*Mr. Richards.*—Each party is to pay his own costs in each proceeding.

*Lord Brougham.*—Yes; below, the East India Company was not a party, so that, if costs had been given below, they would have come upon the respondent.

*Mr. Wigram.*—Your Lordships do not think that the costs should in any way be severed upon any part of the proceedings, considering the great injury we sustained by the sale?

*Lord Brougham.*—No.

*Mr. Richards.*—If my learned friend makes any suggestion as to costs, I would take the liberty of suggesting this: I should have considered that this was like a mortgagor coming to redeem, where he pays not only the interest, but also the costs.

*Lord Brougham.*—That would not apply to the costs of the appeal to the Sudder from the Mofussil, because, if he had not appealed, the other party would not have appealed. Therefore, it was his own fault going to the Sudder. It is quite different from a mortgage being set aside. If the sale had not been set aside, you would have made an application with some chance of success upon that ground. But here the sale is set aside.

*Mr. Richards.*—Each party pays his own costs in each proceeding. Will your Lordships please to name any time within which the money is to be paid by the East India Company?

*Lord Brougham.*—We have this difficulty about that—it is subject to the Governor-General.

*Mr. Richards.*—We will take it in the usual way "forthwith."

*Lord Brougham.*—You had better say nothing about that, because, if you drive a party who has a right to say "yes" or "no" to the wall in point of time, it is possible that he may say "no."

*Vice-Chancellor Bruce.*—I think you may have liberty to apply to the Sudder Commission.

*Mr. Richards.*—Just so, with liberty to apply to the Sudder.

*Lord Brougham.*—If we were to say that it is to be paid within six months, it is possible that they might grudge this Rs. 27,000 to be added to the Rs. 93,000.

*Vice-Chancellor Bruce.*—Each party is to bear his own costs of every stage of the proceedings, from their first commencement before the Mofussil Commission to the present time, with liberty to apply to the Sudder Commission.

The 12th December 1842.

*Present:*

Lord Campbell, Mr. Baron Parke, Mr. Justice Erskine, Dr. Lushington, Sir E. H. East, and Sir A. Johnston.

**Limitation—Clause 2, Section 7, Regulation V., 1827, of the Bombay Code.**

*On Appeal from the Sudder Dewanny Adawlut of Bombay.*

Jewajee and others

*versus*

Trimbukjee and Jagojee and others.

Where a case was held to be within the exception contained in Clause 2, Section 7, Regulation V., 1827, of the Bombay Code (Limitation of Suits) by reason of a claim preferred to the authority that was then the supreme power in the State, although a satisfactory and binding decree was not obtained.

*Lord Campbell.*—In this case their Lordships cannot take the same view of the subject that has been taken by any of the Courts below; and their Lordships must rather regret that the Judges below did not look a little more accurately into the pleadings, to see what questions were to be determined, and a little more accurately to the language of the Regulations of Bombay, by which one of the questions was to be decided.

Their Lordships are of opinion that it lay upon the plaintiff, the now respondent, to shew that he was entitled to one-half of the family property. That he could only do by evidence of adoption. Now, the only evidence of adoption that is brought forward is the sunnud, and that is represented as the judgment of a Court of competent jurisdiction—I mean the sunnud, together with the documents belonging to it. But their Lordships are of opinion that that cannot be considered as the judgment of a Court of competent jurisdiction, because it was an intimation to one party that there should be a judgment in his favor, whereas there was an intimation by the same authority to the other party that the cause remained undecided, and that, when the particular object was gained which was in view when this sunnud was granted, then the Sudder Court would proceed, and there should be an adjudication between the parties; this came from the same authority. We cannot, therefore, consider that that was a judgment binding and conclusive upon the parties.

Nor is there any admission here by which the right of the plaintiff to one-half can be considered as established, because, even supposing that the person by whom the admission was given could represent the other party, he made the admission under the authority of the Government for a particular purpose, and neither he nor those whom he represented can be considered as bound by it. There, therefore, appears to be no evidence whatever of adoption, and therefore no evidence that Chandjee, the original plaintiff, was entitled to one-half of the family property.

The next question that arises is with regard to the Statute of Limitations, and their Lordships are of opinion that, although the sunnud is not to be considered as a judgment binding between the parties, yet that that, taken with reference to the other documents connected with it, is sufficient to bring the case within the exception that has been relied upon, for it shews sufficiently that there had been a claim preferred to an authority that had to try and to decide the question, because we must consider that the Court to which this application was made was then the supreme power in the State, and had authority to decide between the parties.

It is objected, however, that another condition is not complied with, namely, that there is not sufficient proof given of how it was that a satisfactory and a binding decree was not obtained. But we think that, although that sunnud cannot be considered *per se* as a binding and regular judgment, it is enough, coupled with the admissions that were afterwards given, to account for the party not having proceeded to obtain the judgment of the Court itself, particularly coupled with this fact, that he was admitted into occupation of part of the property.

Under these circumstances, their Lordships are of opinion that the justice of the case is, and that we shall be fully authorized in recommending to Her Majesty to remit the cause to the Court below, the Sudder Court, with instructions to them to divide the whole of the property in equal third-parts. Chandjee had an opportunity of shewing that he was entitled to one-half; his attention was repeatedly called to that point; he was warned that it was necessary to prove the adoption; he has failed in doing so. It is admitted that there would be great difficulty now in bringing any further evidence. At all events, he has had the opportunity, and he has not availed himself of that opportunity; we are, therefore, of opinion that he and those who represent him must be content with one-third of the property; then the three appellants will take the second third, and the eighteen will take the other third.

With regard to the costs, we are of opinion that, as the three parties represented by Mr. Wigram were, from the beginning, perfectly willing that the estate should be divided upon the footing of each having a third, there ought to have been a decree in their favor in the first instance. We are of opinion, therefore, that the costs of those parties below ought to be paid according to the course which has been pursued upon these appeals. We are likewise of opinion that their costs of this appeal ought to be paid by the respondents. Therefore, the costs of the three appellants, both of the proceedings below and of the appeal, will be paid by the respondents. The other parties will pay their own costs.

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The 12th July 1843.

*Present:*

The Lord President, Lord Brougham, Lord Campbell, Vice-Chancellor Knight Bruce, Dr. Lushington, Sir E. H. East, Sir A. Johnston, and Sir E. Ryan.

**Jurisdiction—Caste—Religious Ceremonies (Adavi Palki).**

*On Appeal from the Sudder Dewanny Adawlut of Bombay.*

Sri Sunkur Bharti Swami

*versus*

Sidha Lingayah Charanti.

*Quære.*—Whether a suit lies in the Civil Courts against the Chief Priest of the Lingayats by the Swami or Chief Priest of the Smartava sect of Brahmins claiming by grant from the supreme power of the State the privilege of *adavi palki*, of being carried, on ceremonial occasions, in a palanquin borne crossways, so that the poles traverse the line of march.

*Lord Campbell.*—This is an appeal against certain judgments of the Zillah Court of Dharwar, and the Sudder Dewanny Adawlut, Bombay. The appellant, as Swami, or Chief Priest of a college of the Smartava sect of Brahmins, claims, by grant from the supreme power of the State, the privilege of

adavi palki, of being carried, on ceremonial occasions, in a palanquin borne crossways, so that the poles traverse the line of march.

The respondent claims the like privilege as Chief Priest of the Lingayats, worshippers of the goddess Siva, whose symbol, the linga or phallus, they are said to adore.

The suit arose from the respondent, in the month of July 1835, at a great religious festival, at Hoobli, in Bombay, having been carried through the bazaar in his palanquin crossways, attended by a great crowd of Lingayat followers, in sight of large numbers of Smartava Brahmins, who, denying the right of the respondent to this privilege, considered the assumption of it an insult to their sect. In consequence, on the 17th of May 1836, the plaint was filed by the appellant in the Zillah Court, asserting his own right, complaining of the usurpation of the respondent, claiming damages, and praying an order in the nature of an injunction that, in future, the respondent should not be carried in a palanquin crossways.

Their Lordships see great reason to lament the manner in which the suit has been conducted and disposed of both in the Zillah Court and in the Sudder Dewanny Adawlut. After a protracted litigation and an enormous expense, they are not now enabled to decide the rights of the parties, and they are driven to remit the cause for further consideration and enquiry.

The Judges below had a plain course to pursue: to consider, first, whether, assuming the facts alleged to be true, they had jurisdiction to entertain the suit, and, if they had, then giving the parties the opportunity to adduce their evidence, to see whether the right claimed by the appellant was established, and that claimed by the respondent was negatived. But no distinct opinion is expressed by them respecting the law of the case, whether the action is maintainable or not, and important evidence being excluded, the facts are left in a state of great uncertainty, so that we cannot venture, with any safety, either to affirm or reverse the judgment by which the appellant is said to have been non-suited. We do not expect to see proceedings in the native Courts in India conducted with technical form and precision, but the suitors ought to have the benefit of the exercise of industry, caution, and intelligence on the part of the Judges.

In this case it was proposed by the appellant to examine certain witnesses who had lived and enjoyed sovereign authority in the territory over which the disputed right was to be exercised. There appears great reason to believe that the evidence of these witnesses might have been obtained in a shape in which it would have been admissible, but the Judge of the Zillah Court, without sufficient reason, would neither allow the interrogatories to be transmitted for their examination which had been prepared by the vakeel of the appellant, nor frame interrogatories in due form himself, which it is certified to us that it was the duty of his office to have done.

On the 21st of October 1836, he made the following order: "The defendant's "objections have been fully weighed, and it "does not appear right or proper to forward "the questions aforesaid to Maharaj Appa "Saheb, &c. Even if they were sent, it "does not appear to the Court that they "would go to prove the plaintiff's case." The meaning of this last observation their Lordships are unable to understand, as the questions go directly to establish the grant of the privilege and the exercise of it, as alleged by the plaintiff, and to prove that no such right had been exercised by the defendant or his predecessors.

However, on the 24th of October 1836, the Judge pronounced a decree against the appellant, finding "that he should have "produced a sunnud, and have proved that "immemorial usage had been in conformity "to the sunnud; that the evidence adduced "by the plaintiff as to his enjoyment of the "privilege was deficient both in substance "and quality, and by no means amounted "to proof that the evidence produced by the "defendant was as strong in his favour "in this particular; that the plaintiff's claim "was disallowed, and that he should pay all "the costs of the action."

On the 21st of November 1836, a petition was presented to the Zillah Court for a new trial, on the grounds of the rejection of evidence and the discovery of two copper shasuns, sunnuds or grants by the Rajah of Anagoondy 538 years ago, whereby the adavi palki was granted to the High Priest, under whom the plaintiff claims. But the Judge determined "that there seemed to be "no reason at all for a new trial, and that "the prayer of the petition should not be "complied with."

The plaintiff thereupon appealed to the Sudder Dewanny Adawlut, and prayed that his shasuns might be received in evidence.

The shasuns were in the Nandi Nagri character, now almost unknown. The Court, without any proof of the place where they had been kept or found, received them in evidence, and ordered them to be translated into the Mahratta language. They professed to contain a grant by the Rajah Vidyarana, the priest whose successor the plaintiff claims to be, of (among various other privileges) the adavi palki, being carried crossways in a palanquin.

The translation being received, the Court resumed the consideration of the case, and, on the 26th of September 1837, made the following interlocutory order: "The sunnuds "were translated as ordered. From these "it would appear that Vidyarana has had "the privilege of going through the country "in a palanquin sitting crossways. Ap-"pellant is called upon to prove that this "privilege has been enjoyed since the "date of the sunnud by Vidyarana's heirs. "It is also to be proved that he is Vidya-"rana's heir. Respondent is to be allowed "to produce evidence to refute it;" and a reference was made to the Zillah Judge of Dharwar to take depositions on this issue.

A great number of witnesses were accordingly examined, and certain documents were produced on both sides.

At last, on the 24th of January 1838, Mr. Pyne, one of the Judges of the Sudder Dewanny Adawlut, gave his written opinion in favor of the appellant. After going through the evidence, he thus concludes: "On the review of this case, traditionary "evidence would lead to the belief that Sri "Sunkur Bharti is a lineally-descended "Gooroo from Vidyarana, on whom the "privilege of sitting in a palanquin carried "crossways was bestowed by Kudumber "Row, Raja of Svadree Desh, in Saka "1217. That the possession of a sunnud "to this effect by the appellant is confirm-"atory of such being the facts; that the "documentary evidence produced by the "appellant shews that for nearly three-"quarters of a century the Gooroos from "whom he inherits were styled by the "Peishwa as Swami of Sringirimath; and "that, lastly, the local European authority in "Mysore has recorded it as his opinion "that the appellant has the exclusive dis-"tinction of sitting in a palanquin carried "crossways. On the foregoing grounds and "as the respondent has adduced no proof "whatever in favor of his usurpation of this "honorary distinction, I would amend the "decree of the Zillah Court by awarding "nominal damages to the appellant, and "prohibiting the respondent from having his "palanquin carried crossways; and, even did "I not do so, I would desire to refer a case "of such importance to a Full Court."

Therefore Mr. Pyne was for reversing the decree of the Zillah Court by deciding in favor of the appellant upon the evidence as it stood, without any enquiry as to the genuineness of the sunnuds, or any strict proof as to the enjoyment of the right.

But on the 21st of February, Mr. Simson, another Judge of the Sudder Dewanny Adawlut (who had been the Judge to decide the case in the Zillah Court), gave his opinion in favor of the respondent, concluding in these words: "From the foregoing, I "am prepared to reject the appeal; *1st*, "because the evidence upon which it is "attempted to set aside the decree of the "Lower Court has been brought forward in "an informal and suspicious manner, so as "to require its being received with caution, "if received at all; *2nd*, the copper plates "produced by the appellant are not legal "evidence; *3rd*, whatever may be the im-"munities bestowed on the original grant-"ees, the grants do not appear to me "hereditary or exclusive; *4th*, I do not "consider the appellant to have proved his "descent from the grantee. I must be "permitted to add my hope that the Court "will not, on such evidence, confirm an "attempt to obtain a most monstrous mono-"poly over a rival sect, embracing by far "the greatest part of the population, and "one of whose religious ceremonies (the "vyasan thor mandi kol) has been recently "put down by the strong arm of power, "because distasteful to the party now claim-"ing the exclusive right of founding their "spiritual pastor in a form to which the "respondent considers himself equally en-"titled."

Mr. Greenhill, the Third Judge, followed on the same side. After commenting on the appellant's case as originally brought forward, he says: "After the case was "decided in the Zillah Court, where he did "not even seem to have been aware of their "existence, he produced two copper deeds, "written in old characters, which, having "been translated, offer to confer on the "person named certain honors, one of "which is, that he may ride in his palanquin "carried crossways, as it has been trans-"lated.

"These deeds have every appearance of "being genuine, and supposing them to be

"so, and that the appellant is the repre-"sentative of the grantee therein named, "and they do not appear to prohibit other "persons from riding in their palanquins "in the same manner, the same sunnuds give "the right of riding his horse in a parti-"cular manner, and of using an umbrella; "but it is not for a moment to be supposed "that no other person was ever to be per-"mitted to use an umbrella, because the "honor was conferred upon the individual "alluded to. The use of palanquins, of "horses, of umbrellas, &c., were in former "times, and indeed at this day are, considered "as marks of distinction when conferred by "the Government, but I do not see that "a person so honored has any right of "action against another who assumes a "similar pageantry, unless he can shew "that it injures him unjustly. The Go-"vernment, being the source of all honors "of this kind, may permit their use by "whomsoever they choose; and, although "it could probably by usage prohibit the "assumption, I am not prepared to allow "that any private individual can interfere "with what is the natural right of all, so "long as it neither injures nor interrupts "that person, and therefore am of opinion "that the appellant should be non-suited "with costs."

On the 23rd of February 1838, the Sudder Dewanny Adawlut pronounced final judgment, by which it confirmed the Zillah Judge's decree, and condemned the appellant in all costs.

This judgment their Lordships cannot confirm. It does not regard the ground of appeal arising from the rejection of evidence in the Zillah Court, and their Lordships think that an order should have been made allowing the appellant to have the benefit of the examination of the witnesses to whom the suppressed interrogatories were addressed.

Again, after the order of 26th of September 1837, Mr. Pyne could not be justified in treating the sunnuds as forged. Before that order was made, there certainly ought to have been an enquiry respecting the custody of the sunnuds; but the appellant had reason to believe that their genuineness was admitted by an intimation from the Court that he was only to prove the exercise of the privilege and the spiritual pedigree.

Mr. Greenhill, who concurs with Mr. Simson in deciding against the appellant, considers the sunnuds genuine, and it is not quite easy to understand whether he proceeds upon the construction of the sunnuds, or on the ground that, in point of law, at all events, the action is not maintainable, although the other two Judges seem to have concurred in the contrary opinion.

It was strongly pressed upon us by the respondent's Counsel that we should take upon ourselves to decide that the action is not maintainable, and, on this ground, to affirm the judgment, whatever miscarriages there might have been in the conduct of the suit; but this ground of defence not having been taken before, and never having been solemnly considered by the Judges below, and no authorities from the law of Bombay having been cited to us, we cannot venture to give it effect. In England, although an action may be maintained for the disturbance of an office or a franchise, an action could not be maintained by the grantee of a dignity from the Crown against a person who, without a grant, should assume the like dignity; but it does not necessarily follow that such is the law in Bombay. The usurper of the dignity is guilty of a wrong which is, to a certain degree, prejudicial to every one who has a just title to the dignity, and the manner in which such a wrong is to be redressed must depend upon the Municipal law of each particular country. There may be no remedy except by application to the Executive Government to punish the usurpation, or there may be a remedy to every one whose dignity is lowered by the usurpation in right of action against the usurper. Even in this country, it would appear that in ancient times, when armorial bearings were assumed without authority, the family who had a right to bear them might sue in the Court of the Earl Marshal, and might obtain an inhibition.

The right of adavi palki is of quite as substantial a nature; and the Western nations, who attach so much importance to titles, orders, and decorations, have no pretence for treating with levity the marks of distinction conferred by the sovereign authority and highly valued in the East: such as the right to wear a particular button, to use a fan made from a cow's tail, or to be carried crossways in a palanquin.

For those reasons, their Lordships cannot advise that the judgment should be affirmed, but they are by no means prepared to say that judgment should be given for the appellant according to the prayer of his plaint. How his case would have stood had the witnesses been examined whom he propound-

ed, we cannot tell, but the evidence actually adduced in the Zillah Court was insufficient to establish his right or to negative that of the respondent. In the Sudder Dewanny Adawlut the sunnuds were brought forward under circumstances of great suspicion, and they ought not to have been received without enquiry into the custody from which they came, or other proof to shew that they were genuine. Nor has sufficient attention yet been given to the effect of them, or to the consideration whether the appellant, having made out his right and negatived the respondent's, has any remedy by action, or can only apply for redress to the Police or the Executive Government at Bombay.

Their Lordships, therefore, however much they may regret that litigation should be prolonged on such a subject, feel themselves under the necessity of advising that the case should be remitted to the Sudder Dewanny Adawlut for a new trial, each party paying his own costs of this appeal, and all other costs to be in the discretion of that Court at the conclusion of the suit.

*Lord Brougham.*—That is to say, all other costs, as well future costs, as those already incurred.

*Lord Campbell.*—Exactly. Their Lordships beg to express a wish that the Judges of the Court will, in the first instance, consider whether the action is maintainable, the allegations of the appellant, in point of fact, being proved; and, if they are of opinion in the affirmative, that they will carefully enquire into the custody and genuineness of the sunnuds. Should these documents be forged, the appellant must fail; for whether the existence of a sunnud might be presumed from the immemorial exercise of the privilege, when he rests his case upon sunnuds actually produced, by them he must stand or fall. If the Court should be satisfied that the sunnuds are genuine, and that the privilege is conferred by them, the next enquiry will be whether the appellant is to be considered the successor of the grantee, and there has been enjoyment under them. Lastly will come the right of the respondent; if that be negatived *primâ facie*, by proof of non-exercise or interruption, the *onus* will be cast upon him of strictly establishing it.

Their Lordships trust that the Judges will use the necessary means for having witnesses of high rank, who would object to taking an oath, examined without oath according to the regulations now in force upon that subject, and having the interrogatories so framed as to elicit the truth from them without offending their dignity. The rights of the parties may thus be at last satisfactorily settled, and the character of our Indian Government for the enlightened administration of justice effectually upheld.

*Lord Brougham.*—It ought to be observed, with regard to that very important question, as to interrogatories to persons of high rank, upon which the judgment last comments, that even if the objection is not done away, which is most properly made on the ground of those persons refusing cross-examination—for example, refusing to give the grounds of their knowledge of the *causæ scientiæ*, as they say in Scotland—still you may take the evidence, and it would be a strong argument upon its weight, a strong argument to shew that it is of no weight, that they were not cross-examined.

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The 8th December 1843.

*Present:*

Lord Campbell, Mr. Justice Erskine, Sir H. J. Fust, Dr. Lushington, Sir E. H. East, and Sir E. Ryan.

**Hindoo Law—Joint Hindoo Family—Presumption of Joint Property—Adoption—Widow—Maintenance—Practice of Privy Council (Technical objections).**

*On Appeal from the Sudder Court of Bengal.*

Dhurm Das Pandey and others

*versus*

Mussumat Shama Soondri Debiah.

Where a Hindoo family lives joint in food and estate, the presumption of law is that all the property they are in possession of is joint property until it is shown by evidence that one member of the family is possessed of separate property.

The purchase of a portion of the property in the name of one member of the family and the existence of receipts in his name respecting it may be perfectly consistent with the notion of its being joint. The criterion in such cases in India is to consider from what source the purchase-money comes.

An objection which, if taken, might have been cured, and which has not been taken in the Court below, cannot be taken in the Court of Appeal.

Although the exercise of an act of adoption by the widow of a Hindoo who died without male issue, and made in accordance with his request, divested the property from the widow and vested it in the adopted son, the widow sued for an undivided share in the joint property, and a decree made directing her to be put

in possession. HELD that the widow must be assumed to have prosecuted the suit only as guardian for her adopted son; that the decree must be considered to be for his benefit; and that she was put in possession as trustee for him and accountable to him as guardian and trustee for the profits of the property, being entitled herself to a maintenance out of it.

*Lord Campbell.*—THEIR Lordships feel very much indebted to the gentlemen of the Bar on both sides for the manner in which the case has been argued; it has been argued with the greatest ability and with great conciseness, and I must say that we are better assisted by the Bar when a case is so argued than when the arguments are extended to an unnecessary length, and there are repetitions which only perplex us. I am sure nothing was omitted on either side that could assist the Court or be of service to the client.

This case is of a very intricate and perplexing nature, and it is utterly impossible to explain all the facts that appear in evidence before us. But we have the judgment of the Zillah Court, which appears to me to be framed with great care and caution, and I am glad to have an opportunity of saying so, because lately in another case, the case respecting the palanquin, I felt it my duty to declare the regret of all their Lordships, who heard the case, that much pains had not been bestowed upon it both by the Zillah Court and by the Court of Sudder Dewanny Adawlut. In this case it appears to me, and, I believe, to all their Lordships, that both in the Zillah Court and in the Sudder Dewanny Adawlut Court, the Judges have shown great industry, great circumspection, and great discrimination.

Now, the case really involves merely a question of fact. There is no disputed point of law that occurs in the case, and upon a question of fact we must give great credit to the judgment of the Court below, the Judge having an opportunity of seeing the witnesses, and of seeing the documents, and being better acquainted with the habits and customs of the people than we can be supposed to be.

This judgment of the Zillah Court in this case has been affirmed by the Court of Sudder Dewanny Adawlut; the Judge of the superior Court not in all respects taking exactly the same view as the Judge of the inferior Court, but confirming the decree of the inferior Court. We have to determine whether that decree ought to be affirmed or reversed; and after the most anxious consideration, their Lordships are of opinion that the only course that we can safely adopt is to affirm the decree.

It is allowed that this was a family who lived in commensality, eating together and possessing joint property. It is allowed that they had some joint property, and there can be no doubt that, under these circumstances, the presumption of law is that all the property they were in possession of was joint property until it was shown by evidence that one member of the family was possessed of separate property. Such evidence may be received, but their Lordships are of opinion that such evidence has not been given in this case with regard to any part of the property.

Now, what has been relied upon with regard to a portion of the property has been chiefly that it was purchased in the name of one member of the family, and that there are receipts in his name respecting it; but all that is perfectly consistent with the notion of its having been joint property, and, even if it had not been joint property, it still would have been treated exactly in the same manner. We have from the highest authority—from the authority of Sir Edward East and of Sir Edward Ryan whose most valuable assistance we have in this case (and it gives me a confidence that I should not otherwise have felt)—that the criterion in these cases in India is to consider from what source the money comes with which the purchase-money is paid. Here there has been no evidence given that the appellant had any separate property, or that it was from his funds that any part of the purchase-money was paid: therefore, I think that so far, on this part of the case, no difficulty can be entertained, and that the whole of the property must be considered as joint property.

That being so, the widow is entitled to a third of that joint property, unless credit be given to this ikrarnamah which has been set up by the other side. The Judge of the Zillah Court, who must have seen it, who must have examined it, and who had an opportunity of seeing the witnesses by whom it was supported, and the witnesses by whose evidence the authenticity of it was impeached, came to the conclusion that it was a fabrication. The Judge of the Sudder Court was rather of opinion that it bore the seal or signature of the grantor: but that it had been obtained from him when he was incompetent to execute a deed. I must, for my own part, express that the leaning of my opinion rather is in accordance

with that of the Judge of the Zillah Court. But at all events it seems to me that this is a deed to which no faith can be given and that the two Courts were perfectly right in considering that it was not the deed of the grantor, and that it ought not to have any weight given to it.

We now come, therefore, to the question of *quantum*. Their Lordships are of opinion that the whole of the real property must be considered as joint property, and the same as to the personal property, because according to the laws of the Hindoos, as in the Civil Law, no distinction is made between these two species of property. Their Lordships certainly have felt great difficulty respecting the amount of personal property, the cash supposed to be in the house, and it would have been satisfactory to them if, according to the course of proceeding in this country, a reference could have been made by the Court below to ascertain the amount. But we have reason to believe that such a reference would not have been made, and now at this distance of time it could not possibly be made, with any advantage.

To show the amount, there is a document produced, which, if genuine, is sufficient for the purpose; an inventory supposed to have been acknowledged by one of the parties against his own interest. The Judge of the Zillah Court, and the Judge of the Sudder Court, have both concurred in believing that to be a genuine instrument, acknowledged by the party. There is no doubt that it is subject to some suspicion, but we do not feel that we should be at all justified in saying that the Judge of the Zillah Court, and the Judge of the Sudder Court, came to a wrong conclusion: we feel ourselves bound likewise to consider that a genuine document, and, if so, it proves the amount of the property to be according to that stated in the decree.

An objection has been made that, pending the suit, an act of adoption was executed by the respondent, whereby the whole property was divested from the mother and vested in her adopted son. Now, upon the authorities, there can be no doubt that that is the result of an act of adoption; because the property is in the widow from the death of the husband, till the power of adoption is exercised. Then that adoption divests it from the widow, and vests it in the adopted son. But for that reason are we to reverse the decrees of the two Courts? No objection was made in either of those Courts that the proper parties were not before the Court; if such an objection had been made, it might have been removed; and I think it is a safe maxim for a Court of Appeal to be governed by, that an objection which, if taken, might have been cured, and which has not been taken in the Court below, shall not be taken in the Court of Appeal.

We consider that the Judges of the two Courts below were right in coming to the conclusion that the ijazutnama, or deed giving the power of adoption, was a genuine deed. That likewise is subject to great suspicion, but it is supported by witnesses who, if believed, prove it to be genuine. Those witnesses were believed by the Judges below, and we see no sufficient reason why they should be disbelieved. That being a genuine instrument, there was a power of adoption, and it is always to be borne in mind that that deed goes along with the habits and feelings of the Hindoos; because we know that a Hindoo dying without male issue would be most anxious before his death, by writing or by parol, to give a power of adoption, in order that the sacrifices which are required may be performed, and that his departed spirit may be introduced to a state of happiness.

Then, under these circumstances, what is the effect of the decree? It has been objected that the effect of the decree is to put the respondent in possession in her own right, of that which is divested from her by the act of adoption; but their Lordships conceive that, although the decree is not very skilfully framed in that respect, that is not the effect of it. All the facts being stated, it is assumed, as matter of law, that, after she had executed the act of adoption, she prosecuted the suit only as guardian for her adopted son. Then, as the suit must be considered as afterwards prosecuted by her in her name for his benefit, the decree must be considered to be for his benefit, and that she is put in possession as trustee for him. He claimed, as I understand, an undivided share. She is to be put into possession of an undivided share; that share she will hold accountable to him as his guardian and trustee, being entitled herself to a maintenance out of it. Some of their Lordships thought that it might be expedient to alter the decree with relation to that point; but, upon the whole, after considering the matter more maturely, their Lordships are of opinion that that is unnecessary; that the effect of the decree will be to consider the whole of this property as joint property;

that this deed giving the power of adoption (the ijazutnama) is a genuine instrument; that she prosecuted the suit as guardian for her adopted son; and that the decree is in her favor in that right as guardian for her adopted son, and that therefore he will be entitled to call upon her to account for the profits of the joint property, of which she is to be put in possession.

Under these circumstances, their Lordships are of opinion that it will be proper to recommend to Her Majesty that the decrees of the Courts below be affirmed, and with costs. There are doubts upon the facts, but we are proceeding upon the ground that a forged instrument was given in evidence on the part of the appellants, that that has caused the litigation, and that there is no reason in the world why in this case we should depart from the common rule, that the appellant failing must pay the costs of the appeal.

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The 5th February 1844.

*Present:*

Lord Brougham, Lord Langdale, Dr. Lushington, T. P. Leigh, and Sir E. Ryan.

**Mahomedan Law—Deed of Gift—Legitimacy.**

*On Appeal from the Sudder Dewanny Adawlut of Bombay.*

Jeswunt Sing-Jee Ubby Sing-Jee and Chuttur Sing-Jee Deep Sing-Jee

*versus*

Jet Sing-Jee Ubby Sing-Jee.

A deed by a Mahomedan in which he declared "I have adopted *A. B.* to succeed to my property" was held to be neither a deed of gift nor a testamentary gift to take effect after the death of the donor, there being a complete absence of any relinquishment by the donor or of seisin by the donee.

According to the Mahomedan Law, a child born in wedlock is deemed to be the child of the mother's husband.

*Lord Langdale.*—This case comes on upon an appeal from the Court of Sudder Adawlut at Bombay.

The appellant states in his plaint that he was entitled to the property in question in one form or another, as the adopted heir of Rana Ubby Sing-jee, who died in the year 1825.

The respondent alleges himself to be the heir of the same person, and, as such, entitled to the property in question.

The claim of the appellant rests altogether upon the validity of a deed which is stated to bear date on the 26th of December 1821, and which is alleged to be an effectual deed of gift to him of the property in question: it is also alleged, on the part of the appellant, that, if it is not to be considered a deed of gift, it is to be regarded as a will under which he is entitled, if the respondent be not the heir to the whole of the property, or, at all events, to one-third of it. It is, therefore, of the utmost importance to see what is the nature and effect of this deed: it is dated 26th of December 1821, and is signed by "Ubby Sing-jee Deep Sing-Jee." The deed is short, and is in the following words: "As I have divorced my wife, her "son Jet Sing, by illicit intercourse, is hereby "disinherited; I have therefore adopted "you." Then there follow after the signature these words: "I have adopted Rana "Jeswunt Sing to succeed to my property and "title; no one shall interfere in this adoption. "I have also made provision for all my wives "by assigning a portion of land for their "maintenance; they shall not be annoyed "in any way, but considered as the mother "of Jeswunt Sing, and so treated and main-"tained. I have no son, and the heir to "the estate is my brother Rana Chutt-"Sing, whose son, Jeswunt Sing, I have "adopted."

The first question to be considered is whether this is a deed of gift which passes any property to the appellant, and that depends upon these words: "I have adopted Rana "Jeswunt Sing to succeed to my property and "title;" and upon this subject their Lordships have been referred to Mr. Macnaghten's Book, as to what is the meaning of a deed of gift, in which it is stated: "It is requisite "that a gift should be accompanied by de-"livery of possession, and that seisin should "take effect immediately, or, if at a subsequent "period, by desire of the donor." "A gift "cannot be implied—it must be express and "unequivocal—and the intention of the "donor must be demonstrated by his entire "relinquishment of the thing given: and "the gift is null and void where he con-"tinues to exercise any act of ownership "over it."

Now, in the first place, their Lordships feel great difficulty in saying that any gift absolutely was here intended. The words are: "I have adopted Rana Jeswunt Sing to suc-

ceed to my property." When is he to succeed—after his death? Where is the relinquishment or any giving up of the property? There is none. If these words were intended to pass the property, there is a complete absence of any relinquishment by the donor or of seisin by the donee; and therefore it appears to their Lordships that this instrument is not to be treated as a deed of gift.

Then arises the question, Is it a will? We have again the same absence of his intention to give in words. He says he has no son, and he adopts somebody who may succeed. This son may succeed. Any other person may succeed if it is in the nature of a testamentary gift.

This case seems to be, in the very terms of it, almost similar to a case cited from page 124 of Mr. Macnaghten's Book, where the question was as to the effect of a document executed by a party "declaring his nephew to be his representative in proprietary right." The answer declares the document to be of no validity, "and cannot be available "to confer any right of succession on the "nephew, because it purports to constitute "him the representative in proprietary right "of the framer of it; in other words, it de-"clares him in general terms to have the "right to the entire property belonging to "the framer of the document after the death "of the latter;" which is the only construction to be given to the words used here, "I "have adopted Jeswunt Sing to succeed to my "property." Such a declaration does not fall within any description of legal obligation, and has, therefore, no validity as to the creation of proprietary right. It is not, therefore, a deed of gift nor a testamentary gift to take effect after the death of the donor. It appears to their Lordships, therefore, that this document has no effect or operation whatever in giving any right of property to the appellant.

That being so, the appellant has no right on which he can recover anything in this case; but with a view to what is ultimately to be done in this case, it is necessary to consider the matter a little further.

This case is brought forward either upon the allegation that the defendant was a supposititious child, palmed upon her husband by Purtaba, pretending to be his mother, for the purpose of obtaining this property, or else upon the allegation that the child of Purtaba was an illegitimate child, born by illicit intercourse with some other person than the husband, Rana Ubby Sing.

Now, with respect to the question, whether, being supposed to be the child of Purtaba, he was also the child of Ubby Sing, there has been a great deal of evidence gone into, contradictory in some parts of it, but which, quite independent of the conclusion of law, preponderates very greatly in favor of his being the child of Ubby Sing, and, as such, recognized by him. Independently of that, there was no denial that Purtaba was the wife of Ubby Sing, and there is no evidence which can be relied upon to show that the most ordinary presumption ought not to prevail in this case. This is the case of a child born in wedlock, and it must, therefore, be deemed to be the child of the husband.

The other part of the case, which supposes that this child is not the child of Purtaba, does, upon examination of the evidence produced, appear to us to be a gross attempt at fraud and imposition. There is no evidence which can in the smallest degree be relied upon to support such a statement. The declaration of the husband in the instrument produced as the foundation of the appellant's claim admits it is not so, for he there speaks of him as "her son, Jet Sing, by illicit intercourse;" and, though that declaration may not be a true declaration as to the allegation of illicit intercourse, it is conclusive against the supposition advanced by the appellant. There is not the least foundation laid for it, and nothing which can lead us to suppose why he should be induced to put forward such a case, evidently false, and having no foundation whatever.

It is not possible, however, to dispose of this case without making one observation at least upon the proceedings which have taken place in the Zillah Court, where evidence was brought forward to a very great extent. It appears that the Judge so far forgot that it was necessary to have the evidence brought forward under legal sanction and in public, in such a way that there might be the means of controverting it, that he imported, as a ground of his decision, something which came within his own knowledge. It is to be regretted that any such circumstance should have taken place, and still more is it to be regretted, when the case came before the Superior Court, the Sudder Dewanny Adawlut, that a circumstance of

that kind should have been alluded to as one which ought, in the smallest degree, to have any effect upon the judgment of the Court. It was impossible to pass that by without making an observation upon it; but still the other circumstances of the case are so clear that their Lordships see no reason why the decision which has been come to should, in any respect, be altered; that circumstance, if at all looked at, might have been worthy of further consideration; in another respect, if the case had not the character which it must be supposed to have, of a fraudulent attempt to defeat justice, and considering the decisions which have been pronounced and the conduct which has been pursued by the appellant, their Lordships are of opinion that this appeal ought to be dismissed with costs.

*Lord Brougham.*—Including all the costs below; I suppose they have already been paid.

Appeal dismissed with costs.

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The 13th May 1844.

*Present:*

Lord Brougham, Lord Campbell, Dr. Lushington, T. P. Leigh, and Sir E. Ryan.

**Lease—Construction—Onus probandi—Hindoo Law—Damages.**

*On Appeal from the Sudder Dewanny Adawlut of Bengal.*

Maharaja Tej Chund Bahadoor, Zemindar of Burdwan,

*versus*

Sree Kanth Ghose and others.

Where a lease is not in writing, but the terms of holding are specified in a notification addressed by the lessor to his servants, such an acknowledgment is, as against the lessor, conclusive evidence of the terms of the agreement.

Where a lease for a fixed term of 7 years contains no words to import a continuance of the interest after the death of the grantee, nor any expressions which point to any earlier determination of the interest, the *primâ facie* meaning is a continuance for 7 years, and that the lease did not terminate with the death of the original lessee, but survived during the remainder of the term to his heirs and representatives.

The *onus* is on the party who seeks to show that the transaction should be governed by Hindoo Law, that the *primâ facie* construction is contrary to the Hindoo Law or the established custom of considering such contracts in Bengal.

In this case the lessor having, on the death of the lessee, granted a putnee of his whole estate including the farm in dispute, was adjudged liable to pay to the representatives of the lessee damages for the time they were deprived of the beneficial enjoyment of the farm, according to the increased rent which the new lessee had undertaken to pay.

*Dr. Lushington.*—THIS is an appeal from the Court of Sudder Dewanny Adwalut of Bengal, and the subject of the suit is a lease of the pergunnah Monohur Shahi. It does not appear that any lease was granted in writing; but the appellant, the zemindar, states the agreement in the following terms, addressing it to the native servants: that "the mehal in question has "been given in farm to Ram Nidhee Ghose "from 1210 to 1216 B. S. (1803-4 to "1809-10), a period of seven years; he will "receive petitions and kubooleuts, and take "possession and transact business according "to rule. You will attend upon him and "cultivate the soil, pay rent, render papers "and not act contrarily in any way."

This is done in a notification bearing date the 13th of April 1803—a notification addressed to all the native officers of the pergunnah. Such an acknowledgment coming from the appellant is, as against him, conclusive evidence of the terms of the agreement.

The original lessee continued in possession for four years and two months, and died on the 11th of June 1807.

There is no dispute as to these facts, and the only question arising is one of law, *viz.*, whether, by the terms of the grant and the Hindoo Law, the lease terminated with the death of the original lessee, or survived, during the remainder of the term, to his heirs and representatives.

With respect to the construction of the grant, it is contended, on behalf of the appellant, that it contains no words which would necessarily import a continuance of the interest after the death of the grantee, and this may possibly be true. But, on the other hand, the lease is for the fixed term of seven years, and there are no expressions which point to any earlier determination of the interest. The *primâ facie* meaning, then, is a continuance for seven years; and, had there been any intention on the part of the grantor to have affixed any limitation,

he ought to have done so by the insertion of qualifying terms. Had such been the intention of the parties, nothing could have been easier than to have added the words "provided the grantee so long live;" and if the party having the full power to engraft this qualification omits to do so, the general principles of law would be opposed to any implied presumption.

These are the general principles of construction which their Lordships would be inclined to apply to the grant; but, as this is a transaction to be governed by the Hindoo Law, a contrary interpretation may prevail, if it be shown that the *primâ facie* construction is contrary to the Hindoo Law, or the established custom of construing such contracts in Bengal.

The *onus* of proving the law must necessarily lie upon the appellant, who seeks to show that the contract should be governed, not by general, but by particular, rules.

The question, then, is narrowed to this point—has the appellant proved the law governing Hindoo transactions to be such as he avers it is, by authority from any Hindoo books of law, or by decided cases? or has he shown that a construction adverse to his interests would be at variance with the established customs under which such property in that country has been always held and enjoyed?

As to the first head of proof, it may be very quickly disposed of. Neither here nor in the Courts below has any authority been cited from the text-books of Hindoo Law opposed to the decision of the Sudder Dewanny Adawlut.

*2ndly.*—With regard to decisions in the Courts administering Hindoo Law, there was in the Courts below one case cited which has been printed in the Appendix, p. 21—Zoolfikar Ali *versus* Hossein. This case occurred in the Provincial Court of Moorshedabad in 1811, and was decided by Mr. Rocke. It does not, however, appear to have been considered as any authority upon the question of law by any one of the six Judges under whose cognizance this case from time to time has come. It is not adverted to by any one of them, and when the case itself is examined, it is doubtful whether it has any bearing on the main question. It is not clear that the grant in that case was for a term of years, and the suit was by the person who had become the security, and who did not appear to be the heir of the former or original lessee. There is, then, no decided case adverse to the claim of the respondent.

Then, with respect to the third ground, *viz.*, the averment that the continuance of a lease, granted for a term of years, for the remainder of that term to the heirs of the tenant, deceased, is at variance with the established customs under which such property in that country is held, and might be very detrimental to the system. This argument wholly fails. It is not averred nor proved that the subsistence of the lease for its full term, although the original lessee should die during the currency, is an unusual occurrence in Bengal; nor is it said that the maintenance of such lease would be productive of injury to the community. Not one of the Judges has supported such an opinion; and, if there had been any sound ground for such an opinion, their local experience could not have failed to suggest it. Mr. Courtenay Smith, pp. 86-87, who was of opinion that the respondents were not entitled to recover at all, founds his judgment, not on the general law, nor upon the supposition that mischief must always arise from the upholding a lease after the death of the lessee for the remainder of the term, but upon circumstances which he conceives may belong to this transaction; as the want of a specific condition for the continuance of the term after the death of the lessee, the youth of the heir, and the poverty, or supposed insufficiency, of the security. I may observe that none of these latter grounds were attempted to be insisted upon at the bar.

It is not necessary to prosecute this enquiry further, for their Lordships are well satisfied that the judgment of the Court of Sudder Adawlut, maintaining this lease according to the *primâ facie* meaning of the contract, is not contrary to the law or practice of Bengal, and so far from being detrimental to the just rights of property or due cultivation of the soil, a holding which enables the lessee to expend his capital in the improvement of his farm, without the prospect of the due reward being lost to his heirs in case of his own death before the expiration of the term, cannot be otherwise than beneficial.

The present respondents are the heirs of that tenant; they have been deprived of the beneficial enjoyment of the farm for nearly three years, and their Lordships concur with the Court below in thinking that they are entitled to be in-

demnified for the loss accruing from the wrong done to them.

But a question remains as to who is liable to make good this loss—the appellant, the Zemindar of Burdwan, the original proprietor and lessor, or the representatives of Suroop Chund Roy, who form another set of respondents in this case, Chund Roy having, on the death of the grantee of this lease, taken a putnee talook of the whole estate, of which this farm formed a part.

In the Provincial Court and the Sudder Adawlut there has been much litigation on this point, and much evidence taken; but it does not seem to their Lordships necessary to set forth the details of those proceedings. By the final judgment of the Sudder Adawlut, the Zemindar of Burdwan, the appellant, has been decreed to pay the damage which has accrued. He is the original and moving cause of all the loss which has befallen the respondents. Without due regard to the contract he had entered into, and whilst that contract was still subsisting, he demises to Chund Roy the whole estate, including this farm, for an increased rental. The Maharajah, indeed, contends that, in the kubooleut to Suroop Chund, he had stipulated for the observance of existing leases; but Mr. Harrington, at page 93, disposes of this argument by showing that this stipulation could not reasonably be extended to cover this grant; for, if the old lease were to continue, there would be no source from which the new lessee could fulfil his engagement. Indeed, the whole of this argument, as to a prohibiting clause with regard to this lease, is utterly at variance with the main case of the Maharajah, namely, that the lease had expired by the death of the lessee.

The Maharajah has, therefore, by his own acts, and through the medium of others whom he has empowered to act, violated his own engagements, and thereby occasioned great loss to the respondents. For this loss, their Lordships are of opinion that the Sudder Adawlut have justly made him responsible. The amount of the damages given appears to have been fairly fixed, according to the increased rent which the new lessee undertook to pay; they have given for the three years the respondents were dispossessed, Rs. 42,000, being the amount the new tenant undertook to pay—certainly not an exorbitant estimate of the real loss. Their Lordships are therefore of opinion that the decree of the Court of Sudder Dewanny Adawlut must be affirmed, and with costs.

The 18th June 1844.

*Present:*

The Lord President (the Marquis of Lansdowne), Vice-Chancellor Wigram, Dr. Lushington, T. P. Leigh, Sir E. H. East, and Sir E. Ryan.

**Pleading—Joint Hindoo Family—Division.**

*On Appeal from the Sudder Dewanny Adawlut of Madras.*

Moottoo Vijaya Raganadha Bodha Gooroo Swamy Perria Woodia Taver

*versus*

Rany Anga Moottoo Natchiar.

According to Regulation XV. of 1816 of the Madras Code, in a suit for possession of joint-family property in which the title of the plaintiff depended on the fact of a division having taken place in the family, a distinct averment of division must be made in the cause, and a direction given by the Court for the production of evidence in proof of such an averment.

The parties having acted under a misapprehension of the law, leave was given to bring a new suit within three years.

*Dr. Lushington.*—The present litigation is between the widow of the party who was last seized of the zemindary, and his great-nephew, and various suits appear to have been instituted with regard to the right to this property, and the claim of the parties put on various grounds; but their Lordships are of opinion that the whole question is now narrowed to a very short point.

In the Provincial Court, certainly, some notice was taken of the question whether any division had actually been proved to have taken place between the two brothers or not; and the Provincial Court were of opinion that there was not satisfactory evidence to establish the fact of the division. But when the appeal came to be brought before the Court of Sudder Adawlut, that Court came to a contrary conclusion, and decided this case in favor of the widow, on the express ground that the two brothers had become divided, and that, in consequence, this property, whether self-acquired property or not, according to their opinion and judgment, would belong to the widow, and not be inherited by either of the brothers, or the nephew, or the great-nephew.

With regard to the question of law, as far as the opinion of the Pundits could determine it, there seems to have been no difference; they have all stated, in substance, to this effect, that the right and title to the zemindary depended on the fact of division, and the fact of division, therefore,

was and is a most substantial question to be determined in this case. Now, their Lordships find, upon an examination of all these proceedings, that the fact of the division has never been alleged in any of the pleadings. They find, also, that, according to the Regulations of 1816, the XVth Regulation, that the division ought to have been made a distinct point in the cause, and that an order ought to have been given for the production of evidence in proof of such an averment. Then it comes to this, that there has been no such averment, no such point made, and no such direction given; and how it was that the evidence came to be taken on the one side or on the other, with respect to the question of division, no satisfactory explanation has yet been afforded at the Bar.

Now, their Lordships entertain a very strong conviction of the absolute necessity of adhering to this Regulation, for it is, in the *first* place, a Regulation emanating from the highest authority, and is entitled to the force of law; and it is, in the *second* place, one, in their Lordships' judgment, of the utmost importance for preserving the regularity of the proceedings of the Courts in that country, and for preventing constant confusion and uncertainty as to what really are, or are not, the points in litigation, and to which the evidence is to be directed. They conceive that this Regulation has been most wisely framed, *first*, in affirmatively directing that the points on which evidence is to be taken shall be distinctly set forth, and that it shall be a duty imposed on the Court, if those points do not appear to be sufficient for the final termination of the litigation, that they should state distinctly, as a matter of record, the further points on which evidence is to be taken. Further, the Regulation, after having thus affirmatively stated what is to be done, goes on to state what shall not be done: "In like "manner, if proof shall be required on any "other points in the course of the trial, such "points shall be recorded on the proceedings, "and the proper party shall be called upon "for the requisite evidence, and no exhibit "shall be filed or witness summoned, unless "expressly declared to be in proof or refuta-"tion of some point upon which the Court "may have directed that evidence should be "taken."

Now, this Regulation, important as it is, and most clearly expressed, points directly against the course which has been unfortunately adopted in this case, because the point on which the whole case turns, and in the opinion of the Sudder Adawlut, beyond all question, the whole case was decided, never was alleged as a point in any of the proceedings, and evidence which was read in support of it never was directed or sanctioned by the Court.

It is, in the opinion of their Lordships, therefore, indispensably necessary, for the purpose of supporting and securing the compliance with, and securing, this most wholesale Regulation, that they should act in conformity with it; and, if they act in conformity with this Regulation, the inevitable consequence is, that they cannot sustain the decision of the Sudder Adawlut, because it is upon the ground of that point, as the point of division alone, on which that judgment rests.

But, looking at the whole of these proceedings, they do not think that it would be consonant with justice at once to reverse the decree of the Court below, and to affirm the decree of the Provincial Court. They think that the parties have unfortunately lost their way, and, on that mistake and misapprehension, it would be going too far finally to dispose of the case now.

For these reasons their Lordships are of opinion that the decree of the Sudder Adawlut must be reversed, but that leave should be given to the respondent to bring a new suit, notwithstanding the decree of the Provincial Court, at any time within a period presently to be specified, and after full communication of Her Majesty's Order in Council shall have been made to the parties interested, and though their Lordships can make no order on the subject, it would be exceedingly desirable that it should be known to all those who are interested in this property that the question of fact, as to division or no division, appears to be the only point on which the main question of title to this property will ultimately depend.

Perhaps, Mr. Clarke, you can give their Lordships' information at what time the Order of Her Majesty in Council would be likely to arrive in the East Indies, how it would be known, and in what way information should be given to the parties.

*Mr. Clarke.*—I will take the opportunity of knowing precisely the course; a copy of the decree, I take it, will go out by the next mail, the 1st of July; it will arrive at Madras in the middle of August, and it will be immediately made known by the Court to the vakeels of the parties, and communicated to the Provincial Court, for the

information of the parties, at their residence in the province.

*Mr. Pemberton Leigh.*—Would not the Court, in its regular course, give notice to the parties?

*Mr. Clarke.*—Immediately it arrives it would be communicated to the parties representing the suitors in the Sudder Adawlut.

*Sir E. Ryan.*—In this case the respondent is a pauper; is it likely she would have a vakeel to represent her?

*Mr. Clarke.*—Yes, my Lord; paupers are always represented by vakeels.

*Dr. Lushington.*—We think three years is a proper time after the decree is received in India and disclosed to the parties.

*Mr. Clarke.*—The Court might direct that a copy of the decree should be furnished to the parties; the Court always gives certified copies of its own decree to the vakeels of the parties, and I think it is the same with regard to the decree of the Council. I think a copy of the decree sent out from England would be delivered to the vakeels.

*Mr. Moore.*—Perhaps your Lordships would embody in your decree a direction to the Court itself to serve the parties.

*Dr. Lushington.*—Do they file the Order as being a copy of Her Majesty's Order in Council?

*Mr. Clarke.*—Yes, my Lord, they do.

*Dr. Lushington.*—Then that will do.

*Lord Brougham.*—That will amount to three years from the 1st of September next.

*Mr. Pemberton Leigh.*—All the parties being represented here by their attornies, they will have notice of it.

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The 2nd August 1844.

*Present:*

The Lord President (Marquis of Lansdowne), Vice-Chancellor Knight Bruce, Dr. Lushington, T. P. Leigh, Sir E. H. East, and Sir E. Ryan.

**Mahomedan Law—Marriage—Legitimacy—Inheritance.**

*On Appeal from the Sudder Dewanny Adawlut of Bengal.*

Shums-oon-nissa Khanum

*versus*

Rai Jan Khanum, for herself, and on behalf of her minor son Saadat Ali Khan.

If a child has been born to a father of a mother where here has been not a mere casual concubinage but a more permanent connection, and where there is no insurmountable obstacle to a marriage, according to the Mahomedan Law, the presumption is in favor of such marriage having taken place, and the mother and child are entitled to inherit.

*Dr. Lushington.*—The claim in this case relates to the inheritance of the zemindary of Atiya, and the claimants of that inheritance, at least all the claimants which it is necessary now to name, are two persons claiming to be the lawful widows of the deceased zemindar, one of whom claims also on behalf of her son, whom she alleges to have been the legitimate issue of the deceased person.

Both the Courts, under whose consideration the questions in the cause have been brought, have come to the conclusion that the claim preferred by Rai Jan, on behalf of herself and of her son, is a just one—in other words, they consider that there has been sufficient proof to justify them in determining that she was the lawful wife of the deceased zemindar, and that her son was the lawful son of that zemindar. It is hardly necessary to say that, before their Lordships could reverse the decree of two concurrent Courts, they must be perfectly satisfied that some legal miscarriage has taken place. But their Lordships are of opinion, in this case, that the evidence is decidedly in favor of the judgment to which those Courts originally came.

The question appears to be one depending upon the law with relation to Mahomedan property, and the proofs in support of the case as applied to that law. Several references have been made to the work of Mr. Macnaghten upon this subject. It will not be necessary to read at length the part of his preliminary remarks to which reference has been made, and which, indeed, has been already done, but the substance of it appears to be this. After having stated what is the general opinion entertained upon the question, he says, "The Mahomedan lawyers "carry this disinclination," that is, against bastardizing, "much farther: they con- "sider it the legitimate course of reasoning "to infer the existence of marriage from "the proof of cohabitation;" he then says: "None but children who are in the strictest "sense of the word spurious are considered "incapable of inheriting the estate of their "putative fathers. The evidence of persons "who would in other cases be considered "incompetent witnesses is admitted to prove "wedlock, and, in short, where by any pos- "sibility a marriage may be presumed, the "law will rather do so than bastardize the "issue, and whether a marriage be simply

"voidable or void *ab initio*, the offspring of "it will be deemed legitimate."

It may be observed that this is the statement of Mr. Macnaghten, evidently after great deliberation on the subject, because he goes on to refer to what has been said by Sale, and he then observes: "This, I apprehend "with all due deference, is carrying the "doctrine to an extent unwarranted by law; "for where children are not born of women "proved to be married to their fathers, or "of females, slaves of their fathers, some "kind of evidence (however slight) is re-"quisite to form a presumption of matri-"mony." He then observes: "The mere "fact of casual concubinage is not sufficient "to establish legitimacy; and, if there be "proved to have existed any insurmount-"able obstacle to the marriage of their puta-"tive father with their mother, the children, "though not born of common women, will "be considered bastards to all intents and "purposes." The effect of that appears to be that; where a child has been born to a father, of a mother where there has been not a mere casual concubinage, but a more permanent connection, and where there is no insurmountable obstacle to such a marriage, then, according to the Mahomedan Law, the presumption is in favor of such marriage having taken place.

We apprehend that, in considering this question of Mahomedan Law, we must, at least to a certain extent, be governed by the same principles of evidence which the Mussulman lawyers themselves would apply to the consideration of such a question. The first step in this case is the petition which has been so much commented upon at the bar, namely, the petition of Rai Jan, bearing date the 11th of December 1813. In that petition she states herself to be the wife of Fyz Ali Khan, and she sets forth the marriage settlement, without, indeed, ascribing to it any date, or giving any date to the marriage. Having so done, she represents that the Khan was kept away, and not permitted to return to his own home; that there were a number of persons who had attempted to confine her, and not to permit her to go to the Khan; and that he was about to marry another wife.

Now, this document appears to their Lordships to be a document of the very greatest importance; for without going the length of saying that it is a true assertion of all the facts therein contained, it is, at any rate, an assertion of facts in conformity with the subsequent statement of this very person.

The statement in this petition is made in the year 1813, before there is any anticipation of a litigation of this description, and it is made by her at a period when Fyz Ali Khan is not considered or deemed to be incompetent; it is addressed to a competent Court, and she must, if she anticipated any good result from the presentation of that petition, have also anticipated that the facts contained in that petition might be the subject of judicial examination. She therefore offers in the year 1813 to subject her claim (which is in substance the same as her claim now) to the examination of a Court competent to decide upon it.

It appears that that petition was rejected —and we presume on the ground that, even supposing the whole facts contained in it to be true, yet that would be no justification for the interference of the Court for the purpose of preventing the contemplated marriage.

In 1816 Fyz Ali Khan was placed under the protection of the Court of Wards. It is not necessary to go minutely into the question what was the precise state of his mind or of his intellects at that period. It is not distinctly raised in the course of the pleadings which were given in by the parties upon this occasion. But the result of the evidence appears to be that he was a person who had become much addicted to habits of intoxication, and that his intellects were impaired, though it does not appear in any part of that evidence that he had become what may be called an idiot. However, in 1816, his property and also his person were placed under the care of that Court, and proceedings have taken place which have been much relied upon in both of the Courts below in the determination of the question which came under their consideration.

The first document to which it may be expedient to refer is the report of Mr. Pakenham at page 19. Mr. Pakenham, in the discharge of his duty as Collector, is writing a letter to the Court of Wards proposing to them a settlement out of the estate of Fyz Ali Khan; and after having mentioned certain circumstances relating to the amount of property, he recommends the sum to be allotted for the expenses of Fyz Ali Khan and his family to be fixed at 200 rupees a month, namely, 120 rupees for Fyz Ali Khan, his two wives, and his mother, 30 rupees for the servants' wages, and 50 rupees for the support of a number of females who have long lived in, and been

maintained by, the family, and to whom he states that a sum equal to what he proposes has been for some time past allowed. He adds: "This last item I have not recommended without carefully ascertaining "that there are such persons who, from "having been all along supported by the "zemindar, may be considered as entitled to "an allowance."

Now, taking this as evidence of the fact that she was the wife of this party Fyz Ali Khan, it is evidence to this effect that, so far as Mr. Pakenham's investigation had extended, it justified him in making the representation which he made in the discharge of his duty to the Court of Wards. The Court of Wards acted upon that representation, and Rai Jan continued to receive an allowance after the rate of 10 rupees a month from the year 1817 up to the year 1824, when Fyz Ali Khan died.

It appears, further, that during this period Rai Jan was residing in the house of Fyz Ali Khan, or at least in that part of the building appropriated to women belonging to Fyz Ali Khan. All the evidence goes to that extent, and indeed it appears scarcely to be a point in controversy. In page 25, so far as it can be called evidence, there is the report of Mr. Scott, who, it may be observed, is hostile to the claim of Rai Jan. He there states incidentally, for the purpose of justifying his advice, that the other wife should not be permitted to come into the household of Fyz Ali Khan; that this wife is now residing with him. He says: "Now, as your ward has one wife liv-"ing with him, as far as I am able to judge, "any intercourse with another, who has "been so long absent, could in no degree add "to his domestic comfort." It appears that Shums-oon-nissa, the other wife, the appellant in this case, had been residing separately from her husband for a considerable length of time, and that she had presented a petition for the purpose of being allowed to return to him, and the ground upon which the Collector advises against that petition being complied with is, that this wife, the present respondent in the case, was residing with him during that period, and that therefore the return of Shums-oon-nissa would be unnecessary and inconvenient. There are several other documents of the same tenor which it is unnecessary in the view of their Lordships to follow in detail, namely, the reports of the Collectors, Mr. Belli and Mr. Petree, at pages 36 and 37, and the report of the Collector, Mr. Lindsay, at page 40.

We apprehend, then, that in point of fact the case comes clearly and indisputably to this, that this person, Rai Jan, was actually residing during a period of seven years in the female department of Fyz Ali Khan; that, according to the statements, so far as we can make them out, she was so residing for a twelve month anterior to the birth of this child taking place; that she so resided, recognized, to a certain extent undoubtedly, as the wife of Fyz Ali Khan; that the child was born under his roof, and that child continued to be maintained in his house without any steps being taken on the part of Fyz Ali Khan or of any one else to repudiate his title to legitimacy as the offspring of Fyz Ali Khan.

If these facts be so proved, the question is whether the evidence is not sufficient to support the legitimacy of the present claimant, Saadat Ali Khan, according to the law as laid down. In the opinion of the Law Officers, which is to be found at page 214, the Law Officers who were there consulted expressed themselves to the following effect: "Under the above circumstances, in the "event of the proof of these facts, that "Mussamut Rai Jan associated with Fyz "Ali Khan, and remained with the other "females of the house of Fyz Ali Khan, and "Saadat Ali Khan was born of her venter, "being the offspring of the loins of the said "Fyz Ali Khan, as is to be clearly under-"stood from the proceedings of the Appeal "Court of Juhangeer-nagur, dated the 20th "September 1831." They then go on to say that he would be the lawful child of Fyz Ali Khan, and that he and the mother would be entitled to claim their share of the inheritance.

Now, all the facts which are there stated upon the principle of assumption appear to us to be maintained by the evidence in this case, namely, that Mussamut Rai Jan *did* associate with Fyz Ali Khan; that she did remain with the other females in the house of Fyz Ali Khan; that Saadat Ali Khan was born of her venter; and, as to his being the offspring of Fyz Ali Khan, we think that is a circumstance necessarily to be inferred from the previous fact.

With reference, then, to the law as laid down by Mr. Macnaghten, and which appears to be acknowledged at the Bar to be the true law, without going into the question of the oral evidence whether there was an express acknowledgment of this child by Fyz Ali Khan as his son or not, there seems to be that which is at least tantamount

to any oral evidence of any declaration whatever, because there is a consecutive course of treatment both of the mother and of the child for a period of between seven and eight years, under circumstances in which it appears to their Lordships to be next to impossible that such a mode of treatment could have been adopted except upon the presumption of the cohabitation, and of the son being the issue of the loins of Fyz Ali Khan. But their Lordships are not disposed to think that the whole of the testimony, with regard to the verbal acknowledgment of Saadat Ali Khan, ought to be rejected. It is not necessary, however, to decide the case upon that ground, because we think, for the reasons we have stated, and without receiving as evidence that which is not legitimate or credible evidence, there are sufficient facts either admitted by both parties or proved by the treatment and the whole *res gestæ* in the case to bring it within the principles of law which have been already adverted to, and that, therefore, the judgment of the Court below must be affirmed with costs.

Decree affirmed with costs.

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The 13th December 1844.

*Present:*

Lord Langdale, Mr. Baron Parke, Dr. Lushington, T. P. Leigh, Sir E. H. East, Sir A. Johnston, and Sir E. Ryan.

**Compromise—Evidence—Payment of consideration-money.**

Chowdry Deby Persad and Beny Persad

*versus*

Chowdry Dowlut Sing.

According to the practice in India, the statement in a deed of compromise of the payment of consideration-money is not conclusive evidence of payment.

In estimating the value of evidence, the testimony of a person who swears positively that a certain conversation took place is of more value than that of one who says that it did not.

*Mr. Baron Parke.*—Their Lordships are of opinion that in this case they ought to advise Her Majesty to affirm the decree of the Zillah Court. There is no doubt in this case that the deed of Rufanama which was executed between the parties affords evidence as to the only fact which we have to dispose of, by our opinion, upon the present case, namely, whether the 21,000 rupees, which were stipulated as the sum to be paid down upon the executing the compromise, were paid or not. There is no doubt that the Rufanama, which contains a statement of the fact that the 21,000 rupees were paid, is evidence. It is admitted on both sides that it was not conclusive evidence, as the statement of such a fact in a deed, under the seal of the parties, would be in a Court of law in England, but it is evidence as far as it goes.

Then let us see whether that evidence, which is *primâ facie* proof of the payment, is or is not rebutted by all the circumstances of the case.

We think that, looking at the mode in which this case has been treated by the Judge in the Sudder Dewanny Adawlut, who must be supposed to be well informed of the law and the practice in India in such cases, that the statement of such a fact in a deed of this description is *primâ facie* evidence that the money that was therein stated to be paid was paid at the time of the respondent's executing the deed. But he says: "That it is an understood thing "that, after documents are drawn out, money "mentioned in them is paid, and therefore "mention of the receipt of money is made in "the document."

Now, that being so, the inference that would be derived from the statement of such a fact in the deed is that the Rufanama must, *primâ facie*, be considered as evidence that there was, at the time that the deed was executed, and as part of the same transaction, a payment of money. But that inference is completely rebutted by all the evidence in the case, and by the admission of the parties, because all the witnesses present at the time of the transaction of the execution of the Rufanama, either are silent as to the fact of the payment, or they expressly depose that no payment took place at the time.

The appellant himself admits in the proceedings that such was the fact, for he has stated in his answer to the plaint in the Zilla Court that the money was received without stating at what time—not stating that it was received at the time the deed was executed. In his rejoinder he makes a different statement, and says that the money was paid antecedently to the execution of the deed, namely, while the draft of the deed was being prepared. In his petition in the Sudder Court, he states that the money was paid at the time that the deeds themselves were prepared. Thus varying in his statement of the time and

place of the payment of the money, but not stating in any of them that the money was paid at the time the deed was executed.

Therefore the question now is this—The *primâ facie* inference arising from the statement in the deed being rebutted, how stands the evidence with regard to the fact of the payment? The witnesses who depose to the execution of the Rufanama state that the plaintiff, upon that occasion, admitted that he had received the money at an antecedent time. Now, is that fact proved? If that fact had been proved that the money had been paid at an antecedent time, not immediately at the time of the execution of the deed; but whilst the deed was being prepared, is it probable that such a sum as that would have passed from the one to the other without some receipt being given?

Then it is afterwards alleged by the appellant that the payment took place in the presence of respectable witnesses. Now, those witnesses were not called in the Zillah Court, nor is any mention made of them in the petition of appeal. But in the petition of review it is stated, as a fact, that the plaintiff had offered to bring forward those respectable witnesses before whom he said the payment took place, and that the Judge of the Inferior Court, the Ameen, had refused to receive them. Now, it is impossible for their Lordships to believe that such could have been the case; because it appears that the proceedings before the Ameen are conducted with regularity, according to the regulations prescribed by the East India Company. Amongst those regulations it is ordered that every document should be on the file of the Court; and if there had been any petition to examine those witnesses, there is no doubt that there would have appeared, upon the files of the Zillah Court, some durkhast or petition for the examination of those witnesses. Therefore, it is impossible that their Lordships can believe that any such application had been made to the Ameen. Then there is an admission by the defendant that there were those respectable witnesses who might have been brought forward; and the circumstance of his not bringing them forward is exceedingly strong that no such fact took place as that there had been, antecedent to the Rufanama, the payment of the sum of money.

Then, besides all this, it is insisted that there are some circumstances from which it is to be inferred that this payment took place, because it is said in the first place that, at the time when the instalments stipulated for in the deed of compromise were paid, no mention was made of the fact of the large sum of 21,000 rupees not having been paid. Now, that is a fact certainly which at one time weighed with their Lordships, and which it appeared desirable to have explained, and explanation is given of the fact by the evidence of Ghunsam Loll. Ghunsam Loll is a person to whom both the Judge of the Inferior Court and the Judge of the Sudder Dewanny Court give credit; both of them have stated that they acted upon his evidence, and, therefore, they must have formed an opinion that his evidence was worthy of belief, and they are much more competent to form an opinion than we are. Then, if that evidence is believed, not only is that fact explained satisfactorily to our minds that no mention was made of this sum not being paid at the time the instalments were paid, but the evidence is also most material to show that no payment ever took place at all.

With regard to the circumstance of the payment of the instalment of 4,000 rupees, without any observation being made at the time, as insisted upon by the appellant, this witness says that, at the time the payment was made, the respondents, that is, the present appellants, said it was difficult to pay at once 21,000 rupees. He states that, "at the time of the receipt of 4,000 rupees, this conversation took place between them—'What do you say now about the payment of the 21,000 rupees in cash mentioned in the document?' Respondents in answer said, 'It is difficult to pay at once Rupees 21,000. We shall arrange for it; and when the money is paid, we shall take a receipt.'" Therefore it is clear that at that time there was mention made of the non-payment of the large sum of 21,000 rupees. The Kazi, indeed, as Mr. Buller has observed, when he is interrogated as to the same conversation, says that none such took place. But, in estimating the value of evidence, the testimony of a person who swears positively that a certain conversation took place is of more value than that of one who says that it did not, because the evidence of the latter may be explained by supposing that his attention was not drawn to the conversation at the time.

Another circumstance which also had weight with their Lordships at one time is the delay in the institution of the suit. That circumstance is, no doubt, deserving of consideration. It may have been that they were prevented from instituting the suit

sooner by delusive and evasive promises made from time to time. The mere circumstance of the delay in the suit is a circumstance of some weight, but not of any great weight when we look at the other facts of the case.

Their Lordships are of opinion that the burden of proof which lay upon the appellants, of showing the payment of the money, has not been discharged. They have given some *primâ facie* evidence of the payment, but that has been rebutted by the other evidence in the case, and by the consideration that, if it had been true, there were witnesses who could have placed the fact beyond dispute had they been called. It is not likely that the payment of so large a sum, which would require, according to the habits of the natives of India, a considerable time to effect, could have taken place without some persons being present who could have proved the fact. Upon the whole, their Lordships are of opinion that the judgment of the Sudder Court, and also the judgment of the Ameen, are perfectly right, and therefore that the decree ought to be affirmed with costs.

Decree affirmed with costs.

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The 3rd November 1866.

*Present :*

Lord Westbury, Sir J. W. Colvile, Sir E. V. Williams, and Sir L. Peel.

**Judgment—Pleadings—Principal and Agent.**

*On Appeal from the High Court of Judicature at Calcutta.*

Eshanchunder Sing
*versus*
Samachurn Bhutto.

The determination in a cause should be founded upon a case either to be found in the pleadings, or involved in or consistent with the case thereby made.

If a man send an agent with direct authority and positive directions to bid at an auction and to purchase an estate, and the agent accordingly goes to the auction and bids for the estate which is knocked down to him, but collaterally and in a bye manner enters into a distinct and separate contract with an individual that, in consequence of something to be done or to be forborne, he will pledge his principal to pay to that individual a certain sum—the principal cannot be bound by this bye transaction on the part of the agent.

This is an appeal from the decision given by the High Court of Calcutta, reversing a judgment of the Court of the Principal Sudder Ameen of Santipore. The case is one of considerable importance, and their Lordships desire to take advantage of it for the purpose of pointing out the absolute necessity that the determinations in a cause should be founded upon a case either to be found in the pleadings, or involved in or consistent with the case thereby made. Unfortunately, in the present instance, the decision of the High Court appears to be founded upon an assumed state of facts which is contradictory to the case stated in the plaint by the plaintiff, and devoid, not only of allegation, but also of evidence in support of it.

The case made by the plaintiff alleges a distinct agreement between the plaintiff and two brothers (whose names have been pronounced in a short manner—the one Koilas, and the other Eshen) that the three should be joint purchasers and joint owners—owners in common at all events—of a certain lease which was put up by a zemindar to be taken by public tender at a particular time. The plaint proceeds upon the allegation that the lease was taken by Koilas on his own behalf and on behalf of Eshen and on behalf of the plaintiff, and that, in conformity with the agreement between the three, Koilas subsequently executed an instrument for the purpose of giving effect to the agreement. The allegations therefore of the plaint are inconsistent with the hypothesis of Koilas having no interest and acting in the transaction as agent only of Eshen. The plaint also proceeds upon a clear and well-defined ground of relief, *viz.*, contract and agreement between the parties interested. The decision proceeds upon what is set forth as an equity resulting from the relation between Koilas and Eshen of principal and agent, and from the alleged fact of Koilas, in the execution of his authority, having given certain rights and interests to the plaintiff without which his principal (Eshen) would not have been able to obtain the property in question. But the difference between the two grounds of relief and between the two kinds of case is plain.

The decision of the Court of first instance, that of the Principal Sudder Ameen, found the facts of the case to be in direct contradiction to the allegations contained in the plaint. It was found that Koilas had no interest at all ; that the money paid to the lessor was not money in which Koilas had any interest or right ; that Koilas acted from the beginning under the authority and as the agent only of Eshen ; that the contract was completed with the money of Eshen ; and that there is nothing at all to show that Eshen in any manner was made aware of or was party or privy to the alleged transactions between Koilas and the plaintiff. These facts being established by

the judgment, and being therefore binding upon the High Court, which is not a Court at liberty to collect facts anew, it is very much to be regretted that the High Court should have departed altogether from the case made by the plaint, and should have founded their conclusion upon an assumed case, wholly inconsistent with the recorded findings contained in the original judgment. That original judgment was the subject of an intermediate appeal, which, however, does not vary the matter, because the Judge of the first Court of Appeal thought it right to dismiss that application, and to affirm the original judgment.

We now come to consider the assumed state of facts which is the basis of the decition of the High Court. The High Court takes it that Koilas was nothing more than the agent of Eshen; but the High Court appears to have, in some manner or other, arrived at this conclusion, which does not appear to their Lordships to be warranted either by allegation or evidence, *viz.*, that at the auction, or previous to the auction, there was an agreement between the plaintiff and Koilas that the plaintiff should abstain from bidding, and that, in consequence of that abstinence on the part of the plaintiff, Koilas succeeded in obtaining the estate at a less sum of money than otherwise he would have had to give, and that the defendant Eshen took possession of the property with the knowledge of that transaction on the part of Koilas. It is obvious that every one of these propositions of fact is a statement which it was incumbent on the plaintiff to have distinctly alleged, in order that it might be the subject of direct testimony. It is impossible to conclude parties by inferences of fact which are not only not consistent with the allegations that are to be found in the plaint, which constitute the case the defendant has to meet, but which are in reality contradictory of the case made by the plaintiff. It will introduce the greatest amount of uncertainty into judicial proceedings if the final determination of causes is to be founded upon inferences at variance with the case that the plaintiff has pleaded, and, by joining issue in the cause, has undertaken to prove.

It is unnecessary, therefore, to say that it is impossible for their Lordships to accept anything like those conclusions of fact as furnishing a *ratio decidendi* in the present case. Without adverting further to its being incompetent to the Court of Appeal to substitute a new statement of facts for that originally contained in the record, their Lordships further observe that, even if the case substituted were admitted to be true and to be the competent subject of judicia enquiry, the legal conclusion which is a tempted to be derived from those facts is no consistent with the settled principles law or equity. Supposing it to be the ca that a man sends an agent with dir authority and positive directions to bid an auction and to purchase an estate, a the agent accordingly goes to the auctio and, in the execution of that authority, h does bid, and the estate is knocked down him; but collaterally and in a bye manne he enters into a distinct and separate co tract with an individual, that, in cons quence of something to be done or to b forborne, he will pledge his principal to pa to that individual a certain sum; it is quite plain that, upon every consideration of jus tice, the principal cannot be bound by th bye transaction on the part of the agen If the agent makes a contract on th part of the principal, having a definite a thority, and he exceeds that authori by inserting a term in the contra itself, it would not be competent to the pri cipal to say, "I will repudiate the inserte term in the contract, as being *ultra vir* unauthorized, but I will obtain performan of the rest of the contract." In such a cas although the agent had no authority for th additional term, yet, as it is an integral pa of the contract itself, and the party sellin was not aware of the want of authority, th principal could not enforce that contra without giving effect to the additional ter But in the other case, the act of the agen if effect were given to it, would subject th principal, not only to the contract which authorized, and which he may be required the vendor or lessor to fulfil, but also to an a ditional liability which he never contemplate

Their Lordships are obliged to disappro of the decision that has been come to by t High Court. They desire to have the r observed that the state of facts, and equities and ground of relief origina alleged and pleaded by the plaintiff, sh not be departed from, and they could concur in the conclusion of law which been drawn by the Court below, even if th were at liberty to take into considerat the state of facts which that Court assume

Their Lordships, therefore, will adv Her Majesty to reverse the decree that been appealed from; thereby confirming original decree and the decree of the Zill Court, and to give the appellant the costs this appeal, the application to the High Co being directed to be refused with costs.

The 17th November 1866.

*Present:*

Lord Westbury, Sir J. W. Colvile, Sir E. V. Williams, and Sir L. Peel.

**Loan—Interest.**

*On appeal from the High Court of Judicature at Calcutta.*

Charles Sefton Guthrie and Sophia his wife

*versus*

Frederick George Lister.

Where a contract of loan stipulated that the legally demandable rate of interest should be 5 per cent., it was held that a claim by the creditor of interest at 8 per cent., founded upon a bare promise of the debtor to pay 8 per cent. or upon the fact that the debtor had in account voluntarily debited himself with 8 per cent. in lieu of 5 per cent., could not be maintained in law for want of consideration, amounting merely to *nudum pactum.*

THIS is a suit of a painful nature, which has arisen between a daughter and her father, touching the rate of interest payable upon a loan made by the father to her deceased husband.

We think there was no necessity for any of the observations which have been made in the Court below touching the evidence given by General Lister. It appears to us that the account given of the transaction is reasonably consistent and clear from the beginning to the end.

It appears that Mr. Henry Inglis, the son-in-law of General Lister, was engaged in trade; that the trade was lucrative; and that he applied to General Lister to advance him money to be employed by him in that trade. General Lister assented, and sent to his son-in-law, on two several occasions in the same year, two sums of money, one amounting to 41,900 rupees, the other amounting to 19,500 rupees. On the occasion of these advances, two promissory notes were given by his son-in-law to General Lister, and in both those notes (because, although one only is produced, it has been admitted at the bar that there was another, and that the other must be taken to have been of the same tenor with that which is produced), there is a promise by the borrower, Mr. Inglis, to repay the money borrowed with interest at 5 per cent., at the expiration of three years. The contention, now, on the part of the General, the lender of the money, is that he is entitled to interest at the rate of 8 per cent.; that his interest is not to be limited to 5 per cent., which is the prescribed rate of interest in the promissory notes. He might maintain that contention by proving either that at the end of the three years, the time for the repayment of the money, he forbore to press for the money, in consideration of an augmented rate of interest, or he might maintain that the contract, of the terms of which the notes are evidence, was superseded by a new contract, which allowed the money to remain for a longer period of time than three years, at an augmented rate of interest. But, unless some such case can be proved, a claim of interest at 8 per cent. founded upon a bare promise of the debtor to pay 8 per cent., or upon the fact that the debtor has in account voluntarily debited himself with 8 per cent. in lieu of 5 per cent., could not be maintained in law for want of consideration, amounting merely to *nudum pactum.*

It is satisfactory to find that the history of the introduction of the 8 per cent. into the dealings between the parties is very clearly given by General Lister himself; and it is a history which is very creditable to his son-in-law, Mr. Inglis, but which is inconsistent with the General's founding upon the circumstances any legal claim. We prefer to the allegations now made in the plaint—we prefer to take the letter of General Lister addressed to his daughter after the death of her husband, in which he gives her a narrative of the transaction between himself and his son-in-law; and upon an accurate examination of the contents of that letter, it is clear that the General distinctly states there was but one contract on the subject of interest, which he made with his son-in-law. He states the stipulation was that the legal interest, *i. e.*, the legally demandable rate of interest, should be 5 per cent., but that, on the occasion of the loan being made, the son-in-law of his own accord said: "I shall pay you 8 per cent. interest, because I shall be able to make more than three times that rate by the employment of the money in trade."

It is plain that these words were not intended to supersede the written engagement. Independently of this, we find the General giving a striking narrative of what occurred between himself and his son-in-law sub-

sequently, some time after the notes had been made, when the son-in-law rendered a written account, in which he had charged himself with 8 per cent. The General's words amount to this: "I pointed out to Mr. Inglis that he was charging himself with 8 per cent. interest, whereas I was entitled only to 5 per cent.;" but the son in-law said: "It is all right, I can make more than three times that amount by the use of your money, therefore I desire to pay you 8 per cent." That conversation, again, is a clear acknowledgment on the part of the General that he regarded himself as the legal creditor of his son in-law for only 5 per cent. It is in perfect harmony with the account given in the letter that the engagement originally was for 5 per cent., but that the son-in-law said: "He could afford to pay more;" and the General answered, "You can do as you please about it." It was left, therefore, to the *arbitrium* of the son-in-law, if he chose to pay 8 per cent., to pay that amount; but the legal relation which was created was an engagement to pay 5 per cent. only.

What was done subsequently is not inconsistent with that. We have the fact that, subsequently to the date of the promissory note, on several occasions, the son-in-law rendered to his father-in-law accounts current, in which he debited himself with 8 per cent. instead of 5 per cent., and that he continued that practice down almost to his death; for in one of his repositories after his death, his widow found three accounts of written papers, in which also he had debited himself with 8 per cent. If there had been no written promissory note, or if there had been no history given by the creditor making the claim of the origin of the introduction of the 8 per cent., the accounts so made out by the debtor might be a legal ground for presuming that the original contract had been to pay 8 per cent., or that there had been a new contract to pay that rate of interest. They cannot, however, be used as evidence that the original contract contained in the promissory notes was done away with, and a new contract substituted, for the reason we have already given, *viz.*, that the General admits that, when he saw the first account with interest at 8 per cent., he treated it as a thing to which he was not entitled. Clearly, therefore, there was no contract entitling him to 8 per cent. existing at that time; and with reference to the subsequent accounts, with perfect notice of those accounts, because he had them possession, the General writes to his d ter the letter to which we have referred plaining how it had arisen, giving, a have already observed, a history of introduction of the 8 per cent., that it voluntary offer by his son-in-law, and th General did not fasten it upon him, and it part of the contract, but said to his in-law: "You shall be at liberty to you please about it."

The result of the whole, therefore, s to be plainly this, that, so far as the right is concerned, there is but one co existing for valuable consideration, and pable of being enforced, *viz.*, the tract made at the time of the loan, in formity with the written obligation for loan contained in the promissory notes; all departures from that in respect of i est are departures which have been from mere good-will and sense of duty o part of the son-in-law, who is the de but not as being the result of any legal tract or obligation between him and father-in-law.

There is no trace that the father-in- ever treated the matter, up to the tim making the demand, as one which enti him as a matter of right to interest at 8 cent.; he always treats it as a matte bounty and favor on the part of his in-law; and he tells his daughter h his son-in-law at liberty to do as he pl about it.

We regret that the demand has now made. It appears that, when the in is reduced to the legal rate, the sum by the present appellant was more would satisfy the whole demand of General according to his just right, an action, therefore, was brought when was nothing due on the part of the pellant. The consequence must be the decree of the Court below must b versed, and the plaint dismissed, an costs of the proceedings below and of appeal must be borne by the respo General Lister.

We will make our report, and humb vise Her Majesty accordingly.

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